

**Narratives and the Legal Game:
Narrative Power Dynamics and their Reproduction in the Sexual Assault Trial of *R.
v. Ghomeshi***

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Abstract

Legal practice heavily depends on the construction and evaluation of narrative accounts. The ability to legitimately narrate a series of events is a source of power that is unequally distributed in the courtroom. Grounded by a detailed empirical analysis of the court transcripts from *R. v. Ghomeshi* (2016), this dissertation investigates the relations of power and taken-for-granted assumptions that condition struggles over narrative construction in the sexual assault trial. The project contributes to feminist critiques of sexual assault trials by mobilizing the work of Pierre Bourdieu, which has been largely overlooked in feminist socio-legal scholarship, and by showing how the concepts of *narrative capital* and what I term *configurational power* can help us examine narrative power structures. Briefly, *narrative capital* refers to the speaking positions and properties that bestow authority on one's narrative practices. The term *configurational power* refers to the ability to legitimately organize a set of events and experiences into a narrative whole. Through consideration of the conditions and premises that structure who can narrate, in what manner and with what legitimacy, we can better understand the factors contributing to the discrediting of certain testimonies in the courtroom.

Analysing the court transcripts revealed several techniques through which the lawyers exercised configurational power and narrative domination over the complainants during the trial: disconnecting and interrupting the complainants' accounts; highlighting the complainants' position as unknowing characters; configuring inconsistencies in their accounts; and controlling the narrative ending. Unequal distributions of configurational power constituted a relation of domination that existed as self-evidently legitimate, a form of domination that Bourdieu refers to as *symbolic violence*. The standards of legal impartiality, autonomy, and objectivity, as well as cultural stock stories about sexual assault and law's taken-for-granted view of reliable memory, were enacted in the courtroom narrative practices and contributed to the reproduction of this symbolic violence. The unequal relations of narrative capital and configurational power in the courtroom limited the complainants' ability to narrate their victimization and allowed the defence lawyers to create narrative twists during cross-examination that framed the complainants as manipulative women and upended their claims of victimhood. Through this dissertation, I critically analyze the relations of domination that both condition and were reproduced in the courtroom practices of narrative telling and interpretation.

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Introduction

Legal practice relies on narratives. When witnesses recount what they saw, defendants tell their side of the story, lawyers summarize events in closing arguments, and judges write their decisions, they are engaging in narrative construction. Each of these practices involves an attempt to provide a narrative about what happened that the narrator hopes will be perceived as legitimate by their audience. Narrative cannot, however, be thought of merely as a communicative or linguistic device. Instead, narrative construction is a social practice shaped by institutional, cultural, and relational conditions and as such it is implicated in the ongoing reproduction of power relations. There are shifts in who can legitimately narrate, in what manner, and with what outcomes as people enter different contexts and relations. In law, the ways that narratives are elicited and evaluated can have major implications, such as justifying imprisonment or influencing the determination of refugee status. This dissertation project grew out of an interest in how practices of narrativization are organized in the courtroom and the ways that the ordering of narrator positions both instantiate and reproduce relations of domination. Furthermore, I was interested in how legal narrative practices may be underpinned by and contribute to the reproduction of law's legitimizing ideals. To examine the power dynamics and taken-for-granted expectations underpinning legal narrative practices, as well as the ways that these are reproduced, I analysed the trial transcripts from a recent highly-publicized Canadian sexual assault trial, *R. v. Ghomeshi* (2016).

Throughout this project, I draw on the insights and theoretical concepts of French sociologist Pierre Bourdieu. Breaking with both phenomenological approaches, which tend to privilege agents' perceptions and experiences, and objectivist approaches, which focus on theorizing social structures, Bourdieu posits what he refers to as a *praxeological* or *relational*

approach¹ to knowledge that is concerned with the mutually constitutive relations between structuring conditions and agents' experiences and representations of the social world (1973: 53; 1977: 3; 1987a: 3-4; 1996: 264; Bittle & Frauley 2018: 612; Brubaker 1985: 758; Dezalay & Madsen 2012: 448). Ontologically, Bourdieu rejects substantialism and understands social realities as made up of the relations between social positions, the relations between material and symbolic structures, and the relations between these structures and the ongoing practices of social agents (1987a: 3; 1992: 229-230; Everett, Neu, Rahaman & Maharaj 2015: 40-1; McNay 2004: 184). Epistemologically, he views research as a process of constructing "scientific objects" (Bourdieu 1992: 221) and developing models of social relations and social space that are both abstract and based on empirical analysis and which are not captured in the practical models through which agents make sense of their own practices (Bourdieu 1990: 11-12; 1992: 229-231; Lizardo 2010: 666-7).

Instead of "think[ing] in terms of realities that can be 'touched with the finger,' [...] such as groups or individuals" (1992: 228), Bourdieu argues that social scientists should be concerned with constructing models of relations that cannot be touched, but which nonetheless constitute social reality (230-1). For Bourdieu, concepts such as field, habitus, and symbolic power are not meant to refer to substantial objects in social space, but rather to operate as a "conceptual shorthand" (1992: 228) that reminds the researcher of what they are ultimately concerned with, namely, the hierarchical organization of social positions and relations of power that underpin the empirical data being analyzed. Rejecting what he referred to as "an epistemological opposition"

¹ In Chapter Two, I provide a more detailed discussion of Bourdieu's relational approach, the concepts through which he develops it, and how this allows him to move away from the subjectivism/objectivism opposition in the social sciences.

(1992: 225) between theory and methodology, Bourdieu also argued that conceptual and empirical work should be done in tandem.

Bourdieu's relational approach directs us to consider the individual practices, the meanings and frameworks through which we make sense of these practices, and the networks of social relations that condition and are (re)produced through ongoing human activity. Agents construct and (re)produce the social world through their practices, but always in ways that are conditioned by, among other things, the hierarchical ordering of social relations, their shifting social positions, and sets of assumptions and embodied dispositions. In this dissertation, I consider not only the narratives that were told in the courtroom and how they were constructed (i.e. what was said), but crucially the taken-for-granted conditions, premises, and organization of relations that structured what could be legitimately said, by whom, in what manner, and with what degree of authority. To put this in Bourdieusian terms, I examine unequal distributions of forms of capital and symbolic power, the relations of domination that this constitutes, and the ways that agents' courtroom practices misrecognize the domination as natural and legitimate. In other words, I am interested in how courtroom narrative practices are shaped by and contribute to the reproduction of *symbolic violence*², a form of domination that is not recognized as violent because it is experienced as natural (Bourdieu 1977: 191; 1991: 51).

Using a Bourdieusian approach to analyse narrative courtroom practices allows me to examine the structural conditions that underlie and are expressed through different agents' legal strategies (Bourdieu 1992: 256; Bourdieu & Wacquant 1992: 256). At the same time, his work also directs me to consider how agents produce and reproduce structural conditions (Bourdieu

² In Chapter Two, I explain this concept in more detail.

1987b: 852; 1991: 58; Brubaker 1985: 758). Tying together objectivist concerns about social structure and subjectivist concerns about practices of social construction, Bourdieu encourages us to examine the structuring conditions that are always embedded in agents' perceptions and the ongoing social practices that constitute and uphold social structures. In other words, agency and structure are inseparable for Bourdieu. What this means for the current project is that my examination of the narrative practices during the *Ghomeshi* trial was carried out with an eye to what they can tell us about the underlying structure of relations. As Bourdieu reminds us, "the true object of social science is not the individual, even though one cannot construct a field if not through individuals [...] [but rather] [i]t is the field which is primary and must be the focus of the research operations" (Bourdieu & Wacquant 1992: 107). Although I look at the strategies, words, practices, and conflicts of specific individuals, I do so in order to map the structural relations of the legal field as they pertain to narrative. By using Bourdieusian concepts to analyze narrative power dynamics, I both extend his work and contribute to scholarship on the construction of legal narratives, which has not engaged substantively with Bourdieu's work.

The analysis of narrative power dynamics in the courtroom and the mobilization of Bourdieusian concepts contributes to feminist socio-legal scholarship on legal discourse and helps problematize the disqualification of women's experiences. Instead of focusing on the discursive and narrative outcomes of the trial, I consider the underlying conditions that make those narratives possible. Within feminist critiques of the sexual assault trial, there tends to be a focus on aggressive cross-examination practices. By examining hidden, symbolic relations of domination, I examine how the conditions for disqualifying and discrediting are built into the legal field's organization of relations, which are perceived as inherently legitimate. I demonstrate how a structural analysis of narrative practices can inform long-standing feminist concerns about

legal constructions of womanhood, the circulation of rape stereotypes in the courtroom, and the practices used to discredit complainants. In particular, it provides insight into the structures of narrative domination and tacit schemes of perception that constitute the taken-for-granted conditions within which legal narratives of sexual assault are constructed and evaluated in the courtroom. Focusing on the sexual assault trial provides me with an empirical referent for considering the broader question of how relations of power and law's tacit premises are implicated in courtroom narrative practices. Drawing on Bourdieu's work, scholarship on narrative and the law, and feminist socio-legal literature, I examine how the underlying relations, standards, positions, and stakes of the legal game condition and are reproduced through agents' struggles over the narrativization of events.

This dissertation examines the court transcripts from *R. v. Ghomeshi* (2016), a Canadian sexual assault case in which Jian Ghomeshi, the well-known host of a radio talk show, was charged with sexually assaulting three separate women. In Fall 2014, several women came forward to the media (in many cases anonymously) to report that Ghomeshi had sexually harassed them or been violent towards them during sexual activity. Amidst a great deal of media attention, Ghomeshi was fired from the Canadian Broadcasting Corporation in October 2014 and in November 2014 he was charged with four counts of sexual assault and one count of overcoming resistance by choking. In January 2015, he was charged with three additional counts of sexual assault. In May 2015, two of the counts were dropped and the dates were set for two judge-alone trials. At the trial in February 2016, Ghomeshi was acquitted of four counts of sexual assault and the count of overcoming resistance by choking. The remaining charge of sexual assault in the workplace never resulted in a trial; in May 2016, an arrangement between

the Crown and defence led to the charge being withdrawn on the condition that Ghomeshi read a prepared apology in court and keep the conditions of a recognizance for 12 months.

The public and media attention surrounding the *Ghomeshi* trial make it a particularly useful case for considering how legal narrative practices reproduce legal process as a legitimate method of knowledge production. Two days before the trial began, the *National Post* published an article titled “‘Women will be watching’: The wider relevance of Jian Ghomeshi’s sexual assault trial” (Brean, January 30, 2016). The article quotes feminist legal scholar, Elizabeth Sheehy: “My anxiety is Canadian women will be watching this trial with acute attention and will learn lessons from it”. Members of the Canadian public certainly were watching, with people lined up for hours to get a seat in the courtroom or its overflow room, journalists live tweeting or blogging about the trial as it unfolded, popular social media hashtags emerging about the trial, and daily protests gathering outside the courthouse. Except for Ghomeshi’s celebrity status and the complainants’ media interviews, which contributed to generating an extensive amount of media attention, there was nothing especially unusual about *R. v. Ghomeshi*; the decision was not appealed, the defence’s strategy of discrediting the complainants reflected common legal practices (see Chapter One), and, like most sexual assault cases involving incidents from years prior, there was no physical evidence. In many respects, the case was held up by the public and the media as an illustration of how the Canadian legal system deals with sexual assault.

Given this context, the *Ghomeshi* trial provides a useful juncture for examining the structural power relations of the courtroom and, crucially, how these underpin and are reproduced as legitimate through particular narrative practices. At the end of her closing arguments, Ghomeshi’s lead defence lawyer, Marie Henein, quoted from the Supreme Court

decision in *R. v. Curragh Inc.* (1997) to emphasize the importance of the legal process remaining impartial in the midst of the public attention and emotion the case stirred up:

High profile trials, by their nature, attract strong public emotions. In our society, the Crown is charged with the duty to ensure that every accused person is treated with fairness. It is especially in high profile cases, where the justice system will be on display, that counsel must do their utmost to ensure that any resultant convictions are based on facts and not on emotions. (transcript, February 11, 2016: 82)

With the legal system “on display”, the *Ghomeshi* case was an important moment in which the practices taken for granted as crucial to law’s impartiality, fairness, objectivity, and search for the truth could be displayed. In other words, the trial provides a good opportunity to consider the unspoken rules of practice and standards that exist without scrutiny as part of what makes law legitimate. For instance, in the above quote, an objectivist emphasis on the facts is presumed as necessary to ensuring fairness, as I examine in Chapter Four. The purpose of this dissertation is to examine how these underlying standards and rules of practice are premised upon and reproduce certain narrative power relations. In particular, I am concerned with how narrative practices during the sexual assault trial are bound up with the reproduction of both law’s legitimacy and its relations of domination.

According to Campbell (2003: 156), feminist research should attend to “relationships that undermine persons, their self-concepts, abilities, and opportunities, and that shape values and structure continued interactions in ways that entrench, rather than ameliorate, inequalities”. Orienting my work through both Bourdieu’s relational approach and socio-legal feminist critiques of the legal discourses contributing to various forms of dis/advantage and inequality, I consider the power relations between narrative positions that underlie the practices of courtroom agents, as well as the ways that these map onto gendered stock stories of sexual assault. In so doing, I mobilized the concepts of narrative capital and what I term configurational power.

I understand *narrative capital* to refer to the properties operating in a given social space that provide some social agents with more symbolic power in their narrative practices than others. There is a relatively small body of literature on narrative capital; much of this literature, however, focuses on a skill or ability that individuals possess, overlooking the *relational* and *field-specific* aspect of Bourdieu's conception of capital. Narrative capital is both constituted and struggled over in particular relations of power between social agents occupying different positions in a field. In developing the concept of *configurational power*, I incorporated Paul Ricoeur's (1984: 66) understanding of the configurational and episodic dimensions of narrative. Essentially, I used the term *configurational power* to capture and examine the structural relations of narrative power in the courtroom. In particular, the complainants' participation in the legal process was limited to providing episodic details; they were not permitted to legitimately organize the details of their experiences into a narrative whole (what Ricoeur refers to as the configurational dimension of narrative). Throughout the dissertation, I describe this as a form of symbolic domination and examine how it is embedded in schemes of perception that allow it to be experienced as natural.

Given the amount of public and media attention that the *Ghomeshi* received, it is important to note some of the things that I do *not* attempt to do in this dissertation. First, I do not make any claims regarding either Ghomeshi's guilt or innocence or whether the judge was right or wrong in his decision. As several feminist scholars point out (e.g. Bonnycastle 2000: 61-3, 73-4; Gotell 2015: 61, 65; Larcombe 2005: 60; 2011: 42-3), a focus on legal outcomes and conviction rates can lead to a dichotomous success/failure way of looking at the trial that overlooks women's experiences, codifies female vulnerability, privileges punitive responses and does not tell us much about the mobilization of sexual assault stereotypes in the courtroom or

whether and how sexual assault complainants are disqualified through legal processes. Therefore, my concern is not with assessing the correctness of the official finding of innocence, but rather with the power dynamics and taken-for-granted conditions that underpinned courtroom narrative practices. Second, I do not extensively discuss the issue of sexual assault itself, but rather focus on the sexual assault *trial* and the structured courtroom narrative *practices* through which legal narratives about sexual assault were constructed. Similarly, I do not analyze the public responses to the case (e.g. the protests to Ghomeshi's acquittal or the social media conversations surrounding #metoo and #Ibelievesurvivors) and I engage only peripherally with the media coverage of the case. This was a strategic decision based on my wider theoretical interest in the narrative power dynamics of the courtroom.

Finally, my critique of the *Ghomeshi* trial is not intended as a critique or judgement of any of the legal players involved. In the aftermath of the trial, Ghomeshi's female defence lawyers, Marie Henein and Danielle Robitaille, were villainized by many social media users who accused them of betraying their gender³; the hostile response to their defence of Ghomeshi led to calls for the cancellation of the lawyers' speaking engagements, some of which were successful (Outhit, March 17, 2017; The Canadian Press, November 22, 2016). In this dissertation, I do not suggest that these lawyers should have refused to defend Ghomeshi or that their narrative practices were 'inappropriate'. Instead, I consider the structural conditions and internalized relations that were expressed and reproduced through the narrative practices of courtroom agents, including the defence and Crown lawyers, the complainants, and the judge. As they struggled to present their accounts as authoritative and legitimate, they took for granted certain

³ For instance, see the interview she did with Peter Mansbridge on CBC's The National: <https://www.cbc.ca/news/jian-ghomeshi-marie-henein-lawyer-interview-1.3510762>

conditions, power relations, and rules of the legal game. In other words, I use Bourdieu's concepts of *doxa*, *misrecognition*, and *habitus* to move beyond the actions of specific individuals and towards consideration of the underlying logic of courtroom narrative practices, their forms of domination, and the ways that these exist without scrutiny as agents compete to have their narratives recognized as legitimate. Throughout the dissertation, I critically examine the legal game without attempting to pass judgement on its players.

Outline of Dissertation

In Chapter One, I orient this project in relation to the extensive scholarship on gendered legal discourses, the sexual assault trial, and cultural stereotypes about sexual assault. This scholarship has made important contributions to our understandings of the various images of womanhood constructed through legal discourses and the ways in which these images and narratives perpetuate relations of disadvantage along gendered, racialized, and classed lines. Furthermore, many feminist critiques of the sexual assault trial have problematized how complainants are discredited, silenced, and disparaged when they report experiences of sexual violence. I argue that mobilizing Bourdieusian concepts to examine courtroom narrative practices can yield important insights regarding the misrecognized relations of domination that condition practices of discrediting in the courtroom. Furthermore, thinking in terms of Bourdieu's concepts of *habitus* and *doxa* allows us to examine how the conditions, standards, and cultural stock stories that underpin the sexual assault trial function by enabling agents to *experience* the social world in particular ways.

Chapter Two provides a discussion of Bourdieu's work, elucidating the key concepts used throughout the dissertation. For Bourdieu, social order and the practices of social agents are bound in mutually constitutive relations; as they go about their lives and struggle for various

advantages or privileges, social agents (re)produce and transform the social world in ways that are conditioned by their social positions. In this chapter, I discuss Bourdieu's work and how it informed my research, elucidating his concepts of habitus, field, capital, symbolic power, doxa, symbolic violence, and misrecognition. The final sections of this chapter expand Bourdieu's work by considering how the concepts of narrative capital and what I term configurational power can help us examine relations of symbolic power.

In Chapter Three, I turn to the trial of *R. v. Ghomeshi* (2016), providing an overview of the case and beginning to analyse the transcripts. To provide some background for the ensuing analysis, I summarize the events surrounding the public allegations of sexual assault, the unfolding of the trial, and the newspaper coverage of the case. The second half of this chapter demonstrates how the complainants during the *Ghomeshi* trial were expected to provide the episodic content to be manipulated and configured into a narrative whole by the legal professionals. I argue that this constitutes a form of symbolic violence. In this chapter, I outline four key narrative techniques during the *Ghomeshi* trial that depended on relations of configurational power and narrative domination. Drawing on a detailed narrative analysis, I explain how the lawyers' examination practices disconnected the events comprising the complainants' experiences, exploited the complainants' position as unknowing characters, configured inconsistencies, and limited who could legitimately impose a narrative ending. In the chapters that follow, I then explore these practices in greater detail and consider the doxic elements that contributed to the misrecognition of narrative domination as natural and legitimate practice in the courtroom.

In Chapter Four, I consider how notions of legal impartiality, autonomy, objectivity, and procedural fairness contributed to the reproduction of symbolic violence. Embedded in the

practical sense of legal professionals' habitus, these doxic legal standards allowed unequal narrative capital and configurational power to be experienced as a legitimate component of legal process. As the lawyers and judge involved in this case expressly rejected sexual assault stereotypes, pointed to the ways in which procedural justice was upheld in this case, regulated the narrative practices of legal outsiders, and emphasized the objective facts, they took for granted the legitimacy of certain narrative practices and the unequal distributions of narrative capital that they reproduce. Although the complainants did attempt to configure events at several points during the trial, they were limited in their ability to do so because the legitimacy of their participation in the legal game required their compliance with its symbolic violence. This chapter examines how law's underlying premises were bound up in the reproduction and misrecognition of narrative domination in the courtroom.

Chapter Five examines how the narrative practices of the *Ghomeshi* trial relied on gendered binaries and cultural stock stories about sexual assault that were embedded in agents' habitus, providing them with a tacit sense of what is significant, credible, and plausible in an account of sexual assault and what events mean in relation to each other. During in-chief examination, the complainants attempted to describe Ghomeshi as the active pursuer who suddenly turned violent and themselves as only slightly interested in him and as hesitant, responsible female sexual agents who attempted to placate the uncomfortability of the situation in order to avoid confrontation. Ghomeshi's defence team upended this presentation during cross-examination by configuring narratives about infatuated, scorned women who manipulated the legal process. In both the in-chief examination and cross-examination, passivity, vulnerability, responsibility, and compliance with legal process were treated as inherent indicators of genuine female victimhood. This depended upon and reproduced the misrecognition

of gendered relations of domination and broader structures of patriarchy. Chapter Five also considers how the narrative technique of peripeteia functioned as a form of symbolic domination during the trial. While the complainants were unable to create narrative twists that captured the confusion of their experiences, the organization of configurational power in the legal field allowed the defence to create dramatic narrative twists that framed the complainants' claims and explanations as a deceptive façade. These moments of discrediting relied upon the cultural stock stories and gendered tropes embedded in the legal professionals' and complainants' practical sense of habitus.

In Chapter Six, I consider how memory and forgetting were understood throughout the *Ghomeshi* trial and the ways that these conceptions were implicated in the symbolic violence of courtroom narrative practices. Tacit assumptions that genuine and reliable memory is an uncontaminated, static object located in the individual's mind contributed to the legitimacy of legal examination processes and the suspicion with which the complainants' claims were perceived. While there were conflicts over how memory and forgetting should be understood (i.e. whether it is possible for memory to improve and whether information was forgotten because of traumatization or intentional manipulation), there was an underlying doxic presumption that memory can be treated as an evidentiary object and thus should be evaluated through legitimate legal processes and protected from external contamination. Excluded from this understanding are the ways in which remembering is a situated social practice that is shaped by and contributes to relations of symbolic power.

Chapter One – Law as a Gendered Site of Knowledge Production

Introduction

Much has been written on legal power, the gendered, racialized, and classed divisions that legal practices (re)produce, and the problems involved in sexual assault trials more specifically. To locate this dissertation within this vast scholarship, this chapter discusses socio-legal feminist critiques of legal discourse as well as literature on sexual assault trials, legal reforms, and cultural stock stories, with an eye to what a Bourdieusian narrative approach can offer. I begin by looking at various constructions of womanhood that are often (re)produced through legal discourse. Then I move into a discussion of sexual assault trials in particular, starting with an overview of key shifts in Canadian sexual assault law. I also consider feminist critiques of law reform and discuss literature on how sexual assault complainants are often silenced, discredited, disparaged, and re-victimized through legal processes. Next, I turn to scholarship on rape myths or gendered stock stories of sexual assault and discuss their role in the sexual assault trial. I conclude the chapter by considering how Bourdieusian theory can contribute to feminist socio-legal critiques of law and the sexual assault trial. In particular, I suggest that mobilizing Bourdieu's theoretical concepts and expanding his work to look at narrative practices can provide insight about the relations of symbolic domination and tacit schemes of perception through which narratives are constructed, evaluated, and discredited during a sexual assault trial.

1. Legal Discourse and Constructions of Womanhood

For the past several decades, much feminist socio-legal scholarship has been concerned with the various ways that law constructs and upholds certain images of women and womanhood

(e.g. Bell & Coutere 2000; Bonnycastle 2000; Burman 2010; Kapur 2007; Noonan 1996; Park 2017; Scott 2009; Singh 2017; Smart 1995; Thompson 2010). In this work, law is conceptualized not merely as repressive or coercive, but as a discourse that is *productive* and *constitutive* of social life (Chunn & Lacombe 2000: 13-14; Davies 2007: 156; Fudge & Cossman 2002: 5, 30; Scott 2009: 254; Smart 1995: 198). Upholding legal language, legal method, and legal reasoning as authoritative, accurate and rigorous, law presents itself as capable of making truth claims that are inherently more legitimate than other forms of non-legal knowledge (Burman 2010: 177; Smart 1989: 9-11; Valverde 2006: 9-10). In this sense, law's power derives not only from its ability to enforce certain outcomes (e.g. incarceration; fines), but from its ability to authoritatively "impose its definition of events on everyday life" (Smart 1989: 4) and, in so doing, disqualify other ways of defining, understanding, or thinking about social life.

Bourdieu (1987b: 839) similarly argues that law is a *discourse* that is "able by its own operation to produce its effects". Attentive to the conditions and limits of law's power, Bourdieu (1987b: 839) states that "[i]t would not be excessive to say that [law] *creates* the social world, but only if we remember that it is this world which first creates the law". For Bourdieu, the categories and perceptions through which legal discourse produces the social world are themselves constituted through the objective structures organizing social life. In other words, discursive practices that (re)produce categorizations and definitions do not exist apart from the networks of material social relations that social agents have internalized and which form the basis of their practices. In the next chapter, I further explain Bourdieu's understanding of the mutually constitutive relation between perceptions, social practices, and structuring conditions.

As a powerful discourse and site of knowledge production, law (re)produces gendered subjectivities and reifies gendered categorizations (Bell & Coutere 2000: 46-8; Burman 2010:

177; Davies 2007: 156; Smart 1995: 82). Following Carol Smart (1995: 192), several feminist scholars have spoken of law as a “gendering strategy” or “gendering practice” that casts women within various categories of womanhood that intersect in complicated ways with constructions of, for example, race, class, sexuality, and (dis)ability (Bonnycastle 2000: 71; Chunn & Lacombe 2000: 16-17; Comack & Balfour 2004: 10; Kilty 2014: 6-7; Scott 2009: 254). These constructions are shaped by wider social and material relations, such as unequal access to economic resources that make participation in legal processes more feasible. Moreover, law’s gendering practices have material impacts, such as determining who is entitled to remuneration or who is subjected to invasive forms of policing and regulation.

Legal discourse is premised on and reproduces several key dualisms in which one side of the dualism (the former) is generally considered more valuable: objectivity/subjectivity; rationality/emotionality; thought/feeling; abstract thinking/contextual reasoning; culture/nature; public/private; activity/passivity; independence/relationality (Foster 2011: 289-90; Larcombe 2005: 18-19; Naffine 1990: 26, 110, 117; Smart 1995: 82; Smith & Skinner 2017: 446-7). These dualisms parallel the discursive construction of difference between masculinity and femininity. That is, to be masculine is to be rational, independent, and active in the public realm; to be feminine is to be bound by one’s passions, dependant on others, and less reasonable (Campbell 2003: 148-9; Naffine 1990: 118; Smith & Skinner 2017: 447; Warrick 2011: 172-3). As Warrick (2011: 172) argues in her discussion of legal responses to crimes of passion, while men’s violent actions may sometimes be excused as the outcome of a temporary and understandable loss of reason caused by someone else’s actions (e.g. adultery), women are treated as inherently emotional and irrational, making it more difficult to frame their violent actions as understandable lapses in reason, that is, as crimes of passion.

Legal discourse has tended to uphold as its ideal legal subject the “reasonable person”, which entails an abstracted image of an educated and affluent white man who acts rationally, freely competes in the market, and actively pursues his interests without depending on others (Burman 2010: 176; Davies 2007: 153; Fudge & Cossman 2002: 32; Naffine 1990: 100; Scott 2009: 258). By upholding the image of the “reasonable person” as inherently masculine and defining women as his opposite, legal discourse (re)produces a hierarchical distinction between men and women. Although in many countries, including Canada, the ostensibly gender-neutral term “reasonable person” has replaced the term “reasonable man” within legislation, positive images of rationality and reasonableness continue to be associated with masculinity (Foster 2011: 320-1; Warrick 2011: 172-3; 177-180) and claims of gender neutrality tend to produce a formal equality that obscures persisting substantive gender inequalities (Weait 2007: 26-7). Moreover, women’s actions that could be considered rational and resourceful (e.g. increasing their social capital by inviting a male celebrity to an event they are hosting, as one of the complainants in the *Ghomeshi* case did) may be nonetheless framed as emotionally-driven (e.g. she invited him because she was infatuated) or as the result of manipulative calculation, casting their rationality as scheming and untrustworthy.

Within legal discourse, women have often been reduced to their bodies, which are constructed as irrational and potentially disruptive (Kapur 2007: 241; Lees 1997: 74; Smart 1995: 221-2). Law’s ideal subject has a body that operates as an instrument or mechanism that the rational mind uses and rules (Foster 2011: 322; Naffine 1990: 116-118; Russell 2013: 263). By constructing women as equal to their sexed bodies and ruled by embodied emotions, legal discourse reproduces the hierarchical divide between the rational man and the natural woman (Foster 2011: 335; Smart 1995: 224-5). To be seen as rational, women must continually prove

that they are not their bodies – a premise that is often (but not always) assumed for white, able-bodied, heteronormative men. The Cartesian mind/body split⁴ underpinning legal discourse thus parallels the distinction between masculinity and femininity, as well as the collection of dualisms mentioned above. While men may temporarily *act* irrationally, women's bodies are constructed as *being* irrational and by extension women's rationality is always in question (Foster 2011: 335; Lees 1997: 78; Smart 1995: 19, 225; Warrick 2011: 180). That said, the legal ideal of the rational man of law who rules his body is not attainable for all men; men who are racialized, transgendered, impoverished, addicted, physically ill or disabled, struggling with mental distress, or homeless may similarly be reduced to bodily markers and cast beyond the ideal of rationality (Comack & Balfour 2004: 96-97; Foster 2011: 335; Naffine 1990: 118-122; 2005: 5-6).

Within law, women's bodies are often treated as potential "sites for unlawful practices" (Smart 1995: 224) and thus constructed as dangerous and problematic. For instance, the sexual assault trial has historically been permeated by the notion that women's *bodies* may be consenting or desirous even as she verbally expresses her lack of consent or desire (Lees 1997: 75; Smart 1995: 224-5). The legal gaze fixates on the body of the sexually assaulted woman, which is constructed as untrustworthy, seductive, and always potentially disruptive (du Toit 2009: 40-42, Lees 1997: 75; Sheehy 2012: 488; Smart 1995: 224). As Smart (1995: 225) argues, legal discourse presumes that "it is the nature of women's bodies to invite trouble [and] [t]he trial considers whether or not this trouble was self-induced or not, but it does not subvert the idea that it is this body that is the problem". In this view, the woman who has experienced sexual assault is reduced to what was done to her body and how she physically reacted, with a skeptical eye to

⁴ Cartesian philosophy privileges reason and rationality as the work of the philosopher's conscious mind that exists distinct from the material world (Hoy 2004: 20; Olson 2012: 79; Weik 2015: 298).

whether her body betrayed her or behaved seductively (Bumiller 2008: 44-46; Coundouriotis 2013: 369; Cowan 2007: 95-97; du Toit 2009: 40-42). Alongside the discursive construction of women's bodies as irrational and driven by emotions, women who appear to use their body to procure economic means, such as through surrogacy or sex work, have been framed as particularly problematic for the way they disrupt gendered norms and expectations of emotionality and passivity and have consequently been legally regulated and criminalized (Kapur 2007: 248-252; Smart 1995: 227). As Smart (1995: 227) argues, this creates a "powerful double bind" in which legal discourse constructs women's bodies as problematic "both when they appear irrational and (economically) rational". When women appear rational, they break expectations of femininity and may therefore be framed through negative descriptors of rationality, such as being described as cold, unfeeling and calculating. For instance, some media and public discussions characterized Ghomeshi's female defence team as uncaring towards assaulted women and thus as having broken their obligation as women (Ashby, February 2, 2016; Csanady, March 31, 2016).

Legal discourse does not just distinguish between men and women; it constructs diverse and sometimes contradictory images of womanhood (Chunn & Lacombe 2000: 3; Scott 2009: 254). Juxtaposed against the privileged image of a passive, heterosexual, white, middle-class woman, legal discourse constructs various categories of failed or particularly problematic female subjects who must be regulated (Chartrand 2014: 21-22; Kapur 2007: 248; Park 2017: 273-4; Singh 2017: 519-520). For instance, single mothers seeking welfare support, drug-using mothers, or mothers who fail to protect their children from abusive partners may be cast as bad mothers who broke the gendered trope of self-sacrificing, nurturing and responsible motherhood, thereby obscuring structural and relational contexts, such as conditions of poverty or gendered violence

(Bumiller 2008: 96-7; Jesseman & Kellner 2014: 77-78, 83; Kilty & DeJ 2012: 13; Park 2017: 281; Singh 2017: 517-8; Smart 1995: 225). To take another example, women who engage in violent behaviour are often pathologized within legal and correctional discourse as psychologically flawed and treated as doubly offensive for their violation of both legal rules and gendered norms (Kilty & Frigon, 2016; 31; Menzies & Chunn 2006: 174-5; Park 2017: 273; Singh 2017: 515-6; Thompson 2010: 100).

Within Western legal discourse, racialized constructions of womanhood have underpinned legal practices that treat racialized women both as less worthy of legal protection and as especially problematic when they offend or break gendered social expectations (Bonnycastle 2000: 76-7; Crenshaw 1991: 1270-1; Kilty & DeJ 2012: 13; Park 2017: 272-3; Ritchie 2013: 368; Ruparelia 2012: 685; Wright 2001: 202). It is well documented, for example, that sexual violence perpetrated against racialized women has been treated within the legal system as less serious than sexual violence against white women (Crenshaw 1991: 1271; Razack 2000: 128-9; Ruparelia 2012: 685). In Canada, thousands⁵ of Indigenous women and girls have been murdered or disappeared, yet their cases have been given low priority and the structural causes of this gendered and racialized violence have repeatedly been overlooked (Cardinal & Gilchrist 2014: 41; Monchalin, Marques, Reasons & Arora 2019: 4; Palmater 2016: 254-6). It was only after decades of advocacy work and calls for an investigation into the disproportionate and systemic violence experienced by Indigenous women that in 2016 the Government of Canada established a national inquiry (National Inquiry into Missing and Murdered Indigenous Women and Girls 2018: 3). In the final report that came out in June 2019, the National Inquiry

⁵ The exact number is still unknown, a fact that itself demonstrates the systemic devaluing of these women's lives.

declared the violence “a race-based genocide of Indigenous peoples, including First Nations, Inuit and Métis, which especially targets women, girls, and 2SLGBTQQIA people” (2019: 50).

Racialized women who experience violence are often constructed in legal discourse as hyper-sexual or aggressive, and thus as somewhat to blame for their victimization (Crenshaw 1991: 1270-1; Park 2017: 285; Razack 2000: 118), or they are cast as completely helpless victims of the violent and sexist practices of racialized men and thus in need of rescuing (Kapur 2007: 244-247; Park 2017: 272; Razack 2004: 167). For instance, Western legal discourse upholds homogenizing and racist assumptions that Muslim women are invariably oppressed and victimized by Muslim men, justifying various forms of regulation and surveillance of Muslim communities and leading to discriminatory legislation and practices (Jiwani 2011: 25; Razack 2004: 155-160, 168-9; 2018: 188-9), such as the recent efforts in Québec to prohibit Muslim women from accessing public services while wearing a face-covering. Furthermore, Western colonial law tends to individualize the violence committed against Indigenous women, obscuring how this racialized violence functions as an extension and continuation of the violence of white settler colonialism (Balfour 2014: 103; Park 2017: 272; Razack 2000: 93-5). Discourses of individualization and homogenization therefore work in tandem to obscure the gendered and racialized violence of Western colonial states while simultaneously constructing violence against Muslim women as the outcome of an inherently problematic and threatening culture that must be monitored, policed, and disciplined by ‘superior’ western nations (Jiwani 2010: 66; Park 2017: 268; Razack 2004: 130-2, 160).

As aforementioned, women who engage in violence may be pathologized as mentally ill for having broken gendered expectations. The discursive framing of insanity and its associated legal defences (e.g. battered woman syndrome) rest on an image of white, passive femininity as

normative that was disrupted in a particular instance for reasons of “biological abnormality” (Park 2017: 274). Racialized and marginalized women, however, have been stereotyped in legal discourse as aggressive, seductive, and manipulative, and thus as *intrinsically* deviating from the ideals of white, passive femininity and less deserving of leniency when they offend (Comack & Balfour 2004: 90; Park 2017: 273; Ritchie 2013: 368; Thompson 2010: 103-4). For instance, racist assumptions that Black and Indigenous women are particularly prone to violence and drunkenness have led to more punitive responses and less recognition of mitigating circumstances in cases involving Black and Indigenous women who kill their partners (Noonan 1996: 213; Park 2017: 274). Within Canada, Indigenous women continue to disproportionately experience violence, exploitation, criminalization, and incarceration, demonstrating how the impacts of settler colonialism are perpetuated through the Canadian legal system (Balfour 2014: 96-8, 101-2; Kilty 2014: 5). Law functions as a site where gendered, racialized, and classed stereotypes are reproduced and underline who is considered to be problematic or dangerous and thus treated with suspicion, regulated, and punished.

Legal discourse is not unified or monolithic, but rather it is often characterized by contradiction and subject to ongoing struggle (Bonnycastle 2000: 65; Dossa 2000: 154; Gavigan 2000: 105; Naffine 1990: 101-2; Smart 1995: 228). The notion of law as a gendering *practice* or *process* emphasizes that law’s discursive constructions are never fixed, but rather that they are continually reproduced through legal practices and are thus struggled over and challenged as social agents attempt to have their experiences and knowledges legally recognized (Chunn & Lacombe 2000: 18; Kilty 2014: 6; Smart 1995: 218-219). Legal practices and constructions of gendered categories may also contradict one another in complicated ways, such as when women involved in family businesses are differently constructed within corporate law and family law

(Condon 2000: 196-7). As I discuss later, within the sexual assault stereotypes that are reproduced through legal practice, women are expected to both occupy positions of passivity in relation to men *and* demonstrate their active attempts to avoid risk. Moreover, law is not the only site that (re)produces discursive constructions of womanhood; it intersects with the gendering, racializing, and classed practices of other institutions, such as the family, medical institutions, and the economic market (Bumiller 2008: 96-7; Chunn & Lacombe 2000: 3; Davies 2007: 156; Park 2017: 275). Feminist scholars have also been involved in the construction of essentializing images of womanhood, such as by perpetuating the notion of women as inherent victims (Bonnycastle 2000: 76; Bumiller 2008: 9; Singh 2017: 516; Smart 1995: 86). In response to these pervasive constructions of womanhood, many scholars argue that we must unpack or deconstruct the discourses through which women are constituted as particular kinds of subjects (Bell & Couture 2000: 51-2; Larcombe 2005: 138; Razack 2004: 131; Smart 1995: 191).

In this dissertation, I understand narrative as a particular kind of discursive practice, namely, one which helps to constitute the social world by ordering, framing, and imposing meaning on a series of recounted events. Importantly, however, I approach narrative through a Bourdieusian understanding of language and power, mobilizing the concept of *narrative capital* and attending to how unequal distributions of capital condition who can speak, in what manner, and with what authority, and thus who can legitimately participate in legal narrative construction. Feminist analyses of law's gendering practices tend to focus on identifying and critiquing legal constructions of womanhood; that is, these critiques often focus on the discursive *outcomes* of legal process. Although I share feminist scholars' concerns with law's discursive constructions of womanhood, I move beyond a discursive focus and consider the material relations of domination that make the construction of particular discourses and narratives possible.

Furthermore, I contribute to feminist critiques of legal discourse by using Bourdieu's theoretical work on habitus to examine the embodied mechanism through which gendering discourses and gendered relations of power are experienced as natural and expressed in ongoing practices. Bourdieu's concepts of doxa and habitus facilitate consideration of how certain discourses and narratives, such as the gendered categorizations discussed above, can operate at the level of *practice* without needing to be consciously accepted. Agents do not just mobilize and reproduce gendered dualisms problematized by feminist scholars, they *experience* the social world through these dualisms so that, for example, the notion of women being more emotional than men is tacitly *felt* to be true and provides agents with an embodied sense of what things mean. This moves us away from speaking of discourses as though they existed independent of agents. Instead, we can think of discourses operating by being embedded in agents' dispositions and embodied sense. Through this thinking, we draw discursive conditions and subjective perceptions together to demonstrate how inextricably connected they are. In this dissertation, I am concerned not only with legal discourses and their consequences, but with the struggles and practices through which they are (re)produced and the embodied rules, field-specific capital, and structural power relations that condition those practices.

As Smart (1995) argues, the choices we make are never under "conditions of our own making" (117) and "all discursive struggle takes place within an already existing set of assumptions, we never start with a blank sheet on which to write our codes and launch our practice" (118). The diverse constructions of womanhood (re)produced and upheld in legal practice, as well as the ways in which these are struggled over and resisted, are shaped by material conditions and unequal power relations that have been internalized in agents' *habitus* (see Chapter Two). Bourdieu's theory of practice offers a set of conceptual tools through which

we can analyse the structuring conditions, tacit schemes of perception, stakes, and relations of domination underpinning legal practices of discursive and narrative construction. Bourdieu's concept of *symbolic power*, which refers to "the socially recognized power to impose a certain vision of the social world" (1991: 106), parallels the above feminist discussions about law's power resting in its ability to make truth claims and (re)produce images of womanhood that are experienced as legitimate. His understanding of law's symbolic power differs, however, in that he is concerned with how it is distributed unevenly amongst various legal agents in a particular social field, whereas scholars such as Smart, likely in an attempt to follow Foucault's (1977a: 26) aversion to thinking of power as a possession, seem to avoid considering the unequal legal power that *agents* wield. In other words, feminist critiques of law's gendering processes tend to emphasize *law's* power to define and, in so doing, overlook how this power is distributed unevenly within a given field, constituting structural relations of domination amongst agents that condition the (re)production of legal discourses.

In his discussions of symbolic power, Bourdieu draws attention to the practices of the agents wielding this field-specific power and the structuring relations and material conditions within which they do so. In particular, Bourdieu was concerned with how the power to authoritatively name and make legitimate truth claims is unequally distributed among social agents based on their positions and capital, as well as with the internalized schemes of habitus that enable these forms of domination to exist without scrutiny. That is, he attended to how symbolic power is materially and relationally structured and the ways those structures are misrecognized. At the end of this chapter and throughout Chapter Two, I return to Bourdieu's concepts to explain how they helped me examine the relations of power expressed through the courtroom narrative practices of the sexual assault trial. First, however, I discuss how sexual

assault has been dealt with in the legal realm and outline several key critiques of the sexual assault trial.

2. Examining the Sexual Assault Trial

Sexual assault and the ways in which it is understood and responded to within the legal system have been the focus of an extensive body of scholarship. To provide some context for the discussions that follow, this section briefly reviews some of this literature. First, I outline some of the key amendments that have taken place in Canadian sexual assault law, many in response to feminist efforts. Second, I consider several feminist critiques of attempts to use law reform to address the issue of violence against women. Finally, I discuss the various factors that can contribute to the discrediting of complainants and the disqualification of women's knowledge in the legal system.

2.1. Sexual Assault Law in Canada

Scholars have repeatedly pointed out that the vast majority of sexual assaults are never reported to the police and that of those that are reported only a minority of cases result in charges, prosecution, and conviction (e.g. Brown, Hamilton & O'Neill 2007: 355-6; Brown & Walklate 2012: 3-5; Busby 2014: 259; Corrigan 2013: 923; Hengehold 2000: 208). This is typically referred to as the high rate of attrition for sexual assault cases and some scholars refer to the discrepancy between reported assaults and convictions as the "justice gap" (Brown & Walklate 2012: 6, 11; Kelly, Lovett & Regan 2005: 1; Temkin & Krahé 2008: 1). In their analysis of research on attrition in Australia, Canada, England, Wales, Scotland, and the United States, Daly and Bouhours (2010: 568) found that 15 percent of the sexual offences reported to the police resulted in a conviction between 1970 and 2005 and that this conviction rate had

decreased over time in England, Wales, and Canada. In addition, their review of victimization surveys revealed that an average of only 14 percent of people who have been sexually assaulted report the assault to the police (Daly & Bouhours 2010: 568). Once reported, many factors, including withdrawn complaints, police belief that the case lacks credibility or sufficient evidence, and failure to locate or identify suspects, contribute to the filtering out of cases with an average of 30 percent proceeding to prosecution (Daly & Bouhours 2010: 568). This is reflected in Johnson's (2012) analysis of statistical trends in Canada. Reporting that of the estimated 460,000 sexual assaults per year only 0.3 percent resulted in conviction (632), she states that "[t]he most significant point of attrition after police become involved in sexual assault cases occurs when they record the incident as a crime and fail to lay a charge" (Johnson 2012: 633).

Research demonstrates that the acceptance of cultural stereotypes about sexual assault, often referred to as "rape myths", is connected to this process of attrition. The following assumptions are often identified as the most prevalent rape myths: "real rape" is committed by strangers; women always physically resist when sexually assaulted; sexually active women are more likely to have consented or lied about the assault; women secretly want sex even when they say no; women's dress or conduct may mean they were partially to blame for their victimization; real victims report the assault immediately; and women often lie about or exaggerate the details of the assault in question (Balfour & Du Mont 2012: 716; Brownmiller 1975: 311-3; Busby 2014: 258; Coates, Bavelas, & Gibson 1994: 197; Johnson 2012: 625; McIntyre, Boyle, Lakeman & Sheehy 2000: 2-3; Orenstein 1998: 677; Randall 2008: 148; 2010: 420; Sheehy 2002: 167; Tanovich 2012: 558; Temkin & Krahé 2008: 31-2; Tuerkheimer 2012: 1470; Weiss 2009: 812). Many scholars have identified how these rape myths influence whether people report their experiences of assault, how they are treated when they do so, whether they are believed by

various actors (e.g. police, prosecutors, jury, judge), and whether they are blamed for the incident (e.g. Du Mont & Parnis 1999: 7; Henry, Flynn & Powell 2015: 1; Orenstein 1998: 677-683; Sheehy 2002: 158; Temkin 2010: 718-9). I return to the issue of rape myths in the later section on gendered stock stories of sexual assault.

In response to feminist efforts to draw attention to the pervasiveness of sexual violence, the impact of rape myths, and the humiliation experienced by many complainants when they report and testify about sexual assault, there were several key reforms in Canadian sexual assault law during the 1980s and 1990s (Gotell 2010: 210-11; Randall 2010: 401; Schissel 1996: 124; Sheehy 1999: 5-7). In 1983, Parliament redefined the crime of rape and created a three-tiered structure in which sexual assaults are categorized according to the degree of violence involved (Backhouse 2008: 295; Randall 2010: 401; Sheehy 1999: 5). Among other things, the 1983 amendments criminalized sexual assault within marriage and eliminated the prior requirement that rape convictions involve proof of penile-vaginal penetration (Busby 2014: 267; Gotell 2010: 210-11; Randall 2008: 149; 2010: 401; Schissel 1996: 123; Sheehy 1999: 5). Prior to these amendments, common law in Canada permitted complainants to be questioned about their sexual history because it was considered relevant to questions of credibility and consent (Busby 2014: 280-1; Du Mont & Parnis 1999: 4; Sheehy 1999: 3-4). In the 1983 amendments, Parliament put strict restrictions on the admissibility of sexual history evidence⁶, but these were struck down by the Supreme Court in *R. v. Seaboyer* (1991) on the grounds that sexual history evidence might be

⁶ Sexual history evidence was only permitted in the following three circumstances: to suggest that the act was committed by someone other than the defendant; to show there was sexual activity on the same occasion that may have led to a mistaken belief in consent; or to rebut evidence raised by the Crown about the complainant's sexual reputation (Busby 2014: 281).

relevant in other circumstances and that the restrictions potentially undermined the defendant's right to a fair trial (Busby 2014: 281; Gotell 2010: 211; McIntyre et al. 2000: 4).

After the *Seaboyer* case, Parliament responded in 1992 with Bill C-49, which was drafted after extensive consultation with national feminist organizations (Gotell 2010: 211; Sheehy 2002: 171-2). Bill C-49 reinstated some restrictions on the admissibility of sexual history evidence but allowed for more judicial discretion; a special hearing must be held by trial judges in sexual assault cases to determine the probative value of specific sexual history evidence (Bonnycastle 2000: 75; Busby 2014: 281-2; Randall 2010: 402). There has been much critique of whether these amendments and similar "rape shield legislations" made in other countries have been effective in improving complainants' experiences going through the legal process and curbing the circulation of rape myths. Scholars have, for instance, pointed to judges' frequent failures to enforce rape shield laws (Raitt 2010: 273; Tuerkheimer 2012: 1462) and how inferences about sexual history can be made regardless of whether overt references to sexual history are constrained (Komter 2000: 419-20; Matoesian 2001: 213). Furthermore, rape shield laws may reinforce stereotypical definitions of rape by suggesting that all complainants be treated as 'chaste' and framing sexual history evidence primarily as a privacy issue rather than an issue of discriminatory judgements about women's sexuality (Anderson 2010: 659-660; Capers 2013: 854-8; Swiss 2014: 400-401).

The following comments by Marie Henein (Ghomeshi's lawyer) during a panel discussion hosted by the Upper Law Society of Canada in 1998 demonstrate how defence lawyers may work to strategically side-step restrictions on sexual history evidence:

Henein: There is another tactical judgement call I'd like you to keep in mind and that is that while you may not have the strongest argument to do one of these applications [for the admissibility of sexual history evidence] sometimes you bring the application,

especially in front of a judge-alone trial, to introduce all this otherwise inadmissible evidence and if it's excluded well, oh well, the judge has heard it. (Henein)

[*Laughter*]

Panel moderator [*laughing*]: Is that fair?

Henein: I'm absolutely confident that the judge will be able to disabuse his or her mind of the fact that she has a very extensive and lewd prior sexual history. [*Laughter*] But you may want to introduce it. It is a close-to-the-line application but there are again you're talking about tactical advantages. Obviously, the argument has to have merit. I'm not suggesting that you bring frivolous arguments. But do remember that again in a judge-alone a different tactical advantage may be there.⁷

In *R. v. Darrach* (2000), the Supreme Court upheld the 1992 restrictions on the admissibility of sexual history evidence, but its analysis did not consider how this kind of evidence might have prejudicial effects or reinforce gendered inequalities (Busby 2014: 282). In her analysis of lower court decisions on the admissibility of sexual history evidence following *Darrach*, Gotell (2006: 757, 764) found that this evidence was admitted in 53 percent of cases and that judges often ruled on these requests without considering how they reproduced rape myths, impacted reporting rates, or compromised the complainant's right to privacy.

The 1992 amendments also redefined the meaning of consent in Canadian law and introduced restrictions on the "mistaken belief in consent" defence (Busby 2014: 269-271; Gotell 2008: 868; Sheehy 2000: 2; 2012: 492-3). Establishing an affirmative consent standard, Bill C-49 defined consent as voluntary agreement to specific sexual activity, countering notions that consent could be determined based on the complainant's degree of resistance or consent in previous situations (Busby 2014: 270; McIntyre et al. 2000: 6). Furthermore, the 1992 amendments added Section 273.2 to the *Criminal Code*, which specifies that the accused cannot claim to have mistakenly believed the complainant was consenting in cases where "the accused

⁷ This panel discussion can be viewed at: <https://www.youtube.com/watch?v=3AiohQek2zc>.

did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting”. In *R. v. Ewanchuk* (1999), the Supreme Court upheld the redefinition of consent, dismissing the defendant’s claim that consent was “implied” and concluding that in the absence of clear consent an offence has been committed. According to Busby (2014: 271), however, there may still be “some uncertainty among judges as to the full impact of the 1992 changes”. In her examination of Canadian cases since 1992 in which the complainant was semi-conscious or unconscious, Sheehy (2012: 489) found that the “reasonable steps” requirement is applied unevenly and often misinterpreted. For example, in several of the cases that she examined, judges ruled that initial physical contact and even sexual touching of sleeping women constituted reasonable steps (Sheehy 2012: 518-9). Furthermore, while several courts have upheld the position that “consent terminates upon unconsciousness” (Sheehy 2012: 515), some judges have ruled against this notion, suggesting that unconscious women may have given “advance consent”.

After the 1992 amendments restricted the admissibility of sexual history evidence, many defence lawyers began using personal records (e.g. therapy or medical records) to discredit and embarrass complainants (Busby 2014: 288; Gotell 2010: 212; McIntyre et al. 2000: 5, 10). Insinuations and claims that complainants may have false memories of sexual abuse implanted by therapists was a prevalent justification for records production (Campbell 2003: 162-3). Bill C-46 (passed in 1997) was meant to address this practice by restricting the admissibility of the complainant’s records. In addition to allowing complainants and record-holders to have their own legal representation at these application hearings, Bill C-46 requires that when applications for access to personal records are made trial judges must consider the complainant’s equality rights, the impact that the release of records might have on the complainant, and the potential for

records to introduce bias (Busby 2014: 291). Gotell (2006: 757) found that between 1999 and 2002 defence applications for the release of the complainant's personal records were successful in producing at least some records in 48 percent of cases.

Despite the *Criminal Code* amendments and Supreme Court decisions intended to address rape myths and the difficulties they present when prosecuting cases of sexual assault, many of these discriminatory beliefs about how a complainant's account should be evaluated persist in legal practices (Backhouse 2008: 294-5; Busby 2014: 293; Du Mont & Parnis 1999: 7; Gotell 2006: 773; McIntyre et al. 2000: 3; Randall 2010: 404-5). As Sheehy (2002: 158) puts it, "the 'old' rules to test women's credibility bubble to the surface in new practices and legal doctrines". Furthermore, lawyers may strategically resist legislative reforms (Comack & Balfour 2004: 118), as demonstrated by Henein's comment quoted above. As I discuss next, there has been much feminist critique regarding the value and problems of these law reforms.

2.2. Feminist Critiques of Sexual Assault Law Reform

Though legal reforms in the area of sexual assault have improved some women's experiences in the legal system, many feminist legal scholars have pointed to the limits of these developments and critiqued the ways that law and legal reform have been used to respond to violence against women (e.g. Bonnycastle 2000: 62-4; Bumiller 2008: 9-13, 161-3; Crenshaw 1991: 1250-1, 1270-1; Daly 2015: 41; Larcombe 2011: 29; Snider 1994: 76-77; Walklate 2008: 43-8). In her influential book, *Feminism and the Power of Law*, Smart (1989: 49) argues that feminist legal victories in the area of sexual assault come at the cost of upholding and reinforcing a legal system that continues to disqualify women's experiences and contribute to their oppression. Smart (1989: 164-5; 1995: 14, 50; see also Gotell 2015: 61) does not suggest that we abandon enquiries into sexual assault or women's experiences when they report and testify, but

rather than when engaging in these enquiries we need to deconstruct legal definitions and methods and the ways that they help constitute normative understandings of sexuality. She warns against viewing feminist legal victories as sufficient: “we should not make the mistake that law can provide the solution to the oppression that it celebrates and sustains” (Smart 1989: 49).

Several scholars (Bonnycastle 2000: 62-4; Gotell 2015: 61; Larcombe 2011: 29; Snider 1994: 77; 1998: 2, 8-9) problematize the use of conviction rates to measure feminist success or failure with respect to sexual assault law, as well as the prioritization of punishment and the instrumentalist view of law underpinning some feminist efforts to influence the criminal justice system. According to Larcombe (2011: 33-34), an emphasis on conviction rates as the problem to be addressed can obscure systemic issues of gendered ideologies and unequal legal practices and lead to efforts at redress such as “institutional performance targets for convictions, prosecutions or police charging”. Given the fact that the criminal justice system disproportionately targets and punishes racialized men who are often seen as “inherently dangerous and violent” (Ruparelia 2012: 674; see also Bumiller 2008: 55-6; Crenshaw 1991: 1266; Snider 1994: 89-90; 1998: 10; Tanovich 2012: 551), we ought to be very concerned about strategies that seek to increase rates of conviction without considering the complex and intersecting ways in which structures of unequal social relations are organized. Gotell (2015) argues that many of the feminists advocating for law reform in Canada “were not naïve about the dangers of criminalization” (57) and that they critiqued the systemic racism and classism of the legal system and worked to limit the mobilization of discriminatory rape myths within the legal process. For Gotell (2015: 67), we cannot abandon legal reform efforts nor can we absolutely reject criminalization strategies, but we must be careful that “demands for justice [are] not equated with securing harsh punishments and imprisonment” and must attend to “diverse

extralegal strategies that would re-politicise the problem of sexual assault and offer alternative responses”.

Another potential problem with efforts to address sexual violence through legal reforms is that legal notions of victimhood may clash with the complexity of women’s experiences and the various ways in which they may cope, resist, and demonstrate resilience (Ehrlich 2001: 86; Randall 2010: 408; Walklate 2008: 51). Describing what she refers to as “trauma creep”, Walklate (2016: 10-11) argues that contemporary uses of the notion of trauma tend to treat it as uniform and conflate it with victimhood such that the experience of victimization is conceptually melded to that of traumatization, which is itself pathologized. Hidden by this trauma creep is the fact that “individuals recover from bad experiences and have the capacity to deal with horrendous circumstances in a myriad of different ways” (Walklate 2016: 10). In her critique of the 1992 Bill C-49 discussed above, Bonnycastle (2000) argues that these “feminist-drafted [...] amendments” (61) constructed women as powerless and inherently vulnerable to coercive male sexuality, further naturalizing dominant constructions of masculinity and femininity (73). Legal reforms intended to address violence against women can also extend state interference in and control over women’s lives by, for example, requiring them to testify and increasing the surveillance practices of social workers (Bumiller 2008: 64-5, 99; Snider 1994: 85; 1998: 9-10). Moreover, legal notions of victimhood intersect with discourses that frame racialized women and women deemed to lead “risky” lifestyles as promiscuous, less believable, less passive, and thus less worthy of legal protection (Bonnycastle 2000: 74; Capers 2013: 829-30; Crenshaw 1991: 1268-1271; Hengehold 2000: 208; Razack 2000: 125, 129; Ruparelia 2012: 673). In this sense, not only do legal constructions of victimhood uphold notions of feminine passivity, but they also

tend to exclude women whose positions of marginalization are reinterpreted as failures to act in a manner consistent with that of genuine victimhood.

Legal discourse, practice, and reforms also tend to individualize, de-gender, and decontextualize the issue of sexual violence (Daly 2008: 560; Gotell 2010: 209; Hengehold 2000: 195, 209; Randall 2010: 406-7). Discussing how Canadian sexual assault law and the affirmative model of consent have been shaped by the neoliberal context in which they were enacted, Gotell (2010: 216) argues that there has been an emphasis on individualized rights and “discrete sexual transactions, consent-seeking actions and the quality of agreement”. By atomizing and individualizing sexual violence, law removes it from its contexts of gendered power relations (Gotell 2008: 898; 2010: 216). Similarly, Daly (2015: 37) argues that most of the discussions and legal reforms surrounding sexual assault have focused on individual contexts, that is, on situations involving “an individual acting alone (or perhaps with several others) who victimises a family member, peer, acquaintance or person unknown”. This tends to overlook contexts of victimisation that are facilitated by institutional, occupational, or organizational power, such as when sexual violence occurs in remote or segregated communities, is committed by official authorities, or takes place in institutions like residential schools or detention centres (Daly 2015: 37, 40-42).

Scholars have also pointed to the ways in which legal reforms have been met with anti-feminist backlash that suggests we have “gone too far” (Larcombe 2011: 33) and are now discriminating against men accused of sexual violence (McIntyre et al. 2000: 10; Sanday 1996: 240-3). For example, McIntyre et al. (2000: 10) note how Bill C-49 was described by the anti-feminist organization REAL Women “as the ‘Despise Men’ amendment” and framed by many defence lawyers as ignoring the presumption of innocence. This backlash against feminist efforts

to draw attention to the prevalence of sexual violence is also exemplified by the allegations of “false memory syndrome” that arose in the 1980s and 1990s⁸ (Campbell 2003: 2-8; Gilmore 2001: 28-29; McIntyre et al. 2000: 11; Sheehy 2002: 163-4). In response to the many women who began to come forward with recovered memories of childhood sexual abuse, advocates of the notion of false memory syndrome argued that these memories were being implanted by therapists (Campbell 2014: 50; Gilmore 2001: 28-9; Raitt & Zeedyk 2003: 454; Sheehy 2002: 163, 166). In fact, some discourses surrounding false memory syndrome suggested that “the real perpetrators of abuse are feminist therapists who have brainwashed their clients” (Sheehy 2002: 164) and that complainants may “be merely the suggestible pawn[s] of an evil, man-hating, feminist therapist” (McIntyre et al. 2000: 11). As discussed in the next section, the discursive practices through which complainants are discredited and silenced have been a central focus of much feminist scholarship.

2.3. Discrediting the Complainant

Over the past several decades and despite legal reforms, feminist scholars have repeatedly identified serious problems with the sexual assault trial and the ways that complainants continue to be silenced, disparaged, and re-victimized (e.g. Comack & Peter 2005: 295-302; Lees 1997: 53; Randall 2010: 405-7; Scheppele 1992: 128-138, 145-151; Sheehy 2002: 158-9; Smart 1989: 32-43; 1995: 83-86, 224). Within adversarial legal systems like Canada’s, sexual assault complainants appear as witnesses for the Crown, whose role is to represent society’s interests, not specifically those of individual complainants. As stated in the *Crown Prosecution Manual* (2017) written by the Ontario Ministry of the Attorney General, Crown

⁸ False memory syndrome is not officially recognized as a psychiatric illness, but does have strong social and symbolic power and has been powerfully used to attack witness credibility (Raitt & Zeedyk 2003: 456).

prosecutors act as “a public representative” and work “to protect the interests of all Ontarians” (6). While they “owe special duties of candour and respect to all victims” and must make efforts to ensure “victims are provided with all relevant information that allows for full and fair participation in criminal proceedings”, prosecutorial goals and discretion may conflict with the victim’s interests and the Crown “is not, and can never, function as the victim’s lawyer” (Ontario Ministry of the Attorney General, 2017: 7). During a sexual assault trial, complainants are Crown witnesses, rather than parties with a legally-recognized interest in the outcomes (Busby 2014: 266; Comack & Peter 2005: 295; Walklate 2013: 87).

For example, in examining the organization of physical space in the courtroom, Duncanson and Henderson (2014: 166) point out that complainants have “no permanent location in the courtroom”, but rather they appear only to testify and are positioned “to the side in the witness box, oriented in deference to the judge”. According to Raitt (2010: 268, 271-2), allowing complainants to have independent lawyers who are permitted to intervene on their behalf could significantly improve complainants’ experiences with the legal system and help them provide their best evidence. While the complainants in the *Ghomeshi* trial each had independent legal representation, their lawyers’ role was to represent them in matters such as third-party records applications or the public release of certain evidence; they had no standing during trial proceedings. Nonetheless, the complainants’ access to independent legal counsel is a privilege that many victims do not have.

According to many feminist legal scholars (e.g. Gotell 2002: 258-259; Lees 1997: 75-77; Randall 2010: 424-427; Sheehy 2012: 488; Smart 1989: 27-28, 33-35), the legal process tends to disqualify women’s experiences of sexual violence by interpreting evidence through phallogocentric logic, abstracted reasoning, and binaries of guilt/innocence and consent/non-

consent. Phallocentrism emphasizes phallic pleasure and pathologizes female sexuality, viewing it as “unreliable or incomprehensible (or even voracious and insatiable)” (Smart 1995: 79; see also Sheehy 2012: 488; Smart 1989: 27-32). Furthermore, Tuerkheimer (2012: 1476-7, 1490) argues that cultural assumptions about what constitutes normal and deviant female sexuality may be used as the basis for admitting sexual history evidence as indicative of a “sexual pattern” that construes certain complainants, such as those who have engaged in sex work, as “un-rapeable”. As Larcombe (2005: 25-30) argues, law’s focus on whether the accused was aware of the complainant’s lack of consent constructs women’s sexual desire as a potentially unknowable object and positions legal inquiry alongside the accused’s knowledge. That is, both the law and the accused seek knowledge of women’s lack of consent and both are often presented as having been overcome by “the vagaries of the feminine mind” (Larcombe 2005: 30). As the complainant is treated as an object to be known (or deemed unknowable) primarily through bodily evidence and physical actions (e.g. resistance), her explanation of her sexual feelings or the accused’s desires are often disqualified (Cowan 2007: 95; du Toit 2009: 90; Larcombe 2005: 24; Lees 1997: 75-77; Smart 1989: 30-31; 1995: 224-5).

The sexual assault evidence kit exemplifies the legal use of bodily evidence to determine the validity of women’s claims. Although it was originally developed and advocated for by feminist frontline workers who thought it could help facilitate the provision of “health care, feminist advocacy, and counselling” (Doe 2012: 364), the sexual assault evidence kit has been institutionalized and become “a forensic tool [that] [...] requires that the bodies of raped women function as crime sites” (Doe 2012: 369; see also Mulla 2008: 304-6; 2014: 33-4). Sexual assault evidence examinations typically involve documenting injuries or points of contact, conducting oral, vaginal, and anal swabs, scraping beneath fingernails, plucking head and pubic hair, and

collecting clothing (Corrigan 2013: 928-9; Du Mont & Parnis 2001: 69). It is a highly invasive process that can last between two to five hours and has been described as a “second assault” (Doe 2012: 386; see also Corrigan 2013: 935; Mulla 2014: 5). In Mulla’s (2014: 219) study of forensic examinations, she found that many of the sexual assault nurse examiners she interviewed understood themselves as “objective evidence collector[s]” and attempted to objectify their patients in order to maintain emotional distance – a practice that may be experienced by victims as disbelief and may contribute to feelings of re-victimization.

Although completing the sexual assault evidence kit is not a requirement, police officers may present it as such and may view women who do not complete the kit with suspicion (Corrigan 2013: 934-6). The administration of sexual assault evidence kits reproduces the notion that complainants are to comply with institutional protocol (Mulla 2014: 226) and Doe (2012: 386-7) argues that a complainant’s willingness to complete one is sometimes used by police like a lie-detector test and as the basis of whether charges are filed. As Corrigan (2013: 944) states, it “can function as a sort of trial by ordeal”. Furthermore, stereotypes about sexual assault (e.g. that it involves use of force and results in injury) may cause some victims to be denied the option of the evidence kit, influence whether completed kits are sent for laboratory testing, and cause cases without evidence of physical injury to be construed as fabrications (Corrigan 2013: 934, 940; Parnis & Du Mont 2006: 89; White & Du Mont 2009: 6). Some evidence may also be used to mobilize stereotypes that undermine a victim’s credibility, such as when information about contraceptive practices, history of sexually transmitted infections, or previous pregnancies are collected (Corrigan 2013: 940-1; Parnis & Du Mont 2006: 80). In this way, the sexual assault evidence kit may function as another avenue for discrediting women’s accounts.

Legal discourse conceptualizes sexual violence within pre-determined binaries that obscure the complexity of women's experiences (Duncanson & Henderson 2014: 169; Gotell 2002: 257-9; Smart 1989: 33). As demonstrated in Chapter Four, legal definitions of relevancy and concerns about prejudicial evidence prevent complainants from referring to certain contextual information that might help them explain their experiences and actions (Duncanson & Henderson 2014: 160; Randall 2010: 414), such as social stereotypes that kept them from reporting. Law's binary logic organizes things into oppositional terms of mutual exclusivity: truth/falsity, crime/non-crime, guilt/innocence, legal/extra-legal, consent/non-consent (Cammiss 2006: 74; Cohen 1988: 257; Matoesian 2001: 227; Smart 1989: 33). By insisting that consent either was or was not established, this binary logic disregards the confusion of sexual coercion and "the complexity of a woman's position when she is being sexually propositioned or abused" (Smart 1989: 33). As Gotell (2002: 259) argues, "legal discourse acts as a metaphorical sieve, straining out complexity and political and social content from the stories of survivors". In this way, feminist scholars have problematized how legal processes and discourses routinely disqualify women's knowledge and accounts.

There has also been much discussion of the defence practice of "whacking the complainant" and how the experience of testifying in a sexual assault trial can be re-victimizing (e.g. Comack & Balfour 2004: 112-145; Comack & Peter 2005: 298-99; Conley & O'Barr 2005: 15-37; Ehrlich 2001: 76; Hengehold 2000: 198; Lees 1997: 176; Tanovich 2012: 553-4). In fact, many of the legal reforms discussed above were intended to curtail this practice. Since the complainant's testimony is the primary piece of evidence in most sexual assault trials, discrediting the complainant is a key defence strategy that can involve making insinuations about her conduct, character, and appearance. Defence lawyers have been criticized for mobilizing rape

myths by claiming or insinuating, for example, that women who act in certain ways or fail to demonstrate risk-managing behaviour are partially to blame for what happened, women who report sexual assault are untrustworthy, and women deemed promiscuous actually consented (Busby 2014: 293; Comack & Balfour 2004: 131; Lees 1997: 74-78; Randall 2010: 409-415; Tanovich 2012: 553-4).

In her recent examination of prominent websites in Canada advertising legal representation for sexual offences, Craig (2015: 274-6) found that several defence lawyers expressly advertised the aggressiveness of their defence practices in sexual assault cases, even though this type of advertising seems to contravene the rules on marketing in the professional code of conduct for Canadian lawyers. In addition, some of the advertising trivialized non-consensual sexual activity, misrepresented the legal standard of affirmative consent, and perpetuated stereotypes (e.g. that women who resist actually do want to engage in sex), which may breach standards of professionalism and requirements that lawyers' marketing be responsible and truthful (Craig 2015: 276-291).

Within feminist literature, the sexual assault trial is repeatedly described as a re-victimizing and humiliating experience in which women are often disbelieved, sexualized, expected to provide meticulous descriptions of the sexual assault, attributed with blame, and forced to endure having embarrassing details revealed about their personal lives (Busby 2014: 292-3; Larcombe 2005: 61-64; Lees 1997: 71, 79; Smart 1989: 38-39; 1995: 84; Temkin & Krahé 2008: 41). As outlined above, Canadian sexual assault law has been amended to reduce reliance on rape myths and restrict the defence's ability to raise sexual history evidence, access the complainant's personal records, and engage in the practice of "whacking the complainant". Many scholars, however, point to the ineffectiveness of rape shield provisions, which not only

can be circumvented, but may also draw further attention to factors such as sexual history that should be excluded for their *irrelevance* to the question of consent rather than for issues of privacy (Anderson 2010: 659; Bonnycastle 2000: 75; Busby 2014: 288, 292; Matoesian 2001: 213; Swiss 2014: 412). Furthermore, the restrictions on speech during the trial and the linguistic practices of cross-examination place complainants in a dominated position that may parallel or echo the domination they experienced during the assault (Conley & O'Barr 2005: 37). The sexual assault trial has therefore been repeatedly critiqued for the ways that it reproduces rape myths, decontextualizes accounts of sexual assault, and disqualifies and re-victimizes complainants. In the following section, I provide a more detailed discussion of sexual assault stereotypes and argue that a narrative focus may help us understand the ways in which rape myths are embedded in practices of narrative ordering and inference-making even as they are expressly rejected by legal professionals.

3. Gendered Stock Stories of Sexual Assault

There is much discussion of rape myths both within feminist legal scholarship and, in more recent years, within media discourse and public dialogue. In this section, I consider gendered stock stories of sexual assault and their role in the legal context. I begin by discussing some law and narrative scholarship on how cultural stock stories contribute to practices of legal persuasion. I then consider several key stock stories and stereotypes about women's normative role in heterosexual relationships, the ways women ought to protect themselves against or respond to unwanted sexual advances, and what might render a woman's account of violence untrustworthy.

3.1. Stock Stories and Legal Persuasion

Within literature on law and narrative, many scholars have documented and analysed the “stock stories” (e.g. Brooks 2006: 11; Delgado 1989: 2416; Vogl 2013: 68) that are mobilized by legal agents as they construct and interpret different narratives. The term “stock stories” refers to culturally-specific “normative understandings of how events take place and how raced, gendered and classed characters behave and function” (Vogl 2013: 78; see also Brooks 2006: 11; Delgado 1989: 2422-3; Rideout 2013: 72-3). Based on “unrecognized assumptions” and “sets of unexamined cultural beliefs” (Vogl 2013: 68), stock stories operate as models or archetypes for making sense of events and thus have implications for how narratives are heard, (re)constructed, and attributed with meaning. While stock stories help economize our thought processes by enabling us to meaningfully and most often unconsciously organize a wide array of information (Winter 1989: 2235), they also limit storytelling by acting as dominant models for interpreting events and experiences (López 1985: 5-6).

Although they do not fully determine narrative practices (Winter 1989: 2252), cultural stock stories provide familiar frameworks that influence how specific legal narratives are (re)constructed and evaluated (Brooks 2006: 11; Cammiss 2006: 80, 95; Rideout 2008: 67). According to Rideout (2008: 67), persuasive legal storytelling depends on the extent to which a narrative corresponds to culturally dominant stock stories. By “offer[ing] a frame of reference for the story’s significance” (Rideout 2008: 68) that is “culturally shared” (Winter 1989: 2262), stock stories act as models for narrativization that are more likely to be accepted. This point is picked up by scholars in the “Applied Legal Storytelling” movement⁹, who advise lawyers to portray their clients within heroic archetypes and familiar plots (Chestek 2012: 104; Robbins

⁹ Scholars in this area explore the ways that law students, legal professionals, and legal educators can employ storytelling techniques in their practice and pedagogy (Chestek 2012: 99; Rideout 2015: 248; Robbins 2008: 7).

2006: 768-771). For instance, a lawyer might provide their client's lawsuit with "the sense of 'little guy' v. 'big guy'" (Foley & Robbins 2001: 470) or frame the defendant in a criminal case within a stock story about being "embroiled in 'Man against Self'" (474) in which there is a struggle against an internal nemesis such as drug addiction. Stock stories provide normative models for presenting legal cases and, in so doing, limit the range of narratives that are told and accepted in court; the result is that legal narratives are often "constrained by culturally dominant ideologies, ideas and concepts" (Cammiss 2006: 80).

Stock stories facilitate the audience's work of inference-making, wherein they fill in gaps in a narrative (Berger 2011: 281; Cammiss 2006: 78; Jackson 1988: 10-11; Rideout 2013: 73-4; Sherwin 1996/2009: 104-5). When two sequential events are recounted, the connection between them may not need to be explicitly stated, but can often be inferred, as in the following example: *The student studied very hard. She passed the test.*¹⁰ Although the connection between the events in this example is not stated (perhaps the student passed because the test was easy or because she cheated), stock stories about studying hard and passing tests allow for inferences to be made that causally connect the student's studying to her success. As Berger (2011: 278) points out, "if the story you are telling is one that already is embedded in tradition and culture, you need not fill in all the details; you can simply name the characters, and the plot will spring to life in the listener's mind". Of course, it is always possible that the listener will either make no inferences or make inferences that the narrator did not intend, which can lead to misunderstandings and disbelief. For instance, Vogl (2013: 77) discusses a refugee applicant whose narrative was disbelieved partially because the six-month gap between her arrival in Australia and her application for a

¹⁰ Although this is my example, it is inspired by Sherwin's (1996/2009: 105) example that reads as follows: "*John went to a party. The next morning he woke up with a headache.*"

protection visa could not be filled in appropriately. The process of filling in narratives through cultural stock stories is thus an important part of how meaning and plausibility are attributed to legal narratives (Cammiss 2006: 78; Rideout 2008: 65).

According to several scholars (e.g. Delgado 1989: 2416-8; Swiss 2014: 414; Vogl 2013: 68; Watkins 2013: 80), stock stories typically reflect the viewpoints of dominant groups and uphold relations of (dis)advantage. Echoing the aforementioned critiques of scholars such as Naffine and Smart, Scheppele (1989: 2083-4) argues that legal discourses, rules of procedure, and expectations contribute to white, affluent, legally-knowledgeable men having their narratives more easily accepted and adopted as archetypal than those who, by reason of their gender, race, or class, are often treated as legal outsiders. For instance, the legal practice of excluding or distrusting revised narrative accounts can disadvantage female complainants in a sexual assault trial who, due to a multitude of factors, may not immediately refer to an experience as sexually violent or abusive (Scheppele 1992: 169-170). In order to be believed and treated as credible, witnesses, complainants, defendants, and other legal agents are expected to narrate their experiences in line with accepted cultural stock stories (Rideout 2013: 72; Swiss 2014: 412-3; Vogl 2013: 78-80), which for disadvantaged groups may mean framing one's experiences through stereotypes that uphold the status quo and, by extension, one's own position of disadvantage. For instance, Swiss (2014: 415) points to how sexual assault complainants are advised on how to conform their narratives, body language, and appearance with archetypal images of genuine sexual assault victims.

Stock stories contribute to the rejection of accounts that contradict the status quo or challenge an established social order. As normative models for how "things 'are supposed to happen'" (Brooks 2006: 11), stock stories function as a set of expectations and assumptions

against which alternative narratives, especially those produced from positions of social, institutional, or cultural marginality, may be excluded and discredited. As Vogl (2013: 68) argues, “stories that are sanctioned frequently reflect the points of view of those with the power to tell their stories, and exclude the voices of those without such power and whose accounts of the world query and disrupt the status quo”. Since stock stories tend to reproduce the views and presumptions of privileged groups who have more power and resources to make their narratives heard¹¹, marginalized groups may experience greater difficulty narrating their experiences and having their accounts believed and understood (Bennett & Feldman 1981: 174; Polletta, Chen, Gardner & Motes 2011: 115,118; Vogl 2013: 78-80). This may especially be the case in law, where legal professionals occupy positions of privilege and thus engage in practices of narrative reconstruction and interpretation through privileged lenses that are perhaps more akin to dominant understandings of the world. That said, many scholars argue that stock stories are not determinant and that there is always the possibility that alternate narratives will be told in ways that disrupt dominant ways of thinking (Baron 1994: 267-9; Brooks 2006: 1-2; Delgado 1989: 2422; Peters 2005: 447; Winter 1989: 2228).

As Sarat (1999: 359) argues, “[e]very trial is as much about the cannot-be-said as it is about the constructed narrative”. Stock stories not only provide models for constructing and reshaping legal narratives, but also act as a set of expectations against which narratives are judged, discredited, and rejected. In fact, the credibility and plausibility attributed to legal narratives is largely dependent on the degree to which they fit within appropriate narrative models (Rideout 2008: 67; 2013: 72; Vogl 2013: 80; Winter 1989: 2270). In the next section, I

¹¹ That is, they have more *symbolic power* – a Bourdieusian concept mentioned previously in this chapter and explicated further in the next chapter.

turn specifically to gendered stock stories about how women behave (or ought to behave) when being sexually propositioned or assaulted.

3.2. Passive, Responsibilized Victims and Deceptive Accusers

Although the term “stock stories” is not used much in the literature on sexual assault, as scholars in this area more frequently speak of stereotypes and rape myths, the notion of stock stories aligns with discussions about the cultural assumptions that shape how sexual assault is understood. For example, Duncanson and Henderson (2014: 156) describe rape myths as “pre-existing social narratives and understandings about sex and rape” and as “familiar and taken for granted narratives”. After describing the characteristics of “[t]he stereotypical rape narrative” (412), Swiss (2014) explains that, despite the rarity of incidents that actually fit within them, these kinds of dominant narratives have “shaped us to expect certain action to take place in stories regardless of the individual descriptions of the character or the variation of the author” (413). Within the literature on sexual assault, scholars argue that dominant understandings of sexual assault tend to imagine stranger-perpetrated incidents in which the (ideally young, white, and responsible) victim physically resisted as much as possible and immediately reported the assault to the authorities (e.g. Anderson 2010: 645-7; Capers 2013: 830; Comack & Peter 2005: 301-2; Ehrlich 2001: 20, 67; Johnson 2012: 625; Randall 2010: 415-422; Swiss 2014: 412). This stock story disqualifies and renders suspicious the accounts of women who know their assailants, do not have physical evidence to prove their resistance, or experienced uncertainty about reporting or delayed or did not report the incident.

Within stock stories about sexual assault, women are framed as the inherently vulnerable and relatively agentless victims of men’s coercion and uncontrollable sexual impulses (Bonnycastle 2000: 73; Ehrlich 2001: 57; Lees 1997: 77; Smart 1995: 84; Weiss 2009: 812).

According to several feminist legal scholars (Duncanson & Henderson 2014: 162-3; du Toit 2007: 61; Gotell 2008: 877; Larcombe 2005: 55), cultural understandings of what constitutes consent within normal heterosexual sex tend to imagine women as the objects of male seduction and the “passive recipients of male sexual desire” (Ehrlich 2001: 29). In particular, the notion of consent positions women as reacting to the actions and desires of men, that is, as either acceding to or rejecting male-initiated sexual activity. Furthermore, cultural understandings of male-dominated seduction suggest that women’s initial rejection of sexual advances can be transformed into consent through men’s seductive efforts (Duncanson & Henderson 2014: 162-3; Ehrlich 2001: 29; Ellison & Munro 2010a: 794). Stock stories about heterosexual sex normalize the notion that “intercourse is something that *men do* [and] [...] that *women* naturally, or normally, undergo, passively experience, and *consent to*” (du Toit 2007: 61, original emphasis). By reproducing the distinction between normal heterosexual sex and sexual assault as a question of whether the woman acceded to male advances, these stock stories position female sexual desire in subordination to male desire.

Viewing allegations of sexual assault through stock stories of heterosexual sex and consent, legal professionals are not concerned with “whether the woman unambiguously intended, wanted or desired the sexual actions undergone, but rather whether she *allowed* them to take place” (du Toit 2007: 62, original emphasis). As aforementioned, questions about a woman’s active sexual desires are treated as legally irrelevant and subordinate to descriptions of her body and what it might tell us about the absence or presence of consent in response to male actions (Bumiller 2008: 44-46; Cowan 2007: 96; Lees 1997: 78; Smart 1995: 224). In this sense, legal stock stories about sexual assault and consensual sexual activity rest on a view of women as naturally dependant and passive (Comack & Balfour 2004: 90; Lees 1997: 134). This has

implications for how women testifying about their experience of sexual assault are evaluated and discredited within the courtroom. Women who do not conform to images of passivity for various reasons (e.g. behaviour deemed provocative or indications of an active desire to see the accused punished) may have their allegations of sexual assault treated as unworthy of legal action (Larcombe 2005: 110-111; Lees 1997: 74). Furthermore, women who are perceived as having actively pursued wealthy, famous, or otherwise advantaged men may be cast as dangerous predators seeking to manipulate and take advantage of unsuspecting men (Mewett & Toffoletti 2008: 169-170; Tipler & Ruscher 2019: 109-110). In Chapter Five, I empirically examine notions of passive and predatory femininity and, drawing on Bourdieu's concepts of habitus, doxa, and misrecognition, argue that both images take for granted an inherent connection between passive vulnerability and genuine victimhood.

Although positioned as passive objects of male sexual desire, women who allege sexual assault are also expected to have actively engaged in cautionary measures to manage the perpetual risk of sexual violence (Balfour & DuMont 2012: 716; Gotell 2002: 260; 2008: 878-882; 2010: 216-7; 2012: 256-8; Randall 2010: 409-415). According to Gotell (2008: 879), sexual violence is increasingly framed as an “ever-present possibility and danger in women's lives” that leaves risk avoidance practices as their only opportunity to exercise agency against male violence. Merging with neoliberal notions of individual responsibility¹², stock stories about sexual assault suggest that legitimate instances of victimization are those in which the assaulted woman appears to have done everything she could to avoid the risk of sexual violence (Gotell 2012: 252-3; Larcombe 2005: 66; Randall 2010: 409-411). Juxtaposed against this image of “a

¹² Discounting structural inequalities or collective needs, neoliberalism tends to emphasize individual responsibility for one's fate and privilege individuals who are deemed self-reliant, rational, and risk-managing (Kingfisher 2002: 16; Gotell 2007: 135; Snider 2006: 331).

diligent and cautious femininity” (Gotell 2010: 217), women who do not practice cautious self-restraint are deemed at least partially responsible for their experiences of sexual violence (Balfour & DuMont 2012: 716). In a neoliberal context where structurally-based vulnerabilities and inequalities are reconstructed as the individualized outcomes of risky behaviour, women who use drugs, engage in sex work, experience homelessness, or occupy marginalized and racialized spaces are likely to have their experiences of sexual violence attributed to “high-risk lifestyles” (Gotell 2008: 883; see also Randall 2010: 410-11; Ruparelia 2012: 676). In this way, gendered, racialized, and classed power relations that may render some women more vulnerable to sexual violence are inscribed on these women as markers of riskiness and used to frame them as responsible for their victimization.

Given the exacting standards of stock stories about sexual assault (e.g. that it is perpetrated by a stranger against a risk-managing and resisting, yet sexually passive woman), it is unsurprising that there are also stock stories about deceptive women who make false allegations due to delusion, shame, or vengeance. The assumption that women frequently lie about sexual assault renders women’s narratives of sexual violence suspicious and helps to justify the policing of complainants’ narratives. One stock story about false complaints frames women’s allegations of sexual assault as the result of psychological disorder or false memories implanted through therapeutic techniques (Gotell 2002: 282-3; Raitt & Zeedyk 2003: 460). This stock story became particularly prevalent during what has been referred to as the “memory wars” of the 1990s (Baddeley 2012: 75; Campbell 2003: 1; 2014: 3; Loftus 2004: 20; Patihis et al. 2014: 519; Schacter 1995: 135). As women began coming forward around this time to recount that they had recovered memories of childhood sexual abuse, several prominent scholars and an advocacy group for parents whose adult children had accused them of sexual abuse (the False

Memory Syndrome Foundation) questioned whether recovered memory was possible and rejected these allegations as delusions (Campbell 2003: 2-8; Raitt & Zeedyk 2003: 454-6; Schacter 1995: 135-137). Although false memory syndrome is not an officially recognized disorder and it was formulated specifically in the context of the aforementioned advocacy group for those accused of sexual violence, allegations of false memory and stock stories about how women's suggestibility leaves them vulnerable to suggestive therapeutic techniques and implanted memories of sexual abuse have undermined women's claims of sexual violence and even called into question their ability to remember (Campbell 2003: 2-7; 2014: 56; Pope 1996: 957-8; Raitt & Zeedyk 2003: 463; Sheehy 2002: 158). As Campbell (2003: 162-3) points out, notions of false memory and women's suggestibility have been repeatedly used to discredit women who have sought therapy in any respect even if the case does *not* involve recovered memory.

Stock stories about women's delusions may also call into question whether a complainant is even capable of telling the truth. In fact, John Wigmore, the American jurist who Henein quotes in her closing arguments when citing a Supreme Court ruling (see Chapter Four), had the following to say about "errant young girls and women coming before the courts":

Their psychic complexes are multifarious and distorted.... One form taken by these complexes is that of contriving false charges of sexual offences by men. The unchaste mind finds incidental but direct expression in the imaginary sex incidents of which the narrator is the heroine or victim.... The real victim, however, too often in such cases is the innocent man (Wigmore 1970: 736, cited in Busby 2014: 278-9).

While overtly sexist statements such as this may be rare in contemporary courtrooms and legal writing¹³, feminist legal scholarship suggests that implicit stock stories about delusional young

¹³ Though the comments made by a former Federal Court judge during a 2014 sexual assault case in Alberta, Canada sadly demonstrate how common and overt these kinds of sexist assumptions can still be. The case involved a

girls and women who make false allegations for attention remain prevalent in the courtroom, particularly in the absence of corroborative evidence (Busby 2014: 279; Gotell 2002: 282-3; Tanovich 2012: 558). Another stock story about false complainants suggests that women may make up allegations of sexual assault to avoid being seen as promiscuous or to assuage their regret about having engaged in consensual sexual activity (Ellison & Munro 2010a: 797; Randall 2010: 420; Temkin & Krahé 2008: 171-2). Finally, complainants may be framed within stock stories about scorned, manipulative, or vengeful women who make up allegations of sexual assault to punish men or serve their own interests, thus discrediting their testimony (Busby 2014: 285-6; Conley & O'Barr 2005: 32; Gavey & Gow 2001: 343; Raitt & Zeedyk 2003: 467; Sanday 1996: 208-9). Women who do not fit within tropes of feminine passivity may be particularly vulnerable to being presented as vengeful and intentionally deceptive. As I demonstrate in Chapter Five, the narratives constructed by the defence lawyers in the *Ghomeshi* trial relied upon stock stories of scorned and manipulative women to discredit the complainants.

The stock stories discussed in this section provide dominant models for making sense of sexual assault allegations and interpreting their plausibility. As Flynn (2015: 94) argues, however, the complexity of sexual violence cannot be coded into “a series of recognisable things, events, [and] experiences” or made to fit within universalized narratives. Rendering accounts of sexual assault recognizable by framing or interpreting them through readily available stock stories may help legitimize one’s account and make it easier to pass judgement on questions of guilt and innocence, but it also contributes to the discounting of women’s experiences and sexual

complainant who was 19 years old and homeless at the time of the alleged assault. Acquitting the defendant, Judge Robin Camp referred to the complainant as “the accused” several times during the trial, stated that “pain and sex sometimes go together”, and asked the complainant why she did not “keep [her] knees together” (Anderson, *CBC News*, May 23, 2018; Kassam, *The Guardian*, March 9, 2017).

desires and reproduces gendered notions of individual responsibility and passive feminine sexuality.

Within feminist critiques, rape myths are often spoken about as though they exist culturally, yet independent of social agents constraining what can be said. Much of the scholarship on rape myths focuses on identifying and critiquing them and the ways in which they are bound up with other dominant discourses. While this importantly brings to light the disadvantages and exclusions reproduced through the ways that we speak about sexual assault, it tends to emphasize what is said or not said, overlooking the mechanism of perception that allows rape myths and broader gendered relations of power to function beyond the level of that which is said or consciously thought. This is where Bourdieu's concept of *habitus* becomes useful. According to Bourdieu (1977: 72; 1989: 19), social conditions, cultural knowledge, and structural relations are inculcated through ongoing practices and experiences to form part of agents' *habitus*, which provides them with a "practical sense" (1988: 782) of how to perceive and act within the social world. The stock stories and gendered dualities discussed in this chapter can be better understood when considered through Bourdieu's concept of *habitus*. In particular, we can consider how stock stories of sexual assault, tropes of deceptive women, gendered binaries (e.g. women as more emotional and dependant than men), and dominant notions of heterosexual relations (e.g. male pursuer) are embedded in agents' *habitus*, providing them with a practical sense of what certain things mean. When conceptualized in this way, rape myths are not just "mobilized" or "drawn upon", but rather they act as internalized "schemes of perception" (Bourdieu 2001: 8) through which agents *experience* accounts as plausible, strange, or credible (see Chapter Five).

Thinking in these terms can help us to explain how it is that stock stories of sexual assault and gendered binaries may continue to function despite legislative changes and expressed critiques and rejections of these stereotypes. In the current political and cultural context, rape myths and stereotypes are repeatedly condemned and legal professionals are increasingly expected to expunge such frameworks from their argumentation and decision-making. For instance, judges have been criticized, professionally reprimanded, removed from office, and recalled for their mobilization of rape myths (Crawford, *CBC News*, March 9, 2017; Levin, *The Guardian*, June 6, 2018). At the same time, the appointment of Brett Kavanaugh to the U.S. Supreme Court despite Dr. Christine Blasey Ford's heart wrenching testimony of him sexually assaulting her (Foran & Collinson, *CNN*, October 6, 2018) demonstrates our contradictory responses to sexual violence. At this juncture, it is useful to consider how stereotypes embedded in the dispositions and schemes of habitus allow us to draw inferences, experience suspicion, and understand insinuations about that which remains unsaid. Even as we *critique* rape myths, they may nonetheless form part of our habitus, giving us a practical sense of what things mean that we cannot and do not need to expressly articulate.

Furthermore, the specific sexual assault case that I analyse in this dissertation, *R. v. Ghomeshi* (2016), was the first of a number of cases in which public figures (e.g. Harvey Weinstein) were accused of sexual assault or harassment, often involving incidents that were years or even decades old. In the context of an emerging 'call-out culture' and the popularity of social media hashtags such as #IBelieveSurvivors and #MeToo, many individuals who had previously remained silent about their experiences of sexual violence were coming forward to speak about these experiences, often on social media forums. At the same time, dominant notions of womanhood, gendered binaries, and stock stories of sexual assault continue to inform the

practical sense and unspoken dispositions of habitus, thereby conditioning whose experiences are heard and how they are recounted and evaluated. Moreover, unequal distributions of resources provide some women with advantages in terms of having their voice heard in mainstream and social media forums. As individuals have come forward to publicly report sexual assault, there has also been some backlash by those who suggest that accusers may take advantage of both the legal system and an audience's desire to believe survivors. For example, in their analysis of the Twitter posts created in the hours following Ghomeshi's acquittal, Coulling and Johnston (2018: 16) found that many users blamed the complainants for what they viewed as "an attempt to make a mockery out of the justice system". The backlash against #MeToo and #IBelieveSurvivors echoes the backlash against feminist legal reform efforts discussed earlier in this chapter. In this particular case, the backlash was not against legal reforms, but rather against those who mobilized social and mainstream media to publicize their experiences and against the movement to #believesurvivors, which was perceived as a threat to the legal premise of innocent until proven guilty.

In the context of this backlash, the presumed tendency to believe women who recount sexual violence is presented as unfair towards men, reversing arguments about the difficulty of reporting and suggesting that it is unsuspecting *men* who need to be afraid of *women*. This concern about innocent men becoming the victims of women's unfounded accusations has a long history in law (Busby 2014: 278-9; Gavey & Gow 2001: 354; Larcombe 2005: 100). The interplay between increasing public support for survivors and backlash in the form of concerns about false accusations may create a conjuncture that is particularly primed for narratives about manipulative and attention-seeking women who take advantage of call-out culture. In his *R. v. Ghomeshi* (2016) decision, Justice Horkins stated that "[t]he publicity surrounding what [he] [...]"

call[s] the ‘Ghomeshi Scandal’ in 2014 is the context in which the complainants in this case came forward”. The context of increased public attention to historical cases of sexual assault by well-known public figures may heighten legal suspicion towards women’s accounts of sexual assault, an important aspect of juridical habitus discussed in Chapter Five. In this context, the opportunity for a woman to publicly “call-out” her assailant and the success she has in doing so is conditioned by dominant notions of womanhood embedded in habitus that allow certain narratives of sexual assault to be *experienced* as trustworthy or suspicious. As will become more apparent in the chapters to follow, Bourdieu’s concept of habitus provides a theoretical tool for explaining how stock stories, tropes of womanhood, and broader gendered relations are embedded in agents’ schemes of perception and expressed in their narrative practices.

Moreover, Bourdieu’s theoretical insights can help us to understand the practices of discrediting and disqualification that feminist legal scholars have referred to as re-victimizing for sexual assault complainants. In particular, the practices of witness examination constitute *symbolic violence*, a Bourdieusian term that refers to forms of domination that are misrecognized as natural and self-evidently legitimate (1977: 191-2; 1991: 51; 1994: 4). In their critiques of the sexual assault trial, socio-legal feminist scholars tend to focus on cross-examination practices, especially those which are aggressive or abusive, and the ways that judges and Crown lawyers should protect complainants from these practices. Thinking in terms of symbolic violence directs us to examine the structural relations of domination that condition both cross-examination *and* in-chief examination, as well as the taken-for-granted premises that contribute to their misrecognition as inherently legitimate.

Examining the symbolic violence of courtroom narrative practices, such as the ways that complainants are expected to provide episodic details that are manipulated into narrative wholes

by the lawyers (see Chapter Three), provides insight as to why legislative efforts to minimize “whacking the complainant” have limited effect. When Crown and defence lawyers’ practices of breaking down, re-directing, interrupting, and (re)configuring a complainant’s account are experienced as natural extensions of legal standards of impartiality, objectivity, and autonomy (see Chapter Four), the underlying relations of narrative domination that condition the sexual assault trial are reproduced regardless of whether or not the defence tactics appear outwardly aggressive or victim-blaming. In other words, the narrative practices of sexual assault trials are organized through relations of domination that are difficult to identify because they exist without scrutiny as a natural part of telling one’s story in court. Incorporating a Bourdieusian understanding of symbolic violence directs our attention to the structural relations that allow both cross-examination practices and more subtle practices of controlling complainant testimony to exist as legitimate components of legal process. By combining Bourdieu’s concepts with a narrative approach, we can examine the symbolic violence that conditions and is reproduced through courtroom constructions of sexual assault narratives. Furthermore, his work encourages us to consider the schemes and cognitive structures embedded in habitus that allow certain legal narratives and relations of domination to be experienced as naturally legitimate. For Bourdieu, it is important to examine not just what is said, accepted, rejected or expressly struggled over, but what is *practiced* without even having to think about it. It is these doxic practices and their reproduction that I focus on in this dissertation.

Conclusion: Bringing in Bourdieu

Although Bourdieu’s concepts have been occasionally referenced in feminist socio-legal literature (e.g. Chunn & Lacombe 2000: 2000: 14-15; Culhane & Taylor 2000: 121; Park 2017: 271), the insights to be gained from a sustained engagement with his sociological approach and

theory of practice remain significantly overlooked¹⁴. In particular, his work can help us examine the structural relations of power in the legal field, how these are internalized in agents' schemes of perception, and how they condition the discourses and narratives (re)produced through law. Through the concept of habitus, we also move beyond that which is said or not said and consider how rape myths and gendered binaries are embedded in agents' tacit sense of how to perceive the world and how act within it. Furthermore, thinking in terms of symbolic violence allows us to examine the subtle relations of domination that tend to exist without scrutiny as part of both cross *and* in-chief examination, moving us away from a focus primarily on aggressive defence tactics like "whacking" the complainant.

According to Dezalay and Madsen (2012: 434), Bourdieusian sociology has been underutilized within law and society scholarship more generally and references to his work are often limited to brief citations of "The Force of Law" (1987b) or to the use of a few concepts (e.g. capital or habitus). Of course, there are some exceptions. For instance, Kay (2008) and Kay and Hagan (1998: 730-1; 2003: 488-490) use Bourdieusian theory to examine how cultural capital, social capital and habitus shape career trajectories in the legal field along gendered lines. Within socio-legal scholarship, Bourdieu's work has also been used to speak about the mutually constitutive relation of law and culture (Mautner 2011: 856, 863-5; Mezey 2003: 45), to examine notions of legal autonomy and the various practices through which extra-legal knowledge is reconstructed in the legal field (van Krieken 2007: 575-8, 585-6), and to theorize the "force" of international criminal law (Hagan & Levi 2005: 1502-4; 1525-7) and the differences and

¹⁴ Within wider feminist literatures, however, there has been more engagement with Bourdieusian theory. For example, feminist scholars have mobilized and adapted Bourdieu's work to theorize the gendered and classed dispositions of habitus (Lovell 2000: 34; Skeggs 2004a: 83-88), gendered capital (Huppatz 2009: 46-7; Miller 2014: 465), emotional capital (Andrew 2015: 316-7; Reay 2004: 60), a "feminist habitus" (McCall 1992: 853), and the relations between material and cultural forms of gendered domination (Hughes & Blaxter 2007: 115; Lovell 2004: 50-1). I refer to this literature throughout the elucidation of Bourdieusian theory in the following chapter.

interplay between various fields of law and other fields of practice (Lenoir 2006: 13-15; Madsen 2006: 30-33; Madsen & Dezalay 2002: 194-203). Villegas (2004: 68-70) contextualizes Bourdieu's explication of the legal field within the specific disciplinary debates between jurists and sociologists in France. Examining the inculcation of legal habitus and unequal distributions of capital amongst law school students and graduates, Jewel (2008: 1156-7; 1173-1201) uses Bourdieu's work to understand the role of legal education in reproducing hierarchical relations within the legal profession.

Within criminology, Bourdieu's concepts of field and habitus have been used to study policing culture (Chan 1997: 70-76; 2001:118-9; Quinlan 2019: 2-4), the social space of prisons and embodied dispositions of prisoners (Neuber 2011: 4-6; Schlosser 2013: 41-43; Shammass 2018: 211-212), and the social dynamics of street crime and how these are internalized (Fraser 2013: 971; Moyle & Coomber 2017: 318-320; Prieur 2018: 352-355; Shammass & Sandberg 2016: 201). In addition, scholars have extended Bourdieu's work on social and cultural capital to speak of "subcultural capital" (Bullen & Kenway 2005: 52-3; Jensen 2006: 263) and "street capital" (Ilan & Sandberg 2019: 279; Moyle & Coomber 2017: 321-323; Sandberg 2008: 156). Furthermore, Whyte (2012: 101-102) argues that analyses of state and corporate crime should consider the habitus and doxic experiences of state and corporate elites. By extending the concept of cultural capital to speak of "moral capital", Valverde (1994: 215-217; see also Curtis 1997: 304-308) considers whether Bourdieu's work can help us study moral regulation within capitalist societies. Bringing together the theoretical work of Bourdieu and Foucault, Frauley (2012: 220, 228-231) examines the ways that higher education and the category of employability function as a form of social regulation. Scholars have also used Bourdieu's work to examine practices of punishment in a way that considers the embodied conditions enacted through these

practices, the ongoing struggles within and across fields, and the intersection of material and symbolic dimensions (González-Sánchez 2018: 73-80; Grant 2016: 756-763; McNeill, Burns, Halliday, Hutton & Tata 2009: 434-436).

In this sense, some attempts have been made within criminological and socio-legal scholarship to utilize Bourdieu's ideas. That said, the study of legal practices, legal power, and the sexual assault trial more specifically still have much to gain from a sustained engagement with Bourdieu's work and extension of his concepts through empirical investigation. As I discuss in the next chapter, Bourdieu's concepts are especially useful when they are *put to work*, rather than merely applied as descriptors. In this dissertation, I not only use Bourdieu's work to guide my examination of the narrative content of the court transcripts, I also build upon his concepts through my empirical analysis of narrative practices in the courtroom.

As discussed at the end of the first section in this chapter, socio-legal feminist critiques of law as a gendering process tend to emphasize the discursive *outcomes* of law, examining and critiquing its constructions of womanhood. A Bourdieusian examination of courtroom narrative practices can help us understand the embodied schemes, stakes, structural power relations, positions, and conditions of the legal game that make particular narratives and narrative practices possible. In her review of Carol Smart's *Law, Crime, and Sexuality: Essays in Feminism* (1995), Lacombe (1997: 147) argues that Bourdieu's understanding of "field", which refers to the organization of relations in a manner analogous to an implicit gaming space¹⁵, could add "relational and dynamic qualities" to Smart's discussion of law and legal power. According to Lacombe (1997: 147), by focusing on how legal discourse disqualifies women, Smart

¹⁵ I provide a much more thorough discussion of this concept in the following chapter.

concentrates on the “result of the game” and an engagement with Bourdieu’s work could help her examine aspects of the game itself, such as:

The moves the players made; the stakes they had in the game; the value of specific cards; the trump cards players used to effect a change of direction or to modify the stakes; the positions of players in the space of play; and the relative force of each player.

As an intertwined set of theoretical concepts, Bourdieu’s work can help us examine how certain distributions of power, forms of participation, markers of authority, conceptions of legal objects, and ways of speaking are taken for-granted in the courtroom as inherently legitimate and natural components of legal process. In so doing, we can consider how these doxic conditions are reproduced through and hierarchically structure legal practices and struggles. Mobilizing a Bourdieusian narrative approach, I add to feminist analyses of law’s gendering process by examining the unquestioned practices and power relations between positions in the legal field that *condition* the dynamic and ongoing (re)production of law’s truth claims. In other words, I am concerned not only with the narratives and discourses produced through the *Ghomeshi* trial, but the structural relations of power internalized in the habitus of legal agents that made the production of these narratives possible.

Importantly, Bourdieu’s work alerts us to the ways that legal reform efforts aimed at curbing rape myths, preventing practices of “whacking the complainant”, and encouraging legal professionals to take women’s accounts of assault seriously may leave unquestioned the underlying and often misrecognized relations of domination that structure participation in the legal game. According to Lovell (2000: 43), Bourdieu’s work points to “the need to challenge the terms of the game itself and not simply to secure entry for women as legitimate players”. This work of looking at the structural conditions, doxic premises, and hierarchical power relations of the legal game may be particularly important when considering cases such as *R. v.*

Ghameshi (2016), which involved an all-female defence team, legal professionals who professed to reject the relevance of stereotypes, and complainants who appeared free to narrate their accounts both in court and to a wider public audience. Engagement with Bourdieu's work contributes to feminist socio-legal scholarship that is concerned not just with law's power to constrain, but also with its power to impose definitions, divisions, and meanings that shape and legitimate social relations. What his theory of practice provides is a means of investigating how this symbolic power is unequally distributed amongst positions in the legal field, constituting a form of domination that is internalized in the embodied dispositions of legal agents' habitus and reproduced through their ongoing relational practices. In the next chapter, I provide a discussion of Bourdieu's work, focusing on his understanding of relations of domination and their reproduction, which I use to develop the concepts of narrative capital and configurational power that expand Bourdieu's original theoretical tools.

Chapter Two – Mobilizing Bourdieu’s Work to Theorize Relations of Domination in the Courtroom

Introduction

“I have always been astonished by what might be called the paradox of doxa – the fact that the order of the world as we find it, with its one-way streets and its no-entry signs, whether literal or figurative, its obligations and its penalties, is broadly respected; that there are not more transgressions and subversions, contraventions and ‘follies’ [...] that the established order, with its relations of domination, its rights and prerogatives, privileges and injustices, ultimately perpetuates itself so easily [...] and that the most intolerable conditions of existence can so often be perceived as acceptable and even natural.”

– Pierre Bourdieu, *Masculine Domination* (2001: 1)

At the heart of Bourdieu’s work is an overarching concern and curiosity about how we tend to act in accordance with and reproduce the social expectations, unequal power relations, unspoken rules, and conditions permeating the social spaces within which we are positioned. This is not to suggest that we are mechanically submissive or tossed about by the determining forces of society; on the contrary, as I explore throughout this chapter, Bourdieu maintains that social agents actively produce and reproduce their social contexts (Bourdieu & Wacquant 1992: 136). Social structure and social practice are bound in a mutually constitutive relation. Even as structural relations within a given field shape social practice and are internalized in agents’ schemes of perception, these relations depend on agents’ practices for their (re)production.

For Bourdieu, the reproduction of social order and its relations of domination occurs as agents go about participating in the social world and struggling for certain outcomes within it (e.g. a legal outcome, the upper hand in an argument, recognition in a certain social circle). In striving and competing for specific advantages, status, and privileges, *they take for granted the conditions within which that struggle takes place*, thereby reproducing them as self-evidently legitimate. In particular, their competitive practices take for granted the legitimacy of certain hierarchal relations, valuations and evaluations of properties, expected ways of acting,

distributions of privilege, obligations, and consequences. It is not that these social conditions are falsely represented or intentionally reproduced, but that they simply go without saying as agents engage in ongoing social practices.

As argued in the previous chapter, Bourdieu's work can help us theorize relations of domination within the courtroom and how they are perceived as legitimate and reproduced through ongoing social practices, such as narrative production. Mobilizing and extending Bourdieu's conceptual tools, I understand courtroom narrative practices¹⁶ as conditioned by and contributing to the reproduction of unequal distributions of symbolic power, which occurs even as agents struggle with each other to impose their version of events. In this chapter, I discuss Bourdieu's work and its usefulness for an analysis of the structural relations and ongoing struggles composing courtroom narrative practices. Throughout the chapter, I also discuss various feminist engagements with Bourdieusian theory.

I begin with a discussion of Bourdieu's rejection of the theory/method and subjectivism/objectivity dichotomies and his attempts to move away from them in his own work. To explain how he theorized social practice, agents' perceptions and social structures as inextricably interconnected and mutually constitutive, I introduce his important concepts of *field* and *habitus*. In the next section, I discuss Bourdieu's understanding of domination, focusing particularly on the concepts of capital, misrecognition, doxa, and symbolic power. In so doing, I also present language and narrative as bound up in power relations. I then turn to law and discuss how the juridical field is underpinned by and reproduces relations of symbolic power. The

¹⁶ *Narratives* are different from (though clearly connected to) narrative *practices*. In particular, I understand narrative practices to include the construction, reception, interpretation, and evaluation of narratives. Although I am concerned with narrative accounts, the main focus of this dissertation is on narrative *practices* and the forms of domination through which they are conditioned and that they reproduce.

legitimacy and symbolic power of legal practices and truth claims depend on the taken-for-granted premises of positivism, impartiality, and autonomy, which has implications for narrative practices in the courtroom. Finally, I expand Bourdieu's work through the concepts of narrative capital and configurational power.

1. Theorizing Social Practice and Social Structure

To orient and provide a foundation for the discussion to follow, this section discusses some overarching aspects of Bourdieu's project. I begin by explaining how Bourdieu thought research should meld theoretical work and empirical examination. Next, I explain how Bourdieu's work examined both objective structuring conditions *and* agents' schemes of perception, that is, how he brought objectivist and subjectivist concerns together in his analyses. Finally, I discuss the concepts of field and habitus, which were integral to Bourdieu's work and his efforts to escape the false dichotomy of objectivism versus subjectivism.

1.1. Rejecting Oppositions and Putting Theory to Work

In many ways, Bourdieu built his theoretical and methodological project in opposition to the dichotomies and divisions often taken for-granted in the social sciences. According to Bourdieu, several "false antinomies" (1988: 777) structure and delimit what is seen, theorized, and studied in the social sciences as well as the ways that research and knowledge production are approached and evaluated. For instance, divisions between disciplines and intellectual traditions can promote rigidity and limit creative and innovative theorizing (Bourdieu 1988: 778-9; 1992: 227). These divisions encourage scholars to stick themselves and their work in certain categories and merely apply the theory that they have chosen, rather than theorizing *across* various traditions and disciplines. Suggesting that when it comes to choosing which techniques and

thinkers to mobilize our one rule should be “it is forbidden to forbid” (1992: 227), Bourdieu (1988: 780) advocates a theoretical and methodological openness that uses various thinkers to transcend each other’s limits and rigorously ensures that the intellectual resources drawn upon are relevant and useful for the specific project at hand. Although Bourdieusian concepts are central in this dissertation, I attempt to go beyond Bourdieu by, for example, mobilizing the notion of narrative capital and adapting Paul Ricoeur’s work on narrative to help me theorize power in the courtroom. Bringing in Ricoeur and thinking in terms of narrative (which Bourdieu did not do) allows me to work with Bourdieu’s concepts in a slightly different way and to take up his ideas creatively.

Bourdieu (1988: 774; 1992: 224-5; see also Bourdieu & Wacquant 1992: 174-5; Wacquant 1992: 34-5) also strongly opposed the separation of theory and methodology into two projects or moments, advocating instead for a fusion of theoretical construction and empirical analysis. The separation of theory and methodology into, for example, distinct sections in a research proposal, can promote a research approach in which theoretical concepts are rigidly defined, a “technical recipe” (Bourdieu 1988: 774) of analysis is followed, and then an effort is made to bring these back together by applying theory to findings. Moreover, the theory/methodology distinction can further promote rigid adherence to specific concepts or techniques that close the researcher off to how concepts may need to be re-worked and new ways of looking at the data pursued *as the project is undertaken*. For Bourdieu, research cannot be laid out as a recipe or series of steps to be methodically and faithfully followed, nor can theoretical concepts be simply applied to empirical findings. Instead, research should merge conceptual and empirical work, that is, detailed examination of empirical data requires theoretical conceptualization and even abstract theorization can only be worked out when the researcher is

empirically engaged (Bourdieu 1992: 220; Bourdieu & Wacquant 1992: 160-1; Wacquant 1992: 35). According to Bourdieu (1992: 228), empirical analysis should “put [theoretical concepts] in motion and to make them *work*” (original emphasis). Suggesting that theory should practically guide research *and* that important theoretical concepts come out of empirical work, he states that “one cannot think well except in and through theoretically constructed empirical cases” (Bourdieu & Wacquant 1992: 160). Bourdieu also argues that sociological work should reflexively question the pre constructions experienced as common sense in the discourses and practices one is examining (1988: 776; 1992: 235; Dezalay & Madsen 2012: 448; Susen 2013: 206). In later chapters, I consider the taken-for-granted standards, premises, and pre constructions that dominate the juridical field, as well as the practices that they reinforce and through which they are reproduced.

Bourdieu’s rejection of technical blueprints and recipes should not be misconstrued as a rejection of empirical rigour. On the contrary, he suggested that careful attention to empirical details are integral to theorization and the avoidance of fetishized concepts (Bourdieu 1992: 228). Like Mills (1959: 195-224), Bourdieu viewed research as a craft that brings together theoretical creativity and empirical observation. Instead of being a rigid set of steps, Bourdieu states that empirical analysis can involve “a whole series of small rectifications and amendments inspired by what is called *le métier*, the “know-how,” that is, by the set of practical principles that orients choices at once minute and decisive” (Bourdieu 1992: 228). In the analytic work for this dissertation, for example, I kept detailed notes, recorded what I did to analyse the transcript data, used coding software, and used copious examples in my writing to demonstrate my arguments¹⁷. Although my attention to the empirical material was detailed, the techniques I used

¹⁷ In Chapter Three, I provide more discussion of how I read and analyzed the transcripts.

to look at the data were not rigid, but rather developed *as I worked through the research process*; each new analytic step that I took (some useful, others not so useful) stemmed from both what I was reading theoretically *and* what I was seeing in the empirical data.

Building on Bourdieu's concept of habitus (discussed below), McCall (1992: 856) argues that instead of viewing feminist research as characterized by a particular epistemological or methodological approach, we should think of feminist research as inspired by a "feminist habitus". This allows for debates over what constitutes feminist research to be about the "know-how" or dispositions it entails, rather than about various methods. According to McCall (1992: 857), feminist theory enacts a disposition that is concerned with the "binary oppositions inherent in gender symbolism" and the ways that these contribute to forms of gendered (dis)advantage. Importantly, this disposition of feminist habitus is concerned not just with divisions, but with their *hierarchical* implications; as Järvinen (1999: 7) reminds us, classification is not just about division, but about "dividing the world according to hierarchical principles". According to Bourdieu (2001: 7-9), sets of gendered binaries help to naturalize relations of masculine domination. If we accept McCall's argument, socio-feminist critiques of the gendered dichotomies (re)produced through legal discourses (see Chapter One) can be understood as the enactment of feminist habitus. The analyses offered in this dissertation are similarly guided by a concern with the hierarchical implications of law's key binaries and divisions (e.g. legal/extra-legal; partial/impartial; female dependence/masculine independence; emotionality/rationality).

Throughout this dissertation, I attempted to follow Bourdieu's (1992: 220-1) advice of melding theoretical and empirical work such that abstract modes of thinking and seemingly mundane empirical objects mutually shed light on one another. While much of this chapter outlines some of Bourdieu's key ideas, its purpose is not to put forward a theory that is then

applied to interpret empirical findings, but rather to orient the reader and explain the concepts that are then *put to work* as I present my analyses of the transcripts in later chapters. As I hope becomes evident in later discussions of narrative capital and configurational power, theorization and empirical analysis went hand in hand throughout this project, each continually informing the other; theoretical resources helped me attend to and explain certain aspects of power and underlying assumptions in the courtroom even as the content of the transcripts spurred me to develop new theoretical tools to capture what I was observing. Following Bourdieu then, I avoided separating theory and method, working instead to treat consideration of theoretical concepts and empirical analytic work as one and the same.

1.2. Rejecting the Objectivism/Subjectivism Dichotomy

One of the key antinomies that Bourdieu problematized was that of objectivism versus subjectivism (1990: 25; 1987a: 2; 1988: 780-2; 1989: 14-15; Brubaker 1985: 754). In fact, he refers to the objectivism/subjectivism divide as “the rock-bottom antinomy upon which all the divisions of the social scientific field are ultimately founded” (Bourdieu 1988: 780). Introducing *The Logic of Practice* (1990: 25), he states that “[o]f all the oppositions that artificially divide social science, the most fundamental, and the most ruinous, is the one that is set up between subjectivism and objectivism”. Within objectivist theories, the focus is on examining deep social structures and external mechanisms that constrain social agents¹⁸, which can lead theorists to

¹⁸ Following Bourdieu (e.g. Bourdieu & Wacquant 1992: 107), I primarily use the term *agents* throughout this discussion instead of actors, individuals, or subjects. The notion *subject* tends to be connected with theories of consciousness and intention, which Bourdieu wanted to move away from in favour of examining agents’ practical and embodied sense of how to act (Bourdieu & Wacquant 1992: 120-1). Similarly, the term *actor* can sometimes imply a conscious and rationally acting subject, as in rational action theory, which Bourdieu attempts to avoid through his articulation of habitus (Bourdieu & Wacquant 1992: 123-5). Furthermore, Bourdieu is less concerned with biological individuals, than with their positions within fields, as I discuss later in this section. Using the term *agent* emphasizes both the active role that social agents have in (re)producing social spaces *and* the fact that their activity is conditioned by the properties bestowed on them through objective structures. The notions of *individual* and *actor* also seem to me to designate specific people at specific points in time (e.g. Ghomeshi; the three

discount or overlook the constitutive role of agents' perceptions, actions, and practices¹⁹.

Objectivist theories sometimes reify social structures as autonomous and external entities that act upon agents, reducing social practice and action to mere compliance with structural mechanisms (Bourdieu 1977: 24; Sewell 1992: 2; Wacquant 1992: 8). In objectivist or structuralist theories, agents' experiences and perceptions of the world are often disregarded as insignificant and incorrect since social practice is understood as an execution of the structural mechanisms identified by the theorists and which agents do not themselves recognize (Bourdieu 1977: 24-5; 1988: 781; Wacquant 1992: 8). By failing to consider the practical knowledge, representations, and meanings through which agents experience and act within the social world, objectivist theories overlook crucial aspects of how social life and social structures are reproduced and transformed (Bourdieu 1990: 41; 1988: 15; 1989: 15; Brubaker 1985: 750).

Subjectivist theories, on the other hand, often take for granted that the representations and experiences recounted by social agents can capture what is going on in the social world (Bourdieu 1977: 3; 1989: 15). Subjectivism suggests that agents construct the social world through conscious decisions and actions, making it possible, in theory, to explain the social world by grasping the aggregate of the constructs, intentions, strategies, and meanings that agents employ in their daily lives (Ahearn 2001: 114; Bourdieu 1990: 46; 1989: 15; 2013: 294; Wacquant 1992: 9). By emphasizing agents' work of construction, subjectivist theories overlook the conditions within which agents' representations are formed and which their practices

complainants; etc.). I thus at times use these terms to speak of a particular person or group of people (e.g. the actors in the *Ghomeshi* trial); biological individuals or specific actors are, of course, always also socially-positioned agents.

¹⁹ I understand the term *action* to designate the historical actions of specific biological individuals occurring in a specific time and place (e.g. the statements or movements of Ghomeshi's defence lawyer could be spoken of as actions), whereas the notion *practice* refers to the patterned and ongoing activities occurring within a structured social space. These are, of course, closely connected; practices are comprised of individual actions and actions are always situated within a field of practice.

reproduce (Bourdieu 1977: 3; 1989: 15). For Bourdieu (1990: 52; 1988: 782), we must account for agents' intentions, representations, and experiences while recognizing that these are made possible through objective structures and often have implications and meanings beyond what the agents recognize. According to Lizardo (2010: 666-7), Bourdieu uses the term 'structure' as a conceptual object that helps the social scientist speak of objective social relations. These structures of objective relations are different from (though inextricably bound up with) the "*practical models* deployed by the social agent" (Lizardo 2010: 666). In fact, as I discuss later in this chapter, the embodied schemes and logic underpinning agents' practices often contribute to the reproduction of objective structures by *misrecognizing* them.

Bourdieu did not reject objectivism or subjectivism *per se*, but rather the false opposition between them. He wanted to eschew the extremes of either approach by considering both objective structures *and* schemes of meaning and perception (Bourdieu 1990: 25; 1987a: 2; 1989: 14). Demonstrating his rejection of the objectivism/subjectivism dichotomy, Bourdieu (1989: 14) stated that "[i]f [he] had to characterize [his] work in two words [...] [he] would speak of *constructivist structuralism* or of *structuralist constructivism*" (original emphasis). Instead of viewing these theories as irreconcilably opposed, he suggests that both are necessary. The objectivist moment facilitates consideration of how practices are conditioned by structural constraints operating beyond the intention or consciousness of agents, while the subjectivist moment allows us to attend to the meanings, perceptions, and representations that shape how these structures are transformed or preserved (Bourdieu 1990: 52; 1989: 15). Several feminist scholars (Lovell 2000: 31; Moi 1991: 1034; Thorpe 2010: 194) have suggested that a key strength of Bourdieusian theory is that it can be used to consider both the ways that gender is socially constructed through ongoing practices and the ways that gendered social constructions

function as structuring conditions that are “actually *written on the body*” (Fowler 2003: 471, original emphasis). Bourdieu examined both the objective meaning of social practices and how social practices are interpreted through agents’ subjective sense (Truc 2011: 156). In Bourdieu’s work, structure and agency are inseparable. Agents’ perceptions and practices are always shaped by internalized objective relations, and it is through social practices that objective relations are (re)produced and sometimes transformed. As I discuss next, Bourdieu developed his relational approach through the interconnected concepts of *field* and *habitus*.

1.3. Field and Habitus

The concept of *field* refers to an organized network of relations through which agents engage in struggles for domination by acquiring and mobilizing the capital that is valued and to which they have access in that particular field (Bourdieu 1994: 5; 1996: 264; Bourdieu & Wacquant 1992: 95; Dezalay & Madsen 2012: 441; Huppatz 2009: 49-50; Lawler 2004: 120; Madsen 2006: 25-27; Moi 1991: 1021). For Bourdieu (1977: 81-2; 1989: 16; 1992: 256; Bourdieu & Wacquant 1992: 107), social interactions and communicative exchanges between individuals are actually expressions of the objective relations between the positions permeating that particular social space or field. Advocating a “*relational* mode of thinking” (1989: 15; see also 1984/2010: 14; 1992: 228-9) that focuses not on biological individuals but on the organization of *relations*, Bourdieu emphasizes the distributions of capital and field-specific regularities that hierarchically structure the ways that social agents engage with one another within a given field. For instance, instead of speaking of “the dominant class”, a term that he saw as “a realist concept designating an actual population of holders of this tangible reality that we call power” (Bourdieu 1992: 229), he spoke of “the field of power” in which agents are hierarchically positioned and thus able to exert varying degrees of power in relation to other

agents. Unequal distributions of various forms of capital, such as economic, cultural, linguistic, and social²⁰, as well as the field-specific value attributed to certain capital organize agents in relation to one another, thereby conditioning their practices (Bourdieu 1984/2010: 108-9; 1987a: 4; 1989: 17).

Bourdieu does not use the term *field* to refer to a geographic place or bounded area, but rather uses it in a way akin to how one would think of a magnetic field, which suggests “a set of forces (or magnetic pull) that is capable of organizing and controlling a certain set of practices” (Hunt 1993: 358, n. 18). In this sense, a field is not a thing that can be simply located in geographic space (though it may be associated with certain spaces, such as the courtroom or the classroom). Instead, it is a concept for theorizing a particular network of organized relations and how they are reproduced and struggled over (Bourdieu 1992: 228; Lizardo 2010: 681); that is, it is an analytic construct meant to be put to work. Bourdieu’s notion of fields thus aligns with Hunt’s understanding of institutionalization as “clusters and patterns of social relations [that] are condensed into the purposefully organized features that characterize institutions” (Hunt 1993: 8). By thinking of a field as a hierarchically organized cluster of relations, we move away from understanding it as a determining structure or thing, while simultaneously recognizing its ability to structure and condition social practice. Instead of thinking of gender relations as constituting a specific field, feminists drawing on Bourdieu’s work have argued that gender permeates all social fields (Adkins 2004: 6; Lovell 2004: 49; McCall 1992: 842-3; Moi 1991: 1034). In other words, gender relations are both instantiated and reproduced through the hierarchical organization of relations within various fields of practice.

²⁰ Forms of capital are discussed at greater length in later sections.

Within fields, social agents struggle not only over capital, but also over the value attributed to certain forms of capital, the organization of positions, and the divisions and limits of the field itself (Bourdieu 1984/2010: 481-2; 1987a: 13; 1991: 168; Bourdieu & Wacquant 1992: 100; Madsen 2006: 27; Wacquant 1992: 17-8). Likening fields to “gaming space[s]”, Bourdieu suggests that the system of hierarchically ordered positions and the unequal distributions of capital characterizing a particular field function as both the “stakes and instruments of struggle” (1996: 264). In this sense, fields provide a set of gaming positions, instruments, and “tacit rules of the game” (Bourdieu & Wacquant 1992: 99) through which social agents struggle for domination; at the same time, field-specific struggles help to maintain or transform the very divisions, regularities, and value-attributions through which they are structured (Bourdieu 1990: 141; 1996: 264-5; Wacquant 1992: 18). As they participate in the game and struggle for domination within it, social agents reproduce the game itself by recognizing its stakes and mastering its tacit rules (Bourdieu 1984/2010: 164; Bourdieu & Wacquant 1992: 117). As I discuss further in the context of the juridical field, those who have a great deal of capital within a given field have a vested interest in reproducing its implicit rules and organization of social positions.

For Bourdieu, “[t]he notion of field reminds us that the true object of social science is not the individual, even though one cannot construct a field if not through individuals” (Bourdieu & Wacquant 1992: 107). Instead, we should focus on the field itself and its relations of power, divisions, implicit rules, organization of positions, and distributions of capital, even if we do so by looking at how specific individuals act. According to Adkins (2004: 11), Bourdieu’s relational approach means moving away from notions of gender as “an abstract position” and instead conceptualizing gender as “an always lived social relation which will always involve

conflict, negotiation and tension”. The emphasis on *relations* demonstrates the importance of melding theoretical and empirical work; it is through theoretical concepts that we can see beyond what the individuals in our empirical data are doing and it is through empirical materials that we develop an understanding of how a field operates. Although in this dissertation I discuss individuals and their specific actions within the courtroom during the *Ghombreshi* trial, the object of my analysis is not on these individual actors *per se*, but on the implicit rules, distributions of capital, and power relations that underpin and are reproduced through their practices.

While Bourdieu is concerned with the objective relations of fields, he does not view these merely as external mechanisms that determine social practice (1977: 73; 1990: 53-6, 139; 2001: 14). Instead, he considers how social life depends on the dispositions, motivations, and practices of social agents, which are themselves dependant on material conditions and developed from a particular social position (Atkinson 2007: 544-54; Bourdieu 1989: 18-19; 2013: 296; Brubaker 1985: 750). Bourdieu (2013: 296) argues that agents’ practical knowledge or mental schemas are central to the production and reproduction of structuring conditions, that is, to the enduring relations between different social positions within fields. As social agents accumulate experience within a field, they internalize their position within that field, the values attributed to various capital, and the field’s implicit rules of practice (Bourdieu 1990: 139-140; Bourdieu & Wacquant 1992: 136). This internalization produces what Bourdieu refers to as *habitus* – “a socially constituted system of cognitive and motivating structures” (1977: 76) through which agents organize and make sense of their practices and experiences. According to Bourdieu (1991: 51), the formation of habitus does not always involve language or conscious thought, but can be inculcated through silent practices, such as “reproachful looks” and appropriate ways of sitting or standing. For instance, Thapar-Björkert, Samelius, and Sanghera (2016: 156) demonstrate how

women may internalize “disapproving looks and remarks”, leading them to change their behaviour so that they comply with expectations of femininity and male dominance.

Operating as a set of “structuring structures” (Bourdieu 1977: 72), habitus²¹ conditions social practices by naturalizing the social world and providing social agents with “a world of common sense” (1989: 19) and a “practical sense” (1988: 782) for how to act and what things mean in a given field. Importantly, the dispositions of habitus are inculcated over time through social practices (Lovell 2000: 27), but this process of inculcation is not recognized, allowing the dispositions of habitus to be experienced as natural traits of the individual. The gendered schemes of habitus, for instance, are powerful precisely because they “do not include knowledge of their own historical creation” (Jarvinen 1999: 10). Since it operates through agents’ dispositions, practical sense, and embodied knowledge, habitus is not always able to be explained in words; it is “perceived – but not consciously noticed” (Bourdieu 1977: 10). Moreover, habitus functions as a form of “embodied capital [and] acquired know-how” (Bittle & Frauley 2018: 619; see also McCall 1992: 843) in that the accumulation of certain kinds of experiences and practical knowledge are valued over others.

According to Bourdieu (1977: 83; 1990: 54-55; 1996: 272-3), structuring conditions and the objective relations of fields are (re)produced through the ongoing practices of social agents, which are shaped by the socially-conditioned “cognitive structures” and “practical sense” of habitus. Developed from a particular position, habitus is produced by the internalization and embodiment of the objective relations, divisions, value-attributions, material conditions, and implicit rules of the social world and the particular fields within which an agent has accumulated

²¹ According to Michel (2015: 3-5), Bourdieu’s notion of habitus strongly resonates with Ricoeur’s conceptualization of *character*, which he uses to refer to the acquired dispositions that constitute a person’s identity, allowing one to be recognized by the self and others.

experience (Bourdieu 1990: 53; 1984/2010: 95; 1987a: 5-6; 1989: 18; Bourdieu & Wacquant 1992: 136). In this way, objective social conditions, agents' dispositions, and social practices are bound in mutually sustaining relations. The objective relations that structure particular fields are embedded within the habitus and (re)produced and sometimes changed through human activities.

While habitus provides a “feel for the game” (Bourdieu 1988: 782) or a sense of what seems called for in a given situation, it does not preclude the possibility of social agents acting differently or of contradictions arising in one's sense of what is appropriate. That is, it is not meant to be conceptualized in a deterministic manner. As Bourdieu (1977: 73) states, we should “abandon all theories which explicitly or implicitly treat practice as a mechanical reaction, directly determined by the antecedent conditions”. Instead, habitus should be understood as having an “infinite yet strictly limited generative capacity” (Bourdieu 1990: 55; see also Adkins 2004: 5; Lawler 2004: 112). Although Bourdieu is primarily concerned with how social practices and habitus contribute to the social reproduction of domination and inequality, which often leads him to focus on alignments between habitus and field, this fit is not inevitable or inherently stable (Adkins 2003: 26-7; Bourdieu & Wacquant 1992: 73, 130; McCall 1992: 850). In particular, Bourdieu expressly argues that it is possible for “cases of discrepancy between habitus and field” (Bourdieu & Wacquant 1992: 130), such as when an agent's experiences in a certain field accumulate to produce a habitus that then renders strange the rules and relations within a different field. Several feminists mobilizing Bourdieu's work have emphasized the messiness or possibility of *misalignment* between one's habitus and one's objective conditions, which can (but does not always) lead agents to problematize previously taken-for-granted values, practices, and expectations within a field (e.g. Fowler 2003: 485; Hughes & Blaxter 2007: 110; Lawler 2004: 112; Lovell 2000: 33-4; Skeggs 2004b: 27, 29; Thorpe 2010: 195-202). Pointing out that gender

socialization is never “perfect”, Lovell (2000: 33) argues that “posit[ing] a glovelike ‘fit’ between *habitus* and social position [risks] [...] binding subjectivity too tightly to the social conditions in which it is forged”. As Lawler (2004: 112) contends, *habitus* never perfectly reproduces objective relations and similarities in *habitus* can still result in different practices and outcomes. That said, misalignment between *habitus* and field can also contribute to certain agents’ disqualification and marginalization; as I demonstrate in my examination of the *Ghomeshi* trial, disjuncture between the *habitus* of legal witnesses and the standards of the juridical field can mean that they have little to no legal capital, severely limiting their ability to legitimately participate in the legal game.

Since societies contain many fields (e.g. the education field, juridical field, political field, etc.) that may privilege different forms of capital, rely on harmonious or conflicting gaming rules, and intersect or conflict in varying ways, it is possible for social agents to internalize “a wide range of different and even incompatible schemas and have access to heterogeneous arrays of resources” (Sewell 1992: 17). Since structuring conditions can be contradictory, *habitus* can also contain tensions and contradictions (Ahearn 2001: 120), which suggests that social agents must sometimes choose between or somehow reconcile competing senses of how they should act. Although the notion of *habitus* has been criticized as all-encompassing and thus deterministic (Jarvinen 1999: 16; Mottier 2002: 354; Sewell 1992: 15), Bourdieu’s conceptualizations of *habitus* and social practice crucially leave space for irregularities, transposition, and *improvisation* (Bourdieu 1990: 57; Hoy 2004: 106). In particular, the schemes of thought and practical sense of *habitus* must be transposed and put into practice to fit the requirements of a specific situation, meaning that social agents endlessly engage in “regulated improvisations” (Bourdieu 1977: 78) and processes of invention limited by the *habitus* (95).

Bourdieu emphasizes that habitus is *generative* in the sense that it is “an *open system of dispositions*” (Bourdieu and Wacquant 1992: 133; see also Moi 1991: 1022) that are actively applied to and constantly impacted by various experiences. The cognitive structures and “transposable dispositions” (Bourdieu 1977: 72) of habitus do not mechanically determine social practice, but are transposed to produce “infinitely diversified tasks” (Bourdieu 1977: 83) and “regulated transformations” (Bourdieu 1990: 54) as agents engage with one another and struggle for capital within various fields (Sewell 1992: 18).

For Bourdieu (1977: 9; 1990: 55), social practices are structurally conditioned, yet always contain a degree of uncertainty until they are completed. Through the notions of *habitus* and *field*, Bourdieu accounts for the practical knowledge, experiences, and practices of social agents, as well as how these both (re)produce and are conditioned by objective relations and distributions of capital. In this sense, he focuses on structuring conditions without eschewing the lived experiences and practices of agents or treating them as the pre-determined outcome of external social mechanisms. As is likely evident by now, this has important implications for how he understands the reproduction of relations of domination.

2. The Ongoing Reproduction of Social Domination

Relations of domination between positions do not exist independent of social practices; they are expressed and reproduced *only through* situated social practices. Recognizing that social domination is reproduced through ongoing social practices does not mean that it is somehow produced freely by social agents; as aforementioned, the practices and dispositions of agents are pervasively *conditioned* by social divisions, relations of domination, and unequally distributed resources (Bourdieu 1989: 18; Brubaker 1985: 761-2). In this sense, social practices and the relations of domination that they (re)produce are mutually dependent and influential.

I begin this section by discussing how the different positions in a social field are organized in accordance with the unequal distribution of various forms of capital, which is itself struggled over as agents compete with one another and participate in that field. Next, I explain how misrecognition and the realm of the taken-for-granted (i.e. doxa) contribute to the reproduction of relations of domination. Several feminist scholars have found the concepts of capital and doxa, as well as Bourdieu's focus on the *practical* reproduction of domination to be useful in theorizing gendered power relations. I end this section with a discussion of how language and narrative practices are bound up in relations of and struggles over *symbolic power*.

2.1. Social Domination and Distributions of Capital

The unequal distribution of various forms of capital shapes the distances and relations between different positions in a social field (Bittle & Frauley 2018: 619; Bourdieu 1984/2010: 108-109; 1987a: 4; 1989: 17; Madsen 2006: 27). In addition to economic capital, Bourdieu (1984/2010: 5; 1986: 48-51; 1991: 55-62; 1994: 8-9) introduces the notions of social capital (the resources linked to one's network and group memberships), cultural capital (various types of socially recognized competence often guaranteed by the state, as with university degrees), symbolic capital (socially recognized distinctions and authority), and linguistic capital (competence in the dominant language). According to Bourdieu (1987a: 4), the capital that agents have at their disposal functions as "properties capable of conferring strength, power and consequently profit on their holder". Importantly, capital exists as such only within fields that bestow on it particular value and meaning (Bourdieu & Wacquant 1992: 98, 101). Certain resources and competencies may therefore have varying degrees of value attributed to them within different fields. As they struggle to maintain or improve their position in a specific field, social agents mobilize the various forms of capital that they have accrued. Moreover, they may

work to transform one type of capital into another, though this can require a great deal of time and effort, such as when an agent transforms economic capital into cultural capital by paying university tuition and attaining a degree (Bourdieu 1986: 53-4).

In order to serve as the basis for authority and distinction within a certain field, an agent's capital must function as *symbolic capital* (Bourdieu 1994: 8; Bourdieu & Wacquant 1992: 119). Symbolic capital is produced when differences in capital (e.g. economic, social, and cultural) and the distances between objective positions are misrecognized²² as indicators of a person's natural legitimacy, authority, or distinction (Bourdieu 1990: 118; 1994: 8-9; 2013: 297; Brubaker 1985: 756; Skeggs 2004b: 23). In other words, symbolic capital refers to the "profit of distinction" (Bourdieu 2013: 297) gained when a type of capital is recognized as valuable and legitimately possessed (see also Miller 2014: 464). Forms of capital do not always function as symbolic capital within a given field; for instance, the cultural capital of a humanities-based university degree does not bestow its holder with symbolic capital in the medical field. Though the transformation of capital into recognized symbolic capital is field-specific and never fully guaranteed, cultural capital is officialised when it is granted by a socially recognized institution (Bourdieu 1989: 21). For example, degrees provided by qualified academic institutions bestow on their holders an officially recognized distinction, though the symbolic capital of this distinction will vary. What is key to symbolic capital is that it is *misrecognized*; it is produced when a particular kind of capital (e.g. economic, social, and cultural) is not recognized as unequally distributed capital, but rather as an inherently legitimate basis for authority.

²² Misrecognition is discussed further in the next section.

Instead of viewing the concept of capital through notions of economic rationality, Hughes and Blaxter (2007: 117-8) argue that Bourdieu's understanding of capital operates as a means of keeping questions of inequality at the forefront of analysis. As Lawler (2004: 110) points out, Bourdieu's work allows us to theorize class divisions and inequalities that "are not named as such". In order to function as sources of power, a field's valuations and unequal distributions of capital must be recognized as legitimate on a continual basis by agents in that field (Brubaker 1985: 755-56). As aforementioned, habitus provides agents with a practical sense or set of dispositions that have been inculcated over time and conditioned by their position(s) in social fields. Through habitus, the value of certain capital, its distribution in a social field, and the social distances between objective positions "are inscribed in the body", providing agents with a "sense of one's place" (Bourdieu 1987a: 5; see also Atkinson 2007: 544-45) and facilitating the reproduction of domination. In other words, a field's relations of domination tend to be reproduced in social practices because its stakes, tacit rules, values, and unequal positions are embedded in the dispositions of habitus as agents operate and struggle within it.

In his book *Masculine Domination*, Bourdieu (2001) argues that socially constructed sexual divisions and their associated relations of domination and subordination are embedded in the dispositions of habitus and thus experienced as natural. For several feminist scholars (e.g. Järvinen 1999: 15-17; McCall 1992: 851; Mottier 2002: 353-4), Bourdieu's conceptualization of masculine domination problematically reduces gendered order to a relation in which femininity is permanently subordinated to masculinity. Feminists have critiqued Bourdieu for over-emphasizing the reproduction and universality of masculine domination without carefully examining variations and ambiguity in gender norms or the ways in which gender relations have changed over time (Hadas 2016: 234; Mottier 2002: 353-4; Skeggs 2004b: 27-9). Bourdieu's

analyses of gendered power relations are primarily based on Virginia Woolf's 1927 novel *To the Lighthouse* and his own fieldwork in Kabylie, a region in northern Algeria, during the 1950s and 1960s. Several feminists have argued that this empirical focus weakened Bourdieu's attempts to make more generalized statements about masculine domination (Hadas 2016: 219; Moi 1991: 1033; Mottier 2002: 351).

Some of the same feminist scholars who have critiqued Bourdieu's work on gender relations have also argued that his theoretical insights and concepts remain useful for feminist analyses (e.g. Järvinen 1999: 7; McCall 1992: 837; Moi 1991: 1019; Mottier 2002: 350, 356; Skeggs 2004b: 20). For instance, Lovell (2000: 37) problematizes Bourdieu's characterization of women as "capital-bearing *objects*", rather than "capital-accumulating *subjects*". That said, she argues that Bourdieu's work on capital can nonetheless help us to theorize femininity and the various ways that women engage in strategies of capital accumulation and/or function as "repositories of capital for someone else" (Lovell 2000: 38). As aforementioned, Bourdieu argues that theoretical concepts and empirical analysis must always work together; this means that ideas developed to speak of a particular field must be transposed, used flexibly, and mobilized in the context of empirically-grounded analysis (Bourdieu & Wacquant 1992: 75; Skeggs 2004b: 20). While the empirical focus of Bourdieu's (2001) analysis of masculine domination produces a picture of domination that may be very different from, for example, gendered relations in Canada in 2019, his concepts nonetheless prove useful when "*put to work*", rather than applied in a straight-forward manner. This is demonstrated by the extensive number of feminists who have fruitfully mobilized and expanded Bourdieu's work to examine gendered power relations even as they critique aspects of his specific empirical analyses (e.g. Andrew 2015; Fowler 2003; Francis 2015; Huppatz 2009; Kay 2008; Lawler 1999; 2004; McCall 1992;

McRobbie 2004; Menéndez-Menéndez 2014; Miller 2014; Moi 1991; Reay 1997; 2004; Thorpe 2010).

Moreover, Bourdieu's emphasis on the ongoing reproduction of domination does not necessarily need to be seen as a weakness in his work. While he does recognize the indeterminacy of social practices and the ever-present possibility of social change (Bittle & Frauley 2018: 627; Bourdieu 1977: 15-16; 1996: 272; Fowler 2003: 485), Bourdieu makes it clear throughout his oeuvre that he is primarily concerned with the ways that hierarchical relations and social orders are *reproduced*. According to Lovell, this emphasis provides a crucial counterbalance to discussions that may underestimate the barriers to social change and resistance:

In the face of a contemporary political and theoretical emphasis on an easy plasticity and change, I think Bourdieu's work is important in reminding us that pessimism is not the same as determinism; that resistance takes many forms; and that, in any case, for many groups of people, change is very difficult to effect, no matter how much they resist. This is what it means to be dominated (2004: 124-5).

Similarly, Moi (1991: 1032) argues that Bourdieu's work helps us recognize how, despite changes in social conditions, gendered relations of domination are not easily overturned or escaped. An emphasis on the reproduction of domination may be particularly pertinent when discussing the relations of the juridical field, where the very standards of law's legitimacy contribute to unequal distributions of legal capital (see Chapter Four). Without being deterministic, Bourdieu's work directs us to consider the many obstacles to resistance and to avoid underestimating the naturalized practices through which social order is reproduced. For Bourdieu, identifying domination and its processes of reproduction is one of the most important things that sociological critique can offer (Bourdieu & Wacquant 1992: 198).

Bourdieu's notion of capital and his emphasis on domination as *relational* have been used by feminists to consider the shifting and multiple factors that contribute to unequal power relations, as well as the ways that power is linked to even the mundane aspects of daily life, such as one's tastes, manners of speaking, and dispositions (Moi 1991: 1020, 1038; Skeggs 2004b: 20; Thorpe 2010: 181-2). Extending Bourdieu's work, several feminist scholars have theorized gender and gendered dispositions as constituting a type of cultural capital (e.g. Huppatz 2009: 49; Lovell 2000: 40; Skeggs 2004b: 24). If we understand adherence to gendered categories of femininity and masculinity as capable of operating as a kind of embodied cultural capital that bestows varying degrees of distinction upon agents, then this allows us to consider how valuations of various femininities and masculinities fluctuate in different fields and operate in relation to other forms of capital (Huppatz 2009: 49, 52-53; Lovell 2004: 47; Miller 2014: 463-6; Moi 1991: 1038; Skeggs 2004b: 20-24; Thorpe 2010: 181-2). For Bourdieu (1996: 264), the valuation of particular properties and dispositions as capital is shaped by how they are positioned in a specific field in relation other properties. Thus, being socially recognized as feminine cannot be treated as a uniform source of disadvantage, but must be examined empirically; within some fields, femininity may not be as devalued in relation to masculinity and in some contexts it may even function as an advantage (Huppatz 2009: 49, 52-3; Lovell 2000: 40-42; Miller 2014: 463; Moi 1991: 1038). For instance, adherence to tropes of feminine passivity and compliance may function as a precarious and limited form of capital for sexual assault victims by increasing the credibility and plausibility attributed to their account, as I examine in Chapter Five. Bourdieu's emphasis on field-specific relations of domination also helps to explain why changes in gendered domination may occur in some fields and not others (Huppatz 2009: 60; Moi 1991: 1033-4). Furthermore, thinking in terms of capital allows us to consider how women may be denied some

of the cultural capital bestowed on men, but nonetheless accumulate a great deal of other forms of capital (e.g. economic, linguistic, educational, and so on) (Moi 1991: 1038-1040). In other words, Bourdieu's discussion of capital helps us theorize the power relations and unequal distributions of capital *between* women (see e.g. Fowler 2003: 481-5; Reay 2004: 65; Skeggs 2004b: 20).

By thinking of social agents as “bearers of capital”, rather than “*particles*” that are mechanically pushed and pulled about by external forces” (Bourdieu & Wacquant 1992: 108), we can examine relations of domination without eschewing either the force of structuring conditions (e.g. unequal distributions of capital) or the practices of agents as they mobilize, maintain, struggle over, and transform capital. Bourdieu's notion of capital allows us to conceptualize domination and inequality in a way that accounts not only for ongoing struggle, but also for how relations of domination can shift as agents enter fields that value forms of capital differently and how agents may simultaneously have large amounts of certain forms of capital and small amounts of other forms of capital. Thinking in terms of capital encourages us to consider both how fields organize distributions of capital in ways that bestow certain agents with more power than others and how agents struggle to accrue more capital and to increase the value of the capital that they already have.

Connected to his ever-present attentiveness to struggle, Bourdieu argues that the dominated are never fully powerless; in particular, he argues that “[*t*]he dominated, in any social universe, can always exert a certain force, inasmuch as belonging to a field means by definition that one is capable of producing effects in it” (Bourdieu & Wacquant 1992: 80, original emphasis). Furthermore, in his discussion of the principles of division underpinning masculine domination, Bourdieu states that:

There is always room for *cognitive struggle* over the meaning of the things of the world and in particular of sexual realities. The partial indeterminacy of certain objects authorizes antagonistic interpretations, offering the dominated a possibility of resistance to the effect of symbolic imposition. (2001: 13-14, original emphasis)

Although Bourdieu suggests that resistance against domination is always possible and that there is always a degree of indeterminacy, he also points out that escaping from a position of domination can be very difficult because agents are often faced with the option of either playing by the rules of the game or rejecting the rules in a way that tends to decrease their capital in that field (Bourdieu & Wacquant 1992: 82; Lawler 2004: 124-5). For example, complainants in a sexual assault trial may resist the question-and-answer format of examination and its constraints on their speech, but doing so may decrease their credibility in the eyes of legal professionals who have internalized the rules of the legal game. That said, fields and their accompanying distributions of capital and relations of domination are never fixed or predetermined, but are constantly open to change and transformation because it is only through ongoing social practices and struggles that they exist and are (re)produced (Bittle & Frauley 2018: 620; Bourdieu 1996: 264-5; Bourdieu & Wacquant 1992: 199; Brubaker 1985: 758). As I discuss in the next section, the misrecognition of relations of domination contributes significantly to their reproduction.

2.2. Misrecognition, Doxa, and Symbolic Violence

According to Bourdieu (1990: 68, 135; 1996: 265; 2013: 297-98), social domination and the reproduction of existing power relations depend on *misrecognition*, that is, “the naturalization of [an established order’s] own arbitrariness” (1977: 164). The authority and distinction attributed to certain forms of capital and positions in a social field are *not* pre-given or inherent to the nature of the object, but rather built up and reinforced through countless social acts (Bourdieu 1994: 4; 2013: 300). Any organization of objective relations has its own history of

emergence based on historical struggles for power and depends on social practices for its ongoing reproduction. Misrecognition occurs when social agents perceive and treat these relations as *natural* and therefore inherently legitimate (Bourdieu 1990: 140-1; 1994: 4; 1996: 265; 2013: 298, 300; Brubaker 1985: 755-56; Skeggs 2004b: 23). Furthermore, social agents may misrecognize the ways that their practices reproduce a field's tacit rules, distributions of capital, and objective relations (Bourdieu 1990: 68). For instance, when a lawyer represents a client in court, she may intend to both achieve her client's desired outcome and present herself as competent and professional to her colleagues, while simultaneously misrecognizing how her practices of speaking, deferring, and so on reproduce the organization of power relations in the courtroom. It cannot be said that her intentions are false, incorrect, or insignificant, but rather that they *misrecognize* a whole set of implications and deeper meanings.

Symbolic violence refers to relations and practices of domination that are misrecognized as legitimate and natural (Bourdieu 1977: 191-2; 1991: 51, 153; 1994: 4; Bourdieu & Wacquant 1992: 168; Moi 1991: 1023; Menéndez-Menéndez 2014: 65-6). In particular, Bourdieu (1977: 192) describes symbolic violence as “the gentle, invisible form of violence, which is never recognized as such, and is not so much undergone as chosen, [such as] the violence of credit, confidence, obligation, personal loyalty, hospitality, gratitude, piety”. In other words, symbolic violence involves the euphemization of relations of domination, making them more palatable (Bourdieu 1977: 191; Hunt 1993: 331-2). Symbolic and misrecognized forms of domination are inscribed in one's habitus as embodied dispositions such that complicity to them *feels natural* (Bourdieu 1990: 129-130; 1991: 51). Symbolic domination therefore involves a “form of complicity which is neither passive submission to external constraint nor a free adherence to values” (Bourdieu 1991: 51), but rather inscribed in agents' practical sense of how the world

works and how they should act (Fowler 2003: 472). In this sense, symbolic violence only functions as such when agents' dispositions incline them to experience it as legitimate and nonviolent.

Bourdieu (2001: 2) argues that structures of gender domination constitute “the paradigmatic form of symbolic violence” (Bourdieu & Wacquant 1992: 170). Gender norms and gendered relations of domination are deeply embedded in agents' practical sense and bodily dispositions (Bourdieu 2001: 39; Menéndez-Menéndez 2014: 66; Thorpe 2010: 194). For example, when I experience anxiety that my contribution to an intellectual discussion might be annoying (and preface my idea with some variation of “Sorry, I just...”), gendered dispositions about it being inappropriate to speak out of turn or speak too much play a role along with the other dispositions of my habitus²³. To provide another example, McRobbie (2004: 101) examines the symbolic violence of how make-over television shows denigrate women who are cast as “shabby failure[s]” that must be transformed into “well-groomed success[es]” through complicity to expert advice. Combining feminist analyses with Bourdieusian theory, Thapar-Björkert et al. (2016: 158) argue that everyday practices of symbolic violence, such as degrading comments, gift-giving, and condescension, contribute to the women's experiences of subordination in abusive relationships and constitute the “conditions of possibility” for forms of physical violence. Providing a way to think about domination that rejects the dichotomy between consent and coercion (Bourdieu & Wacquant 1992: 172; Menéndez-Menéndez 2014: 65), Bourdieu's notion of symbolic violence captures how powerful relations of domination and

²³ Other inculcated dispositions might also function for me as forms of capital in this situation, such as the linguistic and cultural capital built up throughout my years sitting in university classrooms.

patriarchal structures function precisely by being misrecognized as, for example, individualized experiences of nervousness, advice on self-betterment, or normal heterosexual relations.

Bourdieu (1977: 164; 1991: 132; 2013: 298; Bourdieu & Wacquant 1992: 73) uses the term *doxa* to refer to the aspects of the social world that are taken-for-granted and misrecognized. When the objective relations, capital and positions of a field are experienced as doxic, the fact that it is only “one possible order among others” is misrecognized and it is instead perceived as “a self-evident and natural order which goes without saying and therefore goes unquestioned” (Bourdieu 1977: 166). The legitimacy of a doxic order is so naturalized within our habitus that the question of whether this particular way of ordering relations is legitimate is rarely considered (Bittle & Frauley 2018: 620; Bourdieu 1977: 168; 2001: 9). When something is experienced as doxic, it is “unimaginable” that there are possible alternatives (Ortner 2001: 271).

Bourdieu (1977: 168-170) distinguishes the realm of doxa from the “universe of argument” or “field of opinion”, which is composed of both heterodoxy, which opens up a range of alternatives to the established order, and orthodoxy, which attempts but never fully succeeds to restore previously doxic assumptions to their original doxic state. Doxa is defined in relation to the universe of competing discourses in which an official opinion (i.e. orthodoxy) and a controversial or unconventional opinion (i.e. heterodoxy) constitute the limits of debate and the range of conflicting opinions. This opposition between orthodoxy and heterodoxy “demarcate[s] the field of legitimate argument, excluding as absurd, eclectic, or simply unthinkable any attempt to take up an unforeseen position” (Bourdieu 1999: 45; see also Bourdieu 1991: 132; Susen 2013: 208). In this sense, the debate between orthodoxy and heterodoxy (re)produces what can be said and consequently what *cannot* be said or, more precisely, that which *goes without saying* – the doxic realm of the taken for granted. For example, I may consciously critique the way that

marketing employs gendered scripts to define what it is to ‘be a woman’ (i.e. a heterodox critique of orthodoxy), but nonetheless continue to *experience* certain practices (e.g. wearing make-up, removing leg hair, etc.) as a normal part of day-to-day life, that is, to experience them as natural. As I explore in Chapter Four, even as courtroom agents struggle over what is admissible, what questions can be asked, how events should be represented, and so on, the relations, positions, and organization of struggle in the courtroom, that is, the game itself, exists without scrutiny.

Throughout his work, Bourdieu tends to use the terms *doxa* and *symbolic violence* rather than *ideology* (Bittle & Frauley 2018: 620; Bourdieu 1994: 14; Bourdieu & Eagleton 1992: 111). Although there are many scholars who provide nuanced conceptualizations of ideology and consider the importance of struggle, contradiction and multiplicity (e.g. Eagleton 1991; Fairclough 1989; Hall 1985; Hunt 1993; Jameson 2008; Purvis & Hunt 1993), the term ideology still tends to “convey a sort of discredit” (Bourdieu & Eagleton 1992: 111) and can lead researchers to discount agents’ representations (Bourdieu 1992: 250). For Bourdieu, doxa is not constructed by a ruling or dominant class in order to influence how agents think about the social world, but rather it is the result of historical struggles over how the social world should be ordered (Bourdieu 1994: 15) and is constituted when the conditions structuring struggles over domination are treated as self-evident (Bourdieu 2001: 9; Bourdieu & Wacquant 1992: 168n.123). Bourdieu (1994: 14; Bourdieu & Eagleton 1992: 113) argues that many theories of ideology²⁴ overlook the fact that submission to a dominant social order involves cognitive

²⁴ There are, of course, many theorists who emphasize that ideology is not just about the way agents’ *think*, but is intricately connected to how they *experience*, *interpret*, and *live* within the social world (e.g. Ewick & Silbey 1998: 226; Purvis & Hunt 1993: 479; Susen 2014: 91; 2016: 213). For instance, Althusser (1971: 171-173; see also Bittle & Frauley 2018: 617) argues that ideology operates through a process of interpellation in which institutions hail individuals as particular kinds of ideological subjects and individuals respond by recognizing themselves as and *acting* in accordance with these subjectivities; in other words, ideologies inform agents’ consciousness and daily practices. That said, the notion of ideology is often associated with a focus on dominant schemes of thought and frameworks of representation embedded in agents’ consciousness that then shape how they act and explain, rather

structures that are embedded within our *bodily* dispositions and practices, rather than just our consciousness. For Bourdieu, submission to a dominant social order cannot be explained only through reference to ideas, values, representations, and meanings, but rather submission involves a social order becoming embodied and taken-for-granted within the *practical sense* of one's habitus (Bourdieu 1990: 68-9; 1994: 14; 2001: 13; Bourdieu & Wacquant 1992: 171-2). That is, "doxic submission" (Bourdieu 1994: 14) occurs when the organization of the social world and our place within it is *unthought* and thus experienced as legitimate. In this way, doxa refers to the universalization of dominant frameworks of meaning and visions of the social world (Bourdieu 1994: 15), as well as the embodied experience of certain power relations as natural (2001: 9).

According to Moi (1991: 1034), one of the strengths of Bourdieu's work for feminism is that his analysis of domination "eschew[s] the traditional essentialist/antiessentialist divide". Anti-essentialist critiques argue that gendered categories (e.g. "womanhood") are not inherent, essential, or natural, but rather that they are socially constructed (Ehrlich 2001: 6; Munro 2007: 35-6; Smart 1995: 10). For scholars such as Smart (1995: 50), the goal is thus to understand and deconstruct the "belief in essential difference" between masculinity and femininity. Bourdieu very clearly rejects essentialism (2001: viii; 83; Lovell 2000: 30; Moi 1991: 1034). In fact, he argues that it is necessary to analyze the historically-specific mechanisms and practices that allow structures of sexual division to function *as though* they were natural and eternal (Bourdieu 2001: viii; 83-88). However, he also argues that schemes of categorization and difference are embedded in the practical sense and embodied dispositions of habitus, which are not just thought or believed, but *practiced* (Bourdieu 2001: 93-5). According to Moi (1991: 1034), this allows

than on that which is practiced "*outside* the channels of consciousness and calculation" (Bourdieu 1994: 14). The term doxa facilitates consideration of taken-for-granted meanings, values, and frameworks of explanation (what is often discussed as ideology) while simultaneously serving as a continual reminder to consider the structural conditions that *go without saying* in field-specific social practices.

Bourdieu to avoid thinking of sexual difference as either essential *or* a matter of representation. While sexual differences and masculine domination are the outcome of social practices, rather than essential characteristics, they produce real differences in habitus as agents internalize socially constructed categories and objective relations (Bourdieu 2001: 83, 93-95; Moi 1991: 1034). Since they are embedded in practices and dispositions that are experienced as natural, sexual differences and gendered relations of domination “cannot be simply deconstructed away” (Moi 1991: 1034). In this way, Bourdieu’s understanding of domination and doxic submission allows us to consider how the socially produced category of womanhood is not just a scheme of perception or belief, but an unthought and taken-for-granted sense of how to act.

This way of thinking can also contribute specifically to socio-legal feminist scholarship. Within this literature, scholars examine legal constructions of womanhood and gendered binaries (e.g. Bonnycastle 2000: 73; Munro 2007: 12; Park 2017: 273-4; Smart 1995: 49). At the same time, feminist socio-legal scholars also argue for grounding demands for legal change in women’s material reality and lived experiences (e.g. Comack & Peter 2005: 307; Larcombe 2011: 34; Smart 1989: 159). What a Bourdieusian approach offers is a way to think about gendered divisions and relations of power as socially constructed, while simultaneously recognizing how they are embedded in the practical sense of habitus in a way that causes them to be experienced and enacted as real in practice. In other words, it allows us to deconstruct gendered binaries while also taking women’s lived experiences of gendered practices seriously. For Bourdieu, sociological analysis that deconstructs relations of domination and distributions of capital is valuable because it offers us “a small chance of knowing what game we play” (Bourdieu & Wacquant 1992: 198). The symbolic meaning attributed to these relations, however,

cannot be changed at the level of consciousness, but only through struggles at the level of *practice* and shifts in how daily life is *experienced*.

As Smart (1995: 106) argues, the notion of doxa is useful because “it presumes that we take for granted many things because social life would be virtually impossible if we questioned everything all the time”. By thinking in terms of doxa, we avoid treating agents as “overdetermined cultural dupes” (Smart 1995: 106) and focus on what agents must experience as natural in order for their social practices to function as legitimate in a particular social space. Throughout this dissertation, I follow Bourdieu in using the notions doxa, misrecognition, and symbolic violence. Doing so helps me attend to what is taken-for-granted and *goes without saying* in agents’ practices and struggles over meaning, that is, the doxic conditions and relations of domination that underpin courtroom narrative practices. Bourdieu’s understanding of language and symbolic power, which is discussed in the next section, also informs my examination of courtroom narrative practices.

2.3. Language, Narrative, and Symbolic Power

For Bourdieu, language must be understood and studied as a practice conditioned by objective relations of power²⁵ (Bourdieu 1991: 37-8; Bourdieu & Wacquant 1992: 142-48; Susen 2013: 200). Positioning himself against linguistic approaches that view language “as an object of contemplation rather than as an instrument of action and power”, Bourdieu (1991: 37) argues that linguistic exchanges are “relations of symbolic power in which the power relations between speakers or their respective groups are actualized”. In other words, we cannot understand language or linguistic interactions without thinking about power relations or looking at the social

²⁵ Scholars such as Fairclough (1989: 2), Matoesian (1993: 1-4), and Conley and O’Barr (2005: 18) similarly argue that power relations and language are intricately connected.

conditions that shape who can speak, in what manner, at what time, and with what degree of authority. That is, we have to examine the rules, positions, capital, and relations of the linguistic game and how these have been internalized within agents' habitus and reproduced through their practices. For Bourdieu (1991: 107), words and linguistic practices do not have an inherent power or authority, but rather their power derives from the speaker's capital and relative positioning with a particular field. When analyzing linguistic practices and the force of a particular discourse, it is thus necessary to consider the unequal organization of relations through which they were produced and interpreted – a network of unequal relations that is often experienced as natural and legitimate.

Like other social practices, linguistic (and narrative) practices are conditioned by agents' habitus and the structures of a given field (Bourdieu 1991: 37; Bourdieu & Wacquant 1992: 145). According to Bourdieu (1991: 55; see also Susen 2013: 215), competence in the dominant or normalized language of a field operates as a form of linguistic capital embedded in the dispositions of habitus that allows certain agents to speak more authoritatively than others. In order to provide agents with a "profit of distinction" (Bourdieu 1991: 56), however, access to the dominant language must be unequally distributed. This can occur, for example, when the ability to legitimately speak the dominant language is officialised through educational qualifications that are only attainable for some social agents. In this way, the distribution of linguistic capital is intricately connected to other forms of capital, such as the economic capital that facilitates accumulation of educational cultural capital and the exposure to legitimate language provided by access to certain social networks (i.e. social capital) (Bourdieu 1991: 61). Within a field, the distribution of linguistic capital and the organization of speaking positions (re)produce relations of domination by defining what is required for legitimate speech (e.g. credentials, competence in

legalese, official titles) and thus who may access it. As agents participate in a field, their linguistic practices and legitimacy as speakers are structured by the tacit rules, unequal capital, and positions of the particular linguistic game.

Relations of linguistic domination depend for their reproduction on being embedded in agents' habitus and thus experienced as natural and legitimate. That is, language and the organization of linguistic communication in a field often functions as doxic (Susen 2013: 204-5). Although the ability to competently *speak* in a field's dominant language is unequally distributed, the majority of agents can *recognize* the dominant language (Bourdieu 1991: 62). In other words, linguistic domination requires those who cannot speak the dominant language to nonetheless recognize when others are doing so and (mis)recognize it as an innate skill and thus as a legitimate marker of distinction. Struggles over the linguistic capital to be attained by competence in the dominant language are thus structured by a "disparity between knowledge and recognition, between aspirations and the means of satisfying them" (Bourdieu 1991: 62). According to Bourdieu (1991: 62), the tension caused by this disparity can produce changes in the linguistic field as agents struggle to appropriate existing linguistic markers of distinctions and develop new forms of speech capable of bestowing distinction. Within a linguistic field, the practical sense of habitus functions as the mechanism through which agents both accrue *and* recognize linguistic capital (Bourdieu 1991: 55-6).

Ultimately, struggles over legitimate speech are instances of struggle over *symbolic power*, which Bourdieu (1991: 106) defines as "the socially recognized power to impose a certain vision of the social world". What Bourdieu (1989: 21) refers to as symbolic struggles are essentially struggles "for the monopoly over legitimate naming", that is, for symbolic power. According to Goodman (1978: 7-17), processes of dividing, combining, naming,

(de)emphasizing, ordering, filling in, and overlooking events, entities, and groups constitute ways of making and remaking different kinds of worlds. That is, these processes help to create different “frames of reference” or “systems of description” (Goodman 1978: 2) through which we describe and speak of the world. Drawing on Goodman’s work, Bourdieu (1987a: 13) speaks of symbolic power as “worldmaking power”, namely, the ability to impose, preserve or transform a vision of the world in a way that is perceived and experienced as legitimate. As agents struggle over social boundaries, divisions, meanings, definitions, and principles, they are ultimately struggling over symbolic power (Berard 2005: 206; Bourdieu 1987a: 13; 1989: 22; Dezalay & Madsen 2012: 443). The ability to authoritatively engage in linguistic practices, such as legitimately interrupting, asking questions, defining the parameters of a discussion, speaking without interruption, or dismissing comments, can be understood as exercises of symbolic power (Bourdieu 1992: 258).

Symbolic power depends on *misrecognition* in that it can only operate when it is recognized as natural and legitimate, rather than arbitrary (Bourdieu 1991: 163-4, 170; Susen 2013: 217-8). Indeed, Bourdieu argues that symbolic power operates “where [power] is least visible, where it is most completely misrecognized – and thus, in fact, recognized” (1991: 163-4). It thus requires the complicity of those who recognize particular worldmaking efforts as legitimate (Susen 2013: 217). In this sense, symbolic power is exercised *in relation* to those who recognize it (Bourdieu & Wacquant 1992: 148). The ability to exercise symbolic or worldmaking power depends on the distribution of symbolic capital (Bourdieu 1987a: 15; 1989: 21) and the objective relations between positions in a given social field (Bourdieu 1992: 258), which have been embodied within the dispositions of habitus. Symbolic capital, which is produced when unequal distributions of valued forms of capital are misrecognized as markers of innate merit and

distinction, enables certain agents to speak authoritatively and contributes to the legitimacy of their vision of the social world (Bourdieu 1991: 111). In other words, an agent's symbolic power is "in proportion to their symbolic capital, i.e. in proportion to the recognition they receive from a group" (Bourdieu 1991: 106). As agents' struggle over symbolic power, they mobilize symbolic capital, or the recognized distinctions, authority, and valued competencies that they have accumulated and which may be officially sanctioned (Bourdieu 1987a: 15; 1989: 21; 2013: 297). The ways that capital is unequally distributed within a field therefore shapes relations of symbolic power and authoritative speaking positions.

According to Järvinen (1999: 12-13), men are often misrecognized as naturally more suited to public forms of speaking than women and thus as more authorized to speak. This gendered form of domination functions when "women do not have the same self-evident, embodied right to express themselves in public as do men in equivalent socio-economic positions" (Järvinen 1999: 12-13). That is, across various fields women may have less symbolic power in relation to men. Of course, this is not always the case and women's accumulation of other forms of field-specific capital can provide them with symbolic power. For instance, female lawyers are trained in the language and standards of law, which function as forms of linguistic and cultural capital that bestow them with symbolic power when they speak in their official capacity. That said, dominant legal language and practice have tended to be perceived as naturally more masculine (Bogoch 1999: 332), making it easier for male lawyers to translate their linguistic and cultural capital into recognized symbolic power. As Kay (2008: 204-206) found in her Bourdieusian analysis of Québec's civil law system, male lawyers had more opportunities to translate their cultural and social capital into career advantages than female

lawyers. In this sense, translations of cultural, linguistic, and social capital into recognized symbolic capital and symbolic power are bound up in gendered forms of domination.

Following Bourdieu's understanding of language, I approach narrative practices as socially conditioned practices that are bound up in the reproduction of unequal relations of symbolic power. In particular, I consider the organization of speaking positions and the unequal distributions of capital that structure the symbolic power afforded by agents' positions as they engage in narrative practices. According to Herrnstein Smith (1980: 232), we can define narrative "most minimally and most generally as [...] consisting of *someone telling someone else that something happened*" (original emphasis). Importantly, I move beyond consideration of narrative as a *text* or "object for contemplation" (Bourdieu 1991: 37) and focus on narrative *practices*, that is, *social practices* that are both structurally conditioned and generative. Several scholars argue that narratives are co-produced and negotiated through social interactions between tellers and audiences (e.g. Frank 2011: 33; Salmon & Riessman 2013: 199; Schinkel 2014: 152-3), that social and institutional contexts shape narration and interpretation practices (e.g. Andersen 2015: 669-670; Bano & Pierce 2013: 231; Shuman 2011: 143-5), and that unequal power relations influence how and to what degree social agents can legitimately narrate (e.g. Polletta et al. 2011: 118; Watkins 2013: 71).

Advancing what she terms "narrative criminology", Presser (2009: 178, 189-190; see also Presser & Sandberg 2015: 1, 13-14) suggests that narrative practices can motivate, justify, curb, and shape harmful action. Ricoeur, whose work I turn to in a later section on configurational power, also points to narrative practices by speaking of "the act of emplotment" (1984: 66) and emphasizing that the meaning of both historical and fictional narratives depends on the act of reception (1988: 180). In much of the narrative criminological and narratology literature,

however, the emphasis tends to be on how agents construct narratives and what narratives do. Using a Bourdieusian approach to examine narrative practices, I attend to the relations of domination between speaking positions, unequal distributions of capital, and field-specific rules that structure the ways that agents “tell someone else that something happened” and whether they are perceived as legitimate by other agents. Narrative practices are also conditioned by the embodied dispositions of habitus that provide agents with a sense of what events mean and how they should be narrated in a particular social space.

As social and discursive practices, narrative practices contribute to the (re)production of social relations; that is, they are constitutive of social space, rather than merely passive outputs determined by social conditions. As Ewick and Silbey (1995: 211) argue, narratives “are not just stories told *within* social contexts”, nor do they merely reflect dominant ideas or relations; rather they are “part of the constitution of their own context [...] implicated in the very *production* of those meanings and power relations” (original emphasis). Narrative practices can affirm or even produce dominant cultural assumptions (Bano & Pierce 2013: 230; Yovel 2004: 133-136), communicate organizations’ normative expectations (Polletta et al. 2011: 115), disrupt the seeming self-evidence of dominant ideologies (Smith 2010: 41), or introduce “alternative possibilities for future action” (Higgins & Brush 2006: 719), and thus help to shape, constitute, and (re)produce the social space in which they are embedded. In this sense, the ability to legitimately engage in narrative practices (e.g. causally ordering events or determining the significance of someone else’s account) is an instance of symbolic power and struggles over how events should be narrated are struggles over symbolic power. It is thus important to consider the objective relations, doxic premises, and unequal distributions of various forms of capital permeating a particular social space that shape the narrative practices that exist as legitimate.

Throughout this dissertation, I am less concerned with the structure or grammar of narratives than with the *practices* of narrative production and the unequal relations of symbolic power through which they are structured and which they (re)produce. As Bourdieu (1991: 58) argues, agents reproduce the linguistic field as they struggle for dominance within it. In looking at the narrative practices of the courtroom, I consider how agents' struggles over the narration of events misrecognize and thus reproduce the rules, principles, assumptions, and relations of domination that condition these narrative struggles. In the later sections on narrative capital and configurational power, I expand on the relation between narrative and symbolic power. First, however, I provide a discussion of symbolic power in the juridical field, the doxic underpinnings of law's legitimacy, and the role of narrative practices in law.

3. Relations of Symbolic Power and Doxic Underpinnings in the Juridical Field

According to Bourdieu (1987b: 814-6), we must avoid thinking of law as either an autonomous system (i.e. the formalist point of view) or a mirror image of dominant power relations (i.e. the instrumentalist view). Instead, we should consider the social practices and organizations of relations composing what Bourdieu (1987b: 816) refers to as the "juridical field". In keeping with his understanding of fields as sites of structured struggle, he argues that the logic of the juridical field is the result of both "the specific power relations which give it its structure and which order the competitive struggles [...] that occur within it; and [...] the internal logic of juridical functioning which constantly constrains the range of possible actions" (Bourdieu 1987b: 816). To understand legal practices, it is necessary to consider the rules, stakes, and organization of the legal game, which are often taken for granted as agents struggle for particular outcomes. As aforementioned, consideration of the legal game as it pertains to narrative practices is the focus of this dissertation.

In this section, I discuss how the juridical field operates as a site of struggle over symbolic power that is conditioned by unequal relations of capital and doxic principles. I begin by discussing the symbolic power that is at stake in legal struggles and how unequal distributions of various forms of capital shape who may authoritatively speak, in what manner, and with what impact. Next, I mobilize legal scholarship to argue that the legitimacy attributed to legal processes and relations of power depends on their misrecognition as positivist, impartial, and autonomous. Finally, I consider the role of narrative practices in the juridical field. In particular, I argue that while certain narrative practices are necessary to legal processes and contribute to the legitimacy of legal outcomes, narratives are highly regulated in the juridical field because they pose a potential threat to law's image of objectivity.

3.1. Symbolic Power and the Law

According to Bourdieu (1994: 8), the state fundamentally depends on “the concentration of a symbolic capital of recognized authority” that enables it to exercise a great deal of symbolic power. In fact, Bourdieu (1994: 1) argues that “one of the major powers of the state is to produce and impose [...] categories of thought that we spontaneously apply to all things of the social world—including the state itself”. For instance, juridical capital, a particular kind of sanctioned and bureaucratised symbolic capital, provides certain agents with the power to perform legitimate acts of nomination, that is, to impose an authorized and officially recognized definition of a person, action, or thing (Bourdieu 1987b: 838-39; 1994: 10-12). Agents operating in official roles sanctioned and assigned by the state mobilize the symbolic capital attributed to their *position* (e.g. judge), which has been accumulated through the taken-for-granted organization of relations composing the “bureaucratic universe” (Bourdieu 1994: 12).

Although the bureaucratic universe of the state provides particular legal positions and thus legal agents with symbolic capital (Bourdieu 1994: 12), we must avoid thinking of law merely as an instrument of state power (Bourdieu 1987b: 842; Dezalay & Madsen 2012: 436; Hunt 1993: 90, 128; Smart 1995: 141-5; van Krieken 2007: 578). According to Bourdieu (1987b: 842), there exists a “parallelism of habitus” between legal practitioners and those who hold other kinds of power, including political and economic. In particular, there tend to be similarities in their backgrounds, training, and interests, which can produce a shared practical sense of what should be done. By imposing definitions, interpretations, categories, and judgements that exert symbolic power, law naturalizes, legitimizes, and universalizes particular social ordering and relations (Bourdieu 1987b: 844-48; Lenoir 2006: 14). It is due to similarities in habitus, rather than to any conspiratorial use of law as a direct instrument of ruling classes, that the juridical field tends to help naturalize and universalize dominant world-views (Bourdieu 1987b: 842, 845). That said, naturalizing the dominant social order may at times require acting *against* the interests of specific dominant groups or individuals, as the reproduction of hegemonic rule²⁶ relies upon a degree of compromise (Hunt 1993: 229-230; Pearce & Tombs 1998: 42-3). For instance, Bittle and Frauley (2018: 622-3) argue that legal disciplinary responses to corporate killing reproduce the doxic status of law’s divisions, practices, and symbolic power, as well as the principles and relations of capitalism solidified through legal practices. Furthermore, we should not think of law, or legal habitus, as internally consistent, homogenous, or uniform; instead, law is characterized by contradiction, discord and struggle (Cotterrell 1992: 113; Hunt 1993: 32, 132-3; Naffine 1990: 13, 41, 101-2; Smart 1995: 144-5; Unger 2015: 30, 48). In their

²⁶ Hegemonic rule occurs when the interests, worldview, and paradigms underpinning certain relations of domination are accepted as universal and consequently given popular support even by those groups that are in positions of subordination (Eagleton 1991: 112, 115-6; Gramsci 1957: 170; Hunt 1993: 232; Pearce & Tombs 1998: 36).

examination of the International Criminal Tribunal for the Former Yugoslavia, Hagan and Levi (2005: 1525-7) demonstrate how the organization and force of this international juridical field was established through a mixture of competition and cooperation as agents enacted dispositions inculcated in different national and legal contexts.

Eschewing notions of law as an instrument of the ruling class, Hunt (1993: 9, 183, 224) posits a “relational theory of law” that emphasizes the interconnections between legal and other social relations. In particular, Hunt (1993: 8, 182-3) argues that law is neither autonomous from nor determined by the rest of society, but instead that legal relations are a specific condensation or institutionalization of social relations. Legal definitions, practices, and relations are thus shaped by the “socially constructed meanings, values, and norms” (Hunt 1993: 183) that constitute wider social relations. At the same time, law penetrates and helps to constitute social relations, such that we can think of legal relations and wider social relations as mutually constitutive and influential (Hunt 1993: 225). As aforementioned, Bourdieu (1987a: 3) similarly advocates a relational approach; in fact, his use of the term *field* is meant to direct analytic attention towards the network of relations between positions, rather than individuals or substantive groups (Bourdieu & Wacquant 1992: 228). Ongoing processes of categorization, structured competition, and systematisation institute the relations between positions in the juridical field (Bourdieu 1987b: 822; Lenoir 2006: 12). Following both Bourdieu and Hunt, we can thus think of the juridical field²⁷ as a network of social relations that “are condensed into the purposefully organized features that characterize [legal] institutions” (Hunt 1993: 8). Like in other fields, the social relations that make up the juridical field are hierarchically structured by

²⁷ The juridical field is much more than just the courtroom or juridical spaces; as Dezalay and Madsen (2012: 441) contend, “there are no fixed boundaries of fields”.

unequal distributions of capital and by the tacit rules of the legal game that condition how agents may legitimately struggle to increase their capital.

Even as it is constituted by wider social relations, law plays an important worldmaking or constitutive role in the social world. Not only does law help to define what should be regulated and how (Hunt 1993: 318-20), but its concepts and ideas penetrate “social relations that appear to be free of law” (225). For example, legal notions of private property may shape how neighbours informally negotiate parking spaces on the street (Ewick & Silbey 1998: 21). According to Hunt (1993: 26; see also Cotterrell 1992: 113-4), law does not *create* dominant social relations, but “by stating them as principles and by enforcing them the law operates not only to reinforce these relations but also to legitimize them in their existing form”. Drawing on Foucault’s (1977b: 194; 1980: 119, 131) view of power as productive, Smart (1995: 72-75) argues that law’s power lies in its ability to make truth claims while disqualifying other knowledges. By asserting the neutrality of its methods and the rationality of its texts, law functions as a powerful discourse that can make legitimate claims about nearly every area of social life (Smart 1989: 13; 1995: 74). As J.B. White (1985: 34-5, 205) points out, legal rhetoric is *constitutive* of society in that it can declare significance, define social roles and speaking positions, justify (in)actions, and reproduce cultural meanings.

In this sense, the juridical field is characterized by a concentration of *symbolic power* (Bourdieu 1987b: 838). As Bourdieu argues, legal practices of identification, naming, and classification confer “the maximum permanence that any social entity has the power to confer upon another” (1987b: 838). Legislation and legal proclamations have the ability to officialise, legitimate, and institute particular meanings in a way that materially impacts the social world by, for example, maintaining, validating, or reorganising particular distributions or valuations of

capital. Since symbolic power always depends on misrecognition, law's ability to authoritatively name and classify requires legal rules, order, and processes to be recognized as natural and legitimate (Lenoir 2006: 10). Recalling Bourdieu's explanation of habitus (1977: 72; 1987a: 5-6; 1989: 18-9), we can understand the misrecognition underlying law's symbolic power as facilitated by a practical sense or set of embodied dispositions, built up through countless practices, that enables social agents to experience law as a legitimate authority. Legal principles of vision and division are internalized in our embodied dispositions such that legal rules and methods are misrecognized as self-evidently legitimate and the penetration of law into our everyday lives is regularly experienced as appropriate (Cotterrell 1992: 145). Law's ability to make authoritative claims that help to constitute the social world, namely its symbolic power, is enabled by ongoing processes of misrecognition based on embodied dispositions.

Struggles within the juridical field are not simply struggles for particular legal outcomes, but struggles to universalize and officialise particular meanings and visions of the social world. In other words, the juridical field is characterized by struggles over *symbolic power* in which agents mobilize the unequal amounts of capital available to them. In these struggles over symbolic power, legal agents also struggle over the mechanisms and logic that should organize legal processes themselves (Dezalay & Madsen 2012: 441). Importantly, legitimate participation in legal struggles requires adherence to doxic legal methods and language (Chartrand 2014: 23) and is thus primarily achieved by legal professionals, who possess a "monopoly of the tools necessary for legal construction" (Bourdieu 1987b: 835). According to Madsen and Dezalay (2002: 198), as lawyers and jurists struggle to accrue, maintain, and justify their symbolic capital, they "are compelled to believe in, and defend, the symbols of law in their day-to-day experience". In fact, Bourdieu (1987b: 820) argues that the standards, conceptions, rhetoric, and

processes of law are internalized within a juridical or legal habitus that functions as a prerequisite for participation as a legal professional in the juridical field.

The legal habitus and the symbolic, cultural, and legal capital attained through processes of professionalization are not equally attainable for those who graduate law school. In her Bourdieusian analysis of legal education, Jewel (2008: 1174, 1187-8, 1197-8) demonstrates how unequal distributions of economic, social, and cultural capital shape the law school that students can attend, the social and financial supports they have during school, and their ability to emulate the manners, lifestyle, and dispositions that function as doxic markers of legal professionalism. In this sense, legal education is a process of translating various forms of capital into legal capital, which ultimately (re)produces unequal distributions of capital among law school graduates. Moreover, notions of merit may contribute to the misrecognition of how hierarchical social relations are reproduced through legal education (Jewel 2008: 1175).

In legal processes, conflicts and events are translated into abstract categories, legal language, and “rule-bound exchanges of rational arguments” (Bourdieu 1987b: 830), often rendering legal accounts of events unfamiliar to those who experienced them (Cammiss 2006: 74-5; Delgado 1996: 81; Smart 1995: 74; Watkins 2013: 68). For instance, social agents are transformed into legally relevant constructs (e.g. victims, defendants) that constrain their identity and role before the law (Cammiss 2006: 75, 84; Goodrich 1987: 167) and their experiences are conceptualized through binary logic (e.g. guilt/innocence, consent/non-consent) that may disregard or minimize complexity (Cohen 1988: 257; Smart 1989: 33). By translating conflicts and problems into the dominant language of the juridical field, legal professionals not only protect their linguistic capital and exert “*mastery of the situation*” (Bourdieu 1987b: 834), but may also contribute to the production of symbolic violence through which relations of power and

conflict are misrecognized as non-violent and even legitimate (Lenoir 2006: 11-12). That is, experiences of direct conflict are translated into abstracted and regulated legal debate over specific legal outcomes that may frame power relations in universalizing and legitimating legal terms.

The juridical field is structured through unequal distributions of symbolic capital that differently enable legal agents to legitimately participate in legal struggles (Bourdieu 1987b: 827-29). Although the ambiguity and polysemy of legal meanings leaves substantial room for legal interpretation and thus for ongoing struggles over meaning (Bourdieu 1987b: 827; Goodrich 1987: 179), the unequal organization of symbolic capital (i.e. prestige and legitimacy) and its accompanying relations of symbolic power often exist without scrutiny. That is, as agents struggle for recognition and particular legal outcomes, they misrecognize as inherently legitimate the conditions of the legal game that provide only certain agents with the symbolic power to authoritatively define, categorize, and name. For example, during witness testimony, it is often taken-for-granted that lawyers and judges exercise monopoly over questioning, which enables them to direct the topic of discussion and thereby define what is and is not legally relevant (Ehrlich 2012: 396; Matoesian 1993: 151). Furthermore, unequally distributed competencies in the language of law (i.e. linguistic capital), formal procedures, and official methods of legal reasoning (i.e. cultural capital) maintain relations of domination between legal professionals and non-professionals. For instance, legal language uses ordinary words in specialized and unfamiliar ways, causing confusion for laypersons who are not trained in “the invisible expectations governing the way the words are to be used” (White 1985: 72; see also Bourdieu 1987b: 829; 1991: 142-5). As aforementioned, linguistic competence only produces linguistic capital and an

accompanying “*profit of distinction*” (Bourdieu 1991: 55) when its means of production (e.g. a legal education) is unequally accessible (56).

In the juridical field, symbolic power and the required dispositions of legal habitus tend to be concentrated among those who possess various forms of valued capital, such as economic capital, cultural capital (e.g. educational attainment), embodied capital (e.g. a valued set of dispositions or instincts), social capital (e.g. relationships with other privileged professionals), and linguistic capital (e.g. competence in legalese) (Bourdieu 1987b: 828-9; Dezalay & Garth 2011: 49, 54-58; Kay 2008: 189-191). In this way, the boundaries between those who can speak authoritatively in the juridical field and those who cannot tend to intersect with other social divisions based on unequally distributed capital, perpetuating and extending social domination. As feminists and critical race scholars have repeatedly pointed out, Western law is founded upon and tends to reproduce, though never in a uniform fashion, androcentric, colonial, racialized, and capitalist visions of the world and procedures that advantage those who are male, white, educated, and moneyed (Comack 2014: 13-14; Delgado 2014: 92-3, 97; Naffine 1990: xii, 52, 100-101; 2005: 5; Razack 2000: 129; 2002: 3-4; Scheppele 1989: 2084; Smart 1995: 43, 52). Through unequal distributions of capital (e.g. economic, social, cultural, and linguistic) that are misrecognized as markers of distinction and legitimacy, the juridical field conditions who can legitimately speak, in what manner, and with what degree of authority.

Despite the unequal power relations that structure legal struggles over symbolic power, law perpetually presents itself as a neutral arbiter that operates separate from and above political struggles and objectively and equally applies a universal set of rules (Bourdieu 1987b: 830; Comack 2014: 13; Dezalay & Madsen 2012: 443; Hunt 1993: 27-30; Naffine 1990: 24-5). As I discuss further in the next section, law’s symbolic power depends on its ongoing misrecognition

as legitimate, which in turn depends on its perceived impartiality. This misrecognition is aided by, among other things, references to sets of formal rules that appear independent of the situation, neutralizing language (i.e. passive and impersonal), reliance on precedents (i.e. treating like cases alike), legal methods that emphasize facts and straight-forward application of rules, and the translation of experiences into *legal* problems and terminology (Bourdieu 1987b: 830, 834; Comack 2014: 13-14; Dezalay & Madsen 2012: 438; Goodrich 1987: 167, 181; Hunt 1993: 29-30; Lenoir 2006: 12; Smart 1995: 74). By introducing a “neutralizing distance” (Bourdieu 1987b: 830) between the legal process and the conflicts that law claims to resolve, these practices contribute to the appearance of legal procedures and outcomes as impartial. Law’s “power to define and disqualify” (Smart 1989: 164) is not automatically established or accepted, but rather depends on “the relative weight granted to the ‘rule of law’” (Bourdieu 1987b: 823) and the ongoing reproduction of its perceived legitimacy and impartiality. As Conley and O’Barr (2005: 14) argue, legal power both produces and is produced by “countless linguistic interactions taking place every day at every level of the legal system”. In the next section, I explore how the tenets of legal positivism and liberal legalism function as doxic gaming principles within the juridical field and contribute to the reproduction of law’s symbolic power.

3.2. Law’s Symbolic Effectiveness: Positivism, Impartiality, and Autonomy

The authority of legal claims and judgements, that is, law’s symbolic power, depends on legal processes and relations of power being tacitly perceived and recognized as legitimate rather than arbitrary. According to Bourdieu (1987b: 830, 840, 845), juridical processes imbue claims with the appearance of neutrality, universality, and rationality, contributing to their “symbolic effectiveness” (828) or legitimacy. Underpinning the symbolic effectiveness of law and its

methods are the tenets of liberal legalism²⁸, which envision law as an autonomous, “neutral space” (Bourdieu 1987b: 830) in which legal methods and rules are impartially applied to individuals who are treated the same regardless of social, political, or economic context (Comack & Balfour 2004: 22-23; Davies 2007: 151; Gotell 2002: 258-259; Hunt 1993: 141-142, 304-5; Munro 2007: 42-49). According to Naffine (1990: 26), liberalism divides the world into dichotomies that purport to separate rationality from irrationality, thought from feeling, objectivity from subjectivity, and abstract thinking from context. She argues that “it is from the dichotomous view of the world advanced by liberal philosophy [...] that law derives much of its sense of its own certainty” (Naffine 1990: 26).

Liberal legalism is based on an individualist view of agents as free, rational, interchangeable, and abstracted from their social contexts (Comack 2014: 14; Cotterrell 1992: 119; Ehrlich 2001: 92; Munro 2007: 47; Naffine 1990: 22, 51-53; Norrie 2014: 20; Weait 2007: 23). The universal legal subject is a construct that functions as “the basic conceptual unit of legal analysis” (Naffine 2009: 1) and refers to the idea of a rational person who bears legal rights and duties and competes freely within the marketplace (Comack 2014: 13; Comack & Balfour 2004: 23; Hunt 1993: 120-1). Through the construct of the universal subject, agents are “treated as identical in legal status” (Cotterrell 1992: 109) and practices of abstraction and decontextualization are seen as essential to fairness and equality (Chunn & Lacombe 2000: 3-4;

²⁸ It should be noted that the discussion of liberal legalism provided here is rather simplified, focusing on its key tenets and inevitably overlooking nuances and debates within liberal legal scholarship. My intention, however, is not to outline a strawman of liberal legalism, setting up a diminished representation of its claims solely for the purpose of knocking it down, as some feminist and critical legal studies scholars have been accused of doing (Dworkin 1986: 274-5; Munro 2007: 52). Instead, I focus on these tenets and how they have been critiqued because they are most relevant to law’s *symbolic effectiveness* and are expressly and implicitly enacted in the courtroom rhetoric analysed in later chapters. Furthermore, I do not attempt to launch a philosophical critique of liberal legal thought writ large, but rather to examine how some of its claims were used during the *Ghomeshi* trial to sustain particular relations of domination within the courtroom.

Norrie 2014: 29; Weait 2007: 29-30, 42). In this sense, abstracted individualism helps provide law with the “seal of universality” that Bourdieu refers to as “the quintessential carrier of symbolic effectiveness” (1987b: 845). According to Naffine (1990: 52-3, 78), however, the notion of legal impartiality is fundamentally unfair because of its reliance on this abstracted view of individuals as interchangeable. By assuming that treating people *the same* (formal equality) equates to treating them *equally*, legal methods fail to consider differences in power and advantage (substantive equality), holding everyone who comes before the law against a privileged standard (e.g. the rational, moneyed, free and self-interested white, male actor who competes within the market) and further disadvantaging and excluding those who do not fit within these parameters (Comack 2014: 13-14; Davies 2007: 153; Fudge & Cossman 2002: 32-34; Naffine 1990: 78-81; 2005: 5-6; 2009: 7; Norrie 2014: 29-36; Walklate 2008: 49, 51). In this way, the abstracted individualism that functions as “the linchpin of law’s guiding precept of, and claim to, impartiality” (Naffine 1990: 53) paradoxically contributes to the advantages enjoyed by privileged social groups. Law’s individualism obscures wider social conditions while simultaneously masking this “one-sidedness” (Norrie 2014: 29) through the appearance of universality achieved by its abstracted treatment of everyone as the same regardless of context.

Legal positivism is central to law’s symbolic effectiveness. Within legal positivism, law is understood as comprised of rules and principles that can be empirically and objectively identified and applied through the use of particular legal tests (Dworkin 1986: 40; Gotell 2002: 258; Hunt 1993: 142; Naffine 1990: 35-36). Obscuring the interpretive processes at the heart of legal practice, legal positivism suggests that questions of what the law *objectively is* can be separated from questions of value, morality, or political context (Cotterrell 1992: 10; Dworkin 1986: 112; Hunt 1986: 10-11). Furthermore, legal positivism distinguishes between fact and

value, implying that knowledge should be based on that which is directly observable (Comack 2014: 12; Cotterrell 1992: 9). Law's purported emphasis on the objective facts assumes that facts may speak for themselves, disregarding the cultural assumptions and interpretations embedded in any statement of fact. Within legal positivism, juridical decision-making is treated as a technical matter of applying relevant law to the facts at hand in an impartial manner (Gotell 2002: 258; Jackson 1988: 143; Naffine 1990: 36, 44).

Positivism underpins the notion of the “rule of law”, which asserts that everyone is equally subject to a set of identifiable, objective, and predictable rules (Chartrand 2014: 22; Comack & Balfour 2004: 22-3; Cotterrell 1992: 158; Norrie 2014: 10-11). Pointing to the ambivalence in how rules are applied²⁹ and the ways that advantaged groups have greater access to legal standards, Cotterrell (1992: 160) suggests that the rule of law may be “more important as a legitimating ideology than as a practice of equality before the law”. According to Cotterrell (1992: 9), most legal practitioners work from a positivist outlook though, as Dworkin (1986: 10) points out, they may formally endorse this outlook while espousing different views in less formal settings. In other words, they may critique aspects of legal positivism and the rule of law even as they accept these premises *in practice* as a doxic logic informing their practical sense of how to legitimately participate in the legal game.

Presenting law as “a distinct realm of knowledge and practice, ‘purified’ [...] of ethical, political, social scientific or historical considerations” (Cotterrell 1992: 26), legal positivism intertwines with notions of legal autonomy (Davies 2007: 158; Jackson 1988: 147). As aforementioned, law is not an independent or autonomous institution that acts upon society, but

²⁹ See chapter three of Altman's (1990) *Critical Legal Studies: A Liberal Critique* for a defence of liberal notions of the rule of law and a discussion of how legal structure and secondary rules for interpretation help guard against indeterminacy and ambivalence.

is rather a specific concentration of social relations shaped by wider social meanings and values (Hunt 1993: 182-3, 224-6; see also Cotterrell 1992: 145-6; Ewick & Silbey 1998:17, 35). By asserting the autonomy of legal reasoning through practices such as referencing formal rules and precedents, legal professionals contribute to the legitimacy of legal decisions, legal processes, and the claim that they possess specialized knowledge and expertise (Bourdieu 1987b: 817, 820, 832, 834, 844; Cotterrell 1992: 195-6, 204; Fudge & Cossman 2002: 30). Liberal legalism and legal positivism rely on the doctrine of the separation of powers, which asserts that there is a distinction between the administration of law and the political processes involved in making laws (Altman 1990: 27, 50-1, 100; Comack & Balfour 2004: 28; Hunt 1993: 304-5). Legal positivism views processes of legal reasoning as “operat[ing] at a respectful distance from the individuals to whom justice is dispensed” (Naffine 1990: 25; see also Cotterrell 1992: 44-5). Through rules of evidence, rational forms of argumentation, technical language, and an emphasis on objective facts and equal application of rules, legal processes appear to operate at a distance from the prejudices, politics, and passions of extra-legal realms (Bourdieu 1987b: 830; Fudge & Cossman 2002: 31; Matoesian 1995: 693; Naffine 2009: 2; Valverde 2006: 9-10).

In discussing legal autonomy, impartiality, positivism and individualism, I do not mean to suggest that all legal processes operate to these ends or to imply that legal professionals always view law in this manner. On the contrary, Valverde (2003) shows us that legal institutions often operate with an express recognition of the limited nature of the available knowledge (4) and there may be a great deal of “epistemological creativity and hybridity” (26) in which legal agents mobilize complex combinations of scientific, experiential, administrative, and cultural forms of knowledge (22). To add to this, legal institutions and processes also rely upon narrative forms of knowing, as discussed in the next section. Furthermore, while notions of

impartiality, autonomy, and objectivity may contribute to law's symbolic effectiveness, this does not mean that specific legal proceedings, outcomes, or actions are always seen as just; in fact, a key point of contention in public and media discussions surrounding the *Ghomeshi* case was whether the legal process treats sexual assault complainants unfairly. Outlining how the rule of law is conceptualized in liberal thought, Altman (1990: 27) points out that even amongst liberal scholars who assert the importance of a separation between law and politics there is a recognition³⁰ that "in practice it is impossible to insulate the legal process completely from [...] the political arena".

Instead of suggesting that law *is* autonomous, positivist, individualist or impartial or that it is always thought of in this way, I am concerned with how these understandings of law may operate in the courtroom as doxic elements embedded in the practices of legal agents that contribute to the misrecognition of structures of domination. For example, as agents adhere with the question-and-answer format of witness examination and defer to judgments about what can or cannot be said, they take for-granted the division between legal process and the prejudices of extra-legal realms, as well as the authority of legal professionals to define the boundaries of legal relevance as they apply to the case at hand. Similarly, the use of previously recorded statements to discredit a complainant's courtroom testimony rests upon the objectivist notion that facts can speak for themselves. In Chapter Four, I provide detailed examination of how notions of legal impartiality, relevance, and objectivity functioned as doxic elements during the *Ghomeshi* trial

³⁰ That said, he argues that within the generic liberal model "the infiltration of such political and moral judgments into the legal process" is seen as regrettable and able to be "kept to a minimum, reduced to a merely marginal phenomenon in a process that, for the most part, operates (or can operate) uninfluenced by such judgments" (Altman 1990: 27). I would suggest that it is this more generic liberal model that underpins the narrative practices in the courtroom and the reproduction of law's symbolic power. Furthermore, Altman (1990: 77) contends that "in all legal models, legal reasoning should proceed, for the most part, without reliance on political judgments about the views that compete in the legislative arena".

and the ways that they contributed to the symbolic violence of the courtroom narrative practices. In the next section, I consider how these liberal and positivist understandings of law are bound up with the regulation of narrative practices in the courtroom.

3.3. Symbolic Power and the Legal Regulation of Narrative

As many law and narrative scholars argue (e.g. Berger 2011: 281-3; Brooks 2002: 2; Cammiss 2006: 77; Chestek 2012: 102; Rideout 2008: 53; 2013: 71), law fundamentally depends on narrative and storytelling practices. Not only do legal processes require that people recount their experiences before legal professionals who then transform and reconstruct the narratives in accordance with legal frameworks, but the legitimacy and symbolic power of law also relies on narrative practices. While Bourdieu argues that practices of rationalization, universalization, and neutralization are the basis of law's symbolic effectiveness, narratives may also be crucial to the legitimacy attributed to legal pronouncements. Narratives provide the case-specific content (i.e. the facts) to which legal processes of rationalization can then be applied. According to Amsterdam and Bruner (2002: 141; see also Jackson 1988: 101), narratives make it "possible to relate the Grand and Timeless Principles of a corpus juris to the current particularities of the cases". By providing particular order and meaning to the events before the court, narrative practices may contribute to the "impression of logical necessity" (Bourdieu 1987b: 828) that characterizes symbolically effective legal decisions, helping to obscure "the polysemy or the ambiguity of legal formulas" (827). Through practices of reframing, interpreting and constructing narratives and overarching stories, legal agents make certain legal principles and decisions appear logically applicable and thus inherently legitimate.

Furthermore, narrative practices may also enable legal argumentation and judgements to be recognizable to the community beyond the juridical field (Bruner 2002: 47-8; White 1985:

191). By configuring events in ways that adhere to legal principles *and* cultural archetypes (e.g. the stock story of the smitten, scorned, and manipulative woman), lawyers and judges make their claims defensible not only in legal terms, but also in terms of wider social values and expectations (Chestek 2012: 104; Robbins 2006: 768-771). As I discuss further in the next chapter, legal argumentation involves attempting to portray certain legal outcomes as capable of providing a sense of poetic justice (Chestek 2008: 161; Foley & Robbins 2001: 467; Kaiser 2010: 165-6). While narrative practices do not always successfully imbue particular legal outcomes or claims with legitimacy in the community outside the courtroom, they are vital to making the processes and arguments that occur in “the arcane realm of law” intelligible to non-legal agents and are thus congruous with a culture’s “common sense of justice” (Bruner 2002: 48). Although law’s legitimacy depends on its claim to exist within “its own universe of meaning” and operate in accordance with “its own guiding principles, precepts and purposes” (Naffine 2009: 2), its claims must also mobilize and resonate with cultural understandings of how people typically act and what their actions signify (Amsterdam & Bruner 2002: 7; Cotterrell 1992: 24; Yovel 2004: 131). As Ewick and Silbey (1998: 17) argue, law’s meaning and authority endure because “it relies upon and invokes commonplace schemas of everyday life”. Narratives thus provide a means for legal reasoning to be articulated within dominant cultural frameworks and stock stories.

As I explore in greater empirical detail in later chapters, particularly Chapter Four, the ways in which law regulates and deals with its narrative proclivities take for granted and reproduce notions of legal autonomy, impartiality, and objectivity. Within legal processes, the narratives of legal outsiders are fragmented, transformed, interrupted, and limited (Cammiss 2006: 71; Ewick & Silbey 1995: 217; Harris 2001: 60). According to Brooks (2006: 20), legal

processes “limit and formalize conditions of telling and listening” and subject the messiness of narrative construction “to formulae by which the law attempts to impose rule on story, to limit its free play and extent”. Instead of being told directly and without interruption, the narratives that people bring to law are “elicited piecemeal by attorneys’ intent to shape them to the rules of evidence and procedure” (Brooks 2006: 20; see also Harris 2001: 60, 71). Brooks (2006: 20) argues that law’s policing of narrative is part of its gate-keeping work, whereby the judicial is distinguished from the extra-judicial, and may also be based in a suspicion of narrative’s potential persuasiveness. Given their status as legal outsiders who do not have the juridical habitus that functions as embodied capital in the juridical field, witness narratives may be seen as a threat to legal neutrality and autonomy, that is, to law’s claim to distance itself from external influences through impartial procedures.

The narratives of complainants in sexual assault trials may be regarded as particularly threatening to legal notions of impartiality and therefore treated with even more distrust and suspicion than the testimonies of other witnesses. As discussed in Chapter One, many feminist scholars critique how legal rules and practices have for centuries been underlined by faulty assumptions that women frequently lie about having been sexually assaulted and that it is easy for women to allege sexual assault but very difficult for men to prove their innocence (see e.g. Backhouse 2012: 302-303; Busby 2014: 279; Duncanson & Henderson 2014: 156; Larcombe 2005: 103; Lees 1997: 63, 178; Randall 2010: 420; Tanovich 2012: 558-9). Furthermore, Larcombe (2005: 107) argues that there is an apprehension within law about sexual assault allegations having the potential to compromise the legal process by eliciting powerful emotions in listeners. She writes,

That a man might be convicted on the basis only of a moving story told by an affecting witness, *even if the story is true*, violates the law's image of itself as rational, prudent, acting (only) on the basis of facts and concrete, objective evidence (Larcombe 2005: 109, original emphasis).

Women's narratives of sexual assault are presumed to have an emotional affect and effect that could cause decision-makers to act or be perceived as acting out of compassion or indignation rather than detached consideration of concrete evidence. According to Larcombe (2005: 107), one of the reasons "a rape complainant is felt to warrant an unusual level of scrutiny and suspicion is because it is such an emotionally and morally charged allegation; it may inspire 'indignation' and 'moral repugnance'". In this way, concerns about deceptive women, the persuasiveness of narratives, and the emotional force of sexual assault allegations combine, rendering women's narratives of sexual assault especially threatening to legal notions of impartiality and objectivity. In fact, Larcombe (2005: 113) argues that finding sexual assault allegations to be *false* may contribute to law's image of objectivity by showing that even when faced with emotionally powerful allegations the law is able to set aside emotional appeals and prioritize the facts. In this context, regulations on who can narrate, what they may narrate, and in what manner can be understood as part of law's attempts to extract legally relevant facts while policing emotional narrative constructions and excluding the extra-judicial.

According to Scheppele (1989: 2079), it is the narrative practices of legal insiders that "are officially approved, accepted, [and] transformed into *fact*" (original emphasis). Similarly, Bruner (2002: 48) points out that lawyers and judges "work hard to make their law stories as unstorylike as possible, even *anti*-storylike: factual, logically self-evident, hostile to the fanciful, respectful to the ordinary, seemingly 'untailored'" (original emphasis). By contrast, the narrative practices of legal outsiders, particularly those whose accounts are presumed to provoke a

compromising emotional affect and effect, are treated with suspicion. Law's reliance on narrative practices combines with the underlying tenets of legal positivism and liberal legalism in ways that maintain a clear division between those who can and those who cannot legitimately order events into a meaningful legal narrative, what I refer to in the next section as configurational power.

4. Extending Bourdieu: Narrative Capital and Configurational Power

As I analysed the power dynamics and relations of domination bound up in the courtroom narrative practices of the *Ghomeshi* trial, I mobilized and developed the concepts of *narrative capital* and *configurational power*. These terms helped me theorize and empirically examine unequal relations of symbolic power in the courtroom and how they were reproduced through particular narrative practices. Although the meaning and significance of these concepts becomes more apparent as I “put them in motion and [...] make them *work*” (Bourdieu 1992: 228) in later chapters, here I provide an initial explanation of the terms and their connections to both symbolic power and other forms of capital.

4.1. Theorizing Narrative Capital

The concept *narrative capital* facilitates consideration of the inequalities and power relations that condition the interaction in which narrative telling takes place. By mobilizing and further theorizing this concept, I join those scholars who have found value in extending Bourdieu's understanding of capital to capture what is theoretically and empirically relevant in one's specific project (e.g. Huppertz 2009: 46; McCall 1992: 844; Reay 2004: 60; Valverde 1994: 215). Bourdieu argues that it is necessary to “acknowledg[e] that capital can take a variety of forms” (Bourdieu & Wacquant 1992: 119) and thus to empirically examine the specific forms

that capital takes in the context of a given field (108). Employing and expanding the concept of narrative capital aligns with Bourdieu's argument that theoretical tools must be worked out in reference to an empirical context, which in this research was that of a sexual assault trial.

In brief, I conceptualize narrative capital as the properties that are valued in a particular field so as to provide some agents with more symbolic power in their narrative practices than others. As aforementioned, forms of unequally distributed capital organize the relations within a particular field and operate as its "stakes and instruments of struggle" (Bourdieu 1996: 264). Drawing on Bourdieu's understanding of capital, we can thus think of narrative capital as both an *instrument* that is mobilized in struggles over symbolic power and a *stake* that is itself struggled over. As Labov (2013: 21) points out, narratives typically require more time within conversations than other kinds of speech (e.g. questions and comments) and a narrator might be interrupted in their attempt to occupy that larger conversational space or face "the crushing response, 'So what?'". In this context, narrative capital can be seen as contributing to a speaker's ability to occupy the conversational space required for a narrative to be perceived as legitimate and which minimizes the possibility of the "so what" response.

Within the relatively small amount of scholarship that discusses narrative capital³¹, the term is frequently used to speak of narrative *resources* – those skills, experiences, discourses, speaking positions, and cultural scripts that contribute to whether a narrative is heard and to its perceived value, plausibility, legitimacy, and ability to impact social meanings (Alonso-

³¹ Although several scholars reference Bourdieu in their discussion of narrative capital (e.g. Beneduce 2015: 554; Taysum 2016: 283; Watts 2008: 101), this scholarship does not tend to link the concept of narrative capital with Bourdieu's broader theorization of symbolic domination, social practice, and fields (for an important exception, see Alonso-Poblacion & Fidalgo-Castro 2014; Alonso-Poblacion, Fidalgo-Castro & Palazon-Monforte 2016). Moreover, some scholars share the term *capital* but do not discuss it in reference to Bourdieu's work (e.g. Baldwin 2009; 2013; Goodson 2013; 2017; Theidon 2007). As I problematize later in this section, much of the scholarship on narrative capital does not consider how it is constituted, distributed, struggled over, or valued within the doxic logic of a *specific field*.

Poblacion & Fidalgo-Castro 2014: 256-8; Beneduce 2015: 554, 558; Noy 2004a: 118-120; Watts 2008: 102-103). For example, Noy (2004a: 120) discusses how experiences of tourism provided young Israeli backpackers with “rich material for stories”, specifically stories of self-change, and Watts (2008: 103) notes how linguistic and rhetorical skills provided some of his interviewees with an increased ability to manipulate their narratives and present them as both enticing and believable. Examining the gendered narratives emerging during the Peruvian Truth and Reconciliation Commission, Theidon (2007: 462) explains how certain victim categories operated as narrative capital, providing men who were on the losing side of the war with recognized discursive resources for framing their accounts. In this sense, narrative capital refers to the vast array of discursive, experiential, and linguistic resources that contribute to someone’s ability to tell a narrative that is perceived as valuable³².

Through mobilizing narrative capital, agents can struggle to impose a version of events that may “raise their own or other’s profiles, or simply to discredit others’ positions” (Alonso-Poblacion & Fidalgo-Castro 2014: 257). In so doing, they enact the narrative dispositions of habitus, that is, their practical sense of what events matter, what they mean, and what should be recounted in a given social context. Drawing on Bourdieusian theory to analyse women’s accounts of their involvement in the international cocaine trade, Fleetwood (2014: 41-2, 61, 115-8, 162) argues that the women she spoke with creatively transposed cultural discourses about trafficking, crime, and gender in ways that were delimited by the dispositions of their habitus.

³² It is perhaps helpful here to clarify the distinction between the notion of narrative capital and the previous discussion of narrative practices. I suggest that these concepts point to two aspects of narrative that must be considered when examining how narrative is bound up in the reproduction of power relations. *Narrative practice* points to the socially-conditioned practices involved in narrating and interpreting accounts. *Narrative capital* refers to the resources, properties, and speaking positions valued in a given field that provide some agents with more power in their narrative practices than others. In this way, I do not suggest that narrative *is* narrative capital, but rather that narrative construction involves social practices in which narrative capital is both a resource and stake.

She also identifies how some women were advantaged in their narrative practices because their habitus aligned more easily with institutional discourses (Fleetwood 2014: 62). In this sense, she brings narrative criminology's emphasis on the constitutive nature of narrative practices (Presser 2009: 193; 2016: 139; Presser & Sandberg 2015: 6) into combination with a Bourdieusian awareness of the objective and embodied structures conditioning the ways we construct and interpret narratives. Within narrative criminology, and indeed much narrative scholarship in the social sciences, the agency involved in narrative construction is presented in opposition to the external constraints of social structures (Fleetwood 2016: 176-9). Using a Bourdieusian narrative approach, however, allows us to consider "how structure shapes narratives and human actions, *through* individuals' perceptions and representations of themselves and their world" (Fleetwood 2016: 174, emphasis added). In other words, Bourdieu's work and the concept of narrative capital help us to bring the subjective and objective dimensions of narrative construction together into the same analysis. When we examine an agent's practices, perceptions, and creativity, we must do so with an eye to the objective structures that they express.

Narrative practices help constitute the social world by making sense of events (Bruner 1991: 4), (re)producing "dominant meanings and power relations" (Ewick & Silbey 1995: 211), and generating, organizing, and representing social conflict and social order (Briggs 1996: 3, 13). This constitutive work, however, is always conditioned by the hierarchical relations structuring a given field and the ways that these have been internalized in the embodied schemes of habitus. Narrative capital, which helps agents to construct legitimate, recognized, and appealing accounts, is an important source of symbolic or worldmaking power that is unequally distributed and struggled over within fields. Struggles over who gets to tell a narrative, in what way, and with

what effect, as well as struggles over the resources that help facilitate legitimate narrativization, can therefore be understood as struggles over symbolic power.

Of course, narrative capital is connected to other forms of capital, especially cultural and symbolic. The notion of cultural capital broadly refers to competences, embodied dispositions, qualifications, and goods that provide agents with varying degrees of *distinction* (Bourdieu 1984/2010: 17; 1986: 48-51; Brubaker 1985: 757; Valverde 1994: 219). The accumulation of embodied forms of cultural capital (e.g. taste, skills, and knowledge) requires investments of time, effort, and often economic capital and is significantly impacted by one's family and conditions of initial socialization (Bourdieu 1986: 49; Reay 2004: 58-9). Cultural capital can contribute to narrative capital by, for example, providing narrators with experiences, lifestyle practices, skills, and knowledge that are culturally valued but not accessible to everyone, thus supplying resources for enticing storytelling (Noy 2004a: 134; Watts 2008: 103). Furthermore, occupying the position of an authorized narrator in particular social spaces (e.g. the courtroom) can require the possession of certain forms of cultural capital, such as educational qualifications.

That said, cultural capital does not always contribute to one's narrative capital. For example, Goodson (2013: 14-15; see also Taysum 2016: 283) argues that in some interviews former UK Prime Minister David Cameron appeared concerned that "his life experience of sustained, systemic privilege w[ould] interfere with the narrative he [wa]s trying to create for himself and his party, where there is a 'genuine care and compassion for those who fall behind'". According to Goodson (2013: 14-15; 2017: 14), David Cameron's attendance at elite schools and his distinctly upper-class upbringing may have provided him with cultural capital, but also made it challenging for him to construct a life narrative capable of resonating with those in less privileged situations. In other words, cultural capital does not always translate into narrative

capital; in some instances, it may actually be a hindrance to narrative capital, making it more difficult to construct relatable and appealing narratives. While cultural capital and linguistic capital (e.g. competence in the dominant language) do act as markers of prestige (Bourdieu 1986: 49; 1991: 55; Fairclough 1989: 58), it is also important to consider their limits and the complex ways that they may impact the accrual of other forms of capital. Moreover, Alonso-Poblacion and Fidalgo-Castro (2014: 258) point out that narrative capital, which can be accumulated through everyday experiences, tends to be more widely accessible than cultural capital, which typically requires investments of time and economic capital. This opens up the possibility for narrative capital to act as “a more accessible resource for social contestation and the questioning of orthodox modes of social differentiation” (Alonso-Poblacion and Fidalgo-Castro 2014: 258). Since everyday experiences can provide narrative capital, storytelling can perhaps operate as an effective and accessible mechanism for problematizing established power relations (Smith 2010: 40-41).

Narrative capital is also connected to symbolic capital, that is, to the distinction gained when one’s capital is misrecognized as valuable and legitimately possessed. On the one hand, symbolic capital can contribute to one’s ability to tell particular narratives in a way that is perceived as legitimate in a certain social space (Alonso-Poblacion & Fidalgo-Castro 2014: 257; Watts 2008: 104). For instance, a judge’s cultural capital (i.e. legal education and qualifications) and the embodied know-how of their juridical habitus operate in the courtroom as symbolic capital, justifying their position of distinction and imbuing their narratives with authority and legitimacy as the official version of legally-relevant events. The symbolic capital associated with being seen as a legitimate participant in a certain field can also increase one’s ability to tell narratives *about* that field. For example, Watts (2008: 104) found that those with more symbolic

and cultural capital in the education field exercised more narrative capital when invited to participate in research about higher education.

On the other hand, narrative capital can also contribute to translations of capital into symbolic capital, which is produced when markers of distinction (e.g. embodied cultural capital, academic qualifications) are *misrecognized* and thus “perceived as the innate attributes of a ‘natural distinction’” (Bourdieu 2013: 297), rather than as the outcomes of unequally distributed capital. Properties that provide recognition and authority depend for their value on their position in relation to other, less-valued properties; that is, distinction depends on relations of contradistinction (Bourdieu 2013: 300). When properties of privilege (e.g. legal training) function as symbolic capital, however, they “seem to have no foundation other than the natural dispositions of their bearers” and, consequently, “privilege contains its own justification” (Bourdieu 2013: 300). I would suggest that narrative capital can contribute to this naturalization of relations of privilege by enabling agents to construct life narratives that root the accrual of particular capital within notions of individualized achievement, obscuring the privilege and unequally distributed capital that enabled that achievement. Furthermore, alignment between the narrative dispositions of one’s habitus and the expectations of a particular field can increase one’s authority and legitimacy within that field. Narrative and symbolic capital can thus be mutually reinforcing and may contribute to each other’s accumulation.

Arguing that narratives play a crucial role in how we constitute and perform our identities and how we come to know and interpret the world around us, several scholars focus on how narrative capital increases our ability to create meaningful, reflective, and adaptable life stories (Baldwin 2009: 250; Goodson 2012: 7-8; Taysum 2016: 294-5). According to Goodson (2013: 63), narrative capital enables us to “flexibly respond to the transitions and critical events which

comprise our lives and equip[s] us to actively develop courses of action and learning strategies”. Narrative capital facilitates the ongoing process of connecting our activities and experiences through a meaningful narrative about the self (Baldwin 2009: 247-250; Goodson 2012: 7-8). This in turn can contribute to other forms of capital, such as political, economic, or symbolic capital. For example, former US President Barrack Obama has demonstrated an ongoing effort to present a personal life narrative that draws together his activities, experiences, and aspirations³³, providing him with “huge ‘narrative capital’ for the task of developing political narratives” (Goodson 2012: 7; see also Goodson 2013: 16-17). In this way, narrative capital can refer to the ability to represent oneself in a particular way by weaving together personal stories about one’s life and experiences. This ability is, of course, shaped by cultural and historical context, social position, and unequal relations of privilege (Goodson 2013: 25). As I discuss in Chapter Four, the narrative practices through which we attempt to represent ourselves are conditioned by habitus. In this sense, narrative practices do not freely constitute identity; instead, they involve enacting a practical sense of what one’s experiences and actions mean and how they might be interpreted in a given context.

Thus far, I have primarily discussed narrative capital as a *resource* that is unequally distributed amongst agents, but it is also important to recognize that narrative capital is valued and distributed within specific fields and is often struggled over as a *stake* within those fields. Much of the scholarship on narrative capital relies on one-on-one interviews (e.g. Goodson 2012; 2013; Noy 2004a; 2004b; Taysum 2016; Watts 2008), resulting in an emphasis on narrative capital as a resource that agents *possess* to varying degrees. This overlooks how properties

³³ See, for example, his two autobiographical books: *Dreams from my Father* (Obama 1995) and *The Audacity of Hope* (Obama 2006).

always operate as capital *within particular fields* and how capital is actively *struggled over*. As Alonso-Poblacion and Fidalgo-Castro (2014: 256) point out, the methodological reliance on interviews, “where the individuals build a self in front of the interviewer or researcher, ha[s] had a theoretical consequence: an excessive focus on the individual and the distortion of the social dimensions of the economies and politics of narrative”. Focusing on narrative capital as a resource that can be assessed through interviewing, many scholars treat narrative capital as an individualized capacity or skill (e.g. Baldwin 2009; Beneduce 2015: 558; Goodson 2013; Taysum 2016; Watts 2008), rather than as something that is struggled over and that shifts and changes as you enter various fields. Within the small body of literature on narrative capital, there is little consideration of how uneven distributions of narrative capital structure a particular field or how it constitutes a site of struggle over symbolic power.

Examining narrative capital within the specific social space of the courtroom, I view narrative capital not merely as a capability that agents possess, but rather as a field-specific resource that imbues certain narrative practices with symbolic power and that can itself become the object of struggle. For instance, we can consider how rape myths and stereotypes might function as narrative capital in a sexual assault trial by increasing a narrative’s perceived plausibility. The legitimacy of this narrative capital, however, may itself become a point of contestation when an agent’s efforts to frame experiences and events within certain stock stories of sexual assault are questioned or rejected³⁴. Properties such as academic qualifications, life experiences, narrative skills, and cultural stock stories thus become narrative capital only within the symbolic economy of a particular field. As Bourdieu (1996: 264) argues,

³⁴ In Chapter Five, I empirically and theoretically examine how adherence to stock stories of sexual assault can constitute a form of narrative capital.

Properties only function as capital, that is, as a social *power* relation, in and through the field that constitutes them as stakes and instruments of struggle, rescuing them thereby from the meaninglessness and uselessness to which they would be just as necessarily doomed in another field or another state of the same field (original emphasis).

Since the value attributed to certain characteristics and resources shifts from field to field, it is limiting to speak of narrative capital as an individualized capacity or skill. Instead, narrative capital, like other forms of capital, is constituted through the valuations, divisions, and distinctions of the field in which it operates (Dezalay & Madsen 2012: 441). The narrative dispositions of an agent's habitus and their accumulated forms of capital may translate into narrative capital bestowing symbolic power in some fields, but not in others. The values attributed to various properties and the recognized legitimacy of agents' narrative capital are the result and source of ongoing struggle, though some divisions and valuations may be more doxic or taken-for-granted (Dezalay & Madsen 2012: 441). While there may be certain skills that provide narrative capital across a variety of fields (e.g. the ability to fluently and clearly speak Standard English), it is important to consider the particular valuations and devaluations at work in the field being analysed.

In this dissertation, I explore how narrative capital is valorized, distributed, mobilized, contested, and struggled over within the specific context of a sexual assault trial. This allows me to consider not only the narratives and themes that emerged in the transcripts, but crucially how narrative practices are structured through and reproduce unequal distributions of symbolic power and relations of domination within the courtroom. As I discuss in the next section and explore empirically in the remainder of the dissertation, the structuring relations and narrative practices of the courtroom are organized around what I term *configurational power* – what I understand to be a particular form of symbolic power.

4.2. Courtroom Narrative Practices and Configurational Power

Narratives are not simply *told*, but rather they are *co-constructed* by narrators and their physically present or perceived interlocutors (Frank 2011: 33; Riessman 2008: 31-2; Robert & Shenhev 2014: 11-12; Salmon & Riessman 2013: 199; Shuman 2011: 129). That is, the interactions and social contexts within which narrative practices take place shape the narratives that are told and how they are presented (Herrnstein Smith 1980: 226). Moreover, narrative practices are shaped by the expectations and tacit rules of a given field within which the ability to legitimately engage in narrative practices is unevenly distributed, as discussed above. As argued in scholarship on law and narrative (e.g. Cammiss 2006: 86; Rosen 1996: 112; Scheppele 1989: 2094-7; Watkins 2013: 73, 90; White 1985: 36), legal processes of narrative construction alter the accounts brought to law, drawing out particular details, excluding elements that witnesses may have experienced as significant, and translating events and experiences into legal categories and language. The expectations of the legal context and the power dynamics of courtroom testifying thus shape how legal narratives are constructed, who gets to construct them, with what constraints, and the responses they elicit.

When analyzing the transcripts from *R. v. Ghomeshi* (2016), I initially struggled to understand the complainants' role in the courtroom processes of narrative construction. Although they were expected to narrate their experiences and thereby provide evidence for the legal professionals to evaluate, their ability to select and meaningfully order events was deeply constrained. As many narrative scholars argue (e.g. Gubrium & Holstein 1998: 166; Riessman & Quinney 2005: 394; White 1980: 14), narrative construction fundamentally involves a process of selecting and ordering events so that the account is imbued with a particular point or purpose for being told. Given that the complainants' testimonies were largely organized by the Crown and

defence lawyers, I wondered whether it was accurate to speak of the complainants as narrators at all. At the same time, it was the *complainants'* experiences (discerned through the embodied sense and dispositions of their habitus and expressed through available discursive and linguistic resources) that comprised the narratives constructed during the trial and there were many moments, particularly during in-chief examination, where they were asked open-ended questions and were permitted to narrate and evaluate certain events. In other words, the complainants were both relied upon to narrate their experiences *and* restricted in their ability to act as narrators, as I explore in empirical detail in Chapter Three.

In my analysis, I attempted to follow Bourdieu in merging conceptual and empirical work. By going back and forth between the transcripts, theoretical literature, and conceptual brainstorming (often in one day), I was able to notice things and generate insights that might not have been possible had I tried to define a rigid theoretical framework to then apply or test with empirical analysis. In particular, as I sorted through my initial confusion regarding the narrative positioning of the complainants, I perceived that Paul Ricoeur's (1980: 178-9; 1984: 66-8) understanding of narrative would add to my examination of the narrative capital and symbolic power in the courtroom. As I explain below, I adapted Ricoeur's work in the context of the theoretical and empirical concerns of this project; that is, I use his terminology to speak of distributions of capital and relations of symbolic power in a way that is not present in his own work. Specifically, I use his discussion of *narrative configuration*, in conjunction with consideration of how speaking positions and narrative capital were organized in the trial, to theorize *configurational power* and how it is unequally distributed among courtroom agents. In other words, fusing theory and analysis allowed me to develop useful conceptual tools as I worked through the empirical data.

Like other narrative scholars (e.g. Barthes 1975: 271; Onega & Landa 1996: 3; Presser 2016: 138; White 1980: 9, 27), Ricoeur (1984: x; 65; 1985: 61) argues that narrative does not just provide a chronological account of a succession of events, but rather that it imposes meaning and draws events together into an intelligible whole that communicates a particular point. According to Ricoeur (1980: 178-9; 1984: 66-8), every narrative brings together an *episodic dimension* (i.e. the chronologically-ordered description of events) and a *configurational dimension* (i.e. the ordering of events into a meaningful whole). He summarizes these dimensions as follows:

The act of emplotment combines in variable proportions two temporal dimensions, one chronological and the other not. The former constitutes the episodic dimension of narrative. It characterizes the story insofar as it is made up of events. The second is the configurational dimension properly speaking, thanks to which the plot transforms the events into a story. This configurational act consists of “grasping together” the detailed actions or what I have called the story’s incidents. It draws from this manifold of events the unity of one temporal whole. (Ricoeur 1984: 66)

Both dimensions are integral to narrative construction. While the episodic dimension³⁵ supplies and chronologically orders the action of the narrative, the configurational dimension judges and imposes meaning upon those actions, framing them so that they lead to an acceptable, though not necessarily predictable, conclusion (Ricoeur 1980: 178-9; 1984: 67; 1985: 61).

³⁵ The episodic dimension should not be thought of as some sort of untainted plot summary, as a straightforward series of events somehow recounted independent of interpretation, speaking context, or purpose. Critiquing narrative scholars who argue that narratives have a “basic story” that is independent of its various versions or manifestations and of human interpretation, Herrnstein Smith (1980: 221) argues that “[f]or any particular narrative, there is no single *basically* basic story subsisting beneath it but, rather [...] there are always *multiple* basic stories that can be constructed” (original emphasis). The episodic dimension of narrative discussed by Ricoeur is not simply an uninterpreted or basic series of events. Instead, creating a chronological account of events (i.e. a narrative’s episodic dimension) involves interpretive decisions about, for instance, what to include or exclude. Although the configurational dimension is responsible for much of the interpretive work done to create a narrative, such as drawing events into relations of causality rather than relations of simple succession, the episodic dimension does not somehow exist free of interpretation or independent of context.

When configuring a series of events, narrators make implicit and explicit claims about what those events mean, thereby imposing a vision of the world that may or may not be perceived as legitimate. As Ricoeur (1984: 154) argues, every narrative configuration contains its own explanation of the events it recounts because “to narrate what has happened is already to explain why it happened”. I suggest that the configurational dimension of narrative is intricately bound up with symbolic power – namely, the ability to impose a definition or meaning that is recognized as legitimate (Bourdieu 1987a: 13; 1994: 1). In particular, the ability to legitimately order, “grasp together”, and impose meaning on a series of events (i.e. narrative configuration) can be understood as an exercise of symbolic power.

Within the courtroom, narrative practices are organized around unequal distributions of authoritative narrative configuration, what I term *configurational power*. Relations of configurational power in a given social space are misrecognized as self-evidently legitimate and are conditioned by and contribute to the distributions of other forms of capital. For instance, cultural and linguistic capital may provide legitimacy to some agents’ configuration of events and the organization of configurational power amongst positions may influence distributions of economic capital by impacting juridical outcomes. Configurational power can be understood as a form of symbolic power in that it allows a speaker to legitimately order, connect, and make sense of a series of episodes. The concept of configurational power and examining how it operates in the legal field means thinking not only about the power to *speak* legitimately, but crucially about the power to *configure* legitimately. One can have the power to speak in particular ways in a given field but nonetheless have limited opportunities to configure that speech into a narrative whole, as I explore further in the ensuing chapters.

As I argue throughout the substantive analysis chapters, relations of configurational power and narrative capital constitute a key form of symbolic domination in the courtroom. Narrative configuration, that is, the particular way a narrator “construes significant wholes out of scattered events” (Ricoeur 1980: 178) or “draws a meaningful story from a diversity of events or incidents” (Ricoeur 1984: 65), is an exercise of symbolic power. When agents struggle over configurational power, namely, the ability to impose their understanding of events, they are struggling over symbolic power. These struggles are always conditioned by a field’s distributions of capital, tacit rules, and unequal relations of power. In other words, configurational power both conditions *and* is struggled over in courtroom narrative practices.

Using Ricoeur’s work to examine narrative practices in the courtroom, I argue that the complainants in the *Ghomeshi* case were expected to supply the *episodic* dimension by recounting and commenting upon each specific episode or event, but that they lacked control over the *configurational* dimension, that is, they did not have configurational power. In fact, the legal process does not just allow or expect the complainants to provide the episodic dimension, but rather *relies upon it*. As several scholars point out (e.g. Coundouriotis 2013: 366; Ehrlich 2001: 38; Gotell 2008: 885-6), sexual assault trials often rest on the evidence of witness-complainants, particularly when there is no physical evidence of harm. In this sense, without the complainant providing the episodes for the narratives being constructed in the courtroom, legal professionals would have limited or no content to configure.

By suggesting that the complainants’ configurational power was limited, I do not mean to suggest that they did not or were not permitted to engage in any configurational work at all. This would be an impossibility. As Herrnstein Smith (1980: 229) argues, our experiences and knowledge of past events are comprised of “general and imprecise recollections, scattered and

possibly inconsistent pieces of verbal information, and various visual, auditory and kinesthetic images” that are organized and understood as an ordered set of events only through the narrative act. In other words, the very practice of telling what happened always involves configuring scattered recollections; we can thus understand each episode a complainant recounts as an act of configuration or “grasping together”. I suggest, however, that while the complainants were expected to make sense of and narrate *episodic stories*, relational structures of narrative domination limited the complainants’ ability to configure this collection of stories into an overarching *narrative*³⁶. Instead, it was the legal professionals who were in a position to “grasp together” the episodic stories to create a particular narrative mosaic³⁷ or overall picture of what happened. In the next chapter, I elucidate this argument in greater detail and argue that the lawyers’ exercise of configurational power during the *Ghomeshi* trial constituted symbolic violence, namely, a misrecognized form of domination.

Conclusion

This chapter has elucidated the key theoretical concepts that I work with in the chapters that follow. Following Bourdieu’s understanding of domination as structured by objective relations and (re)produced by ongoing social practices and struggles, I approach the sexual

³⁶ I understand *stories* to be accounts of events or episodes that can vary in both length and complexity. A *narrative* is comprised out of these stories, which it organizes into a meaningful whole to make a particular point. In this sense, stories can be thought of as the episodes or incidents comprising a narrative’s episodic dimension; the narrative configures those stories in order to provide an overarching account of what happened and why it matters. I use the term *episodic story* to speak of each event recounted during witness examination in the *Ghomeshi* trial; often the episodic story is a response to the Crown’s question “What happened next?” Through witness examinations and closing arguments, the Crown and defence lawyer construct narrative configurations that bring the episodic stories into meaningful relation with one another in different ways. It is important to note that my distinction between episodic stories and narrative configurations is intended not as a fixed boundary, but rather as a conceptual tool that allows me to think about the configurational work in courtroom narrative practices.

³⁷ I use the term *narrative mosaic* to refer to the narrative pattern that emerges as episodic stories are pieced together. The term is inspired by Gewirtz’ (1996: 7) discussion of trial narratives, where he states that “a witness’s story usually furnishes discrete pieces in a mosaic whose overall shape emerges only as the trial progresses”. Speaking of a narrative mosaic emphasizes how a complainant’s stories are disjointed through the trial process so that they can be rearranged and reordered by the configurational work of legal professionals.

assault trial as a social space that is organized through unequal distributions of capital and in which agents, using the capital available to them, strive to have their version of events legitimated and struggle to further increase their capital. Struggles in the juridical field can be understood as struggles over symbolic power, namely, the ability to impose a vision of the social world that is perceived by other social agents as legitimate and authoritative. As they struggle for legitimacy, capital, and specific legal outcomes, legal agents experience the conditions and relations of the legal game as natural. That is, they misrecognize as self-evidently legitimate the rules for speaking, distributions of authority, practices of fact-finding, and logic of legal reasoning that underpin and organize the juridical field and their place within it. Moreover, legal agents tend to misrecognize the ways in which their own practices and participation in the legal game reproduce the relations of domination composing the juridical field.

Developing and expanding the concept of narrative capital helped me theorize how narrative practices are bound up with relations of domination. Narrative capital refers to the resources (e.g. cultural stock stories; valued experiences; embodied sense of how to narrate events in an appealing manner) that contribute to agents' ability to engage in narrative practices that are perceived as legitimate. Importantly, narrative capital not only conditions who may narrate, in what manner, and with what authority, but also functions as a *stake* over which agents struggle. In other words, the distribution of narrative capital organizes narrative practices and power relations while at the same time agents engage in ongoing efforts to accumulate or maintain narrative capital. Drawing on theoretical engagement and empirical examination, I presented the concept of configurational power as a form of symbolic power conditioned by distributions of capital. In particular, configurational power refers to the ability to authoritatively

configure and interpret a series of events, grasping them together into a meaningful whole or narrative mosaic.

The concepts of narrative capital and configurational power provide theoretical tools for examining the power relations that structure courtroom narrative practices and the ways that certain narrative practices reproduce these relations and their misrecognition. These concepts and the mobilization of Bourdieu's work contributes to the feminist critiques of the sexual assault trial discussed in Chapter One by facilitating a deeper understanding of the narrative practices and relations of domination that contribute to the disqualification of sexual assault complainants. Furthermore, since narrative capital and configurational power can be struggled *over*, these concepts help us examine the ways that complainants might attempt to resist the disqualification of their experiences and to create opportunities for configuration, as well as the doxic gaming conditions within which they do so. In the next chapter and the chapters that follow, I put to work and further develop the theoretical concepts explicated in this chapter by examining the symbolic violence of narrative practices during the witness examinations of the *Ghomeshi* trial, the ways that the legal professionals exercised their configurational power, and the doxic elements that contributed to the misrecognition of these relations of narrative domination.

Chapter Three – Configurational Power and Symbolic Violence in the Sexual Assault Trial of *R. v. Ghomeshi*

Introduction

We have a criminal justice system where the playing field is definitely unbalanced, it's not fair. And that's one of the reasons women don't disclose.

– Constance Backhouse (interview in Houpt, *Globe & Mail*, February 1, 2016)

The message for genuine sexual assault victims should be very reassuring. The message is that if you come forward, the police and the courts will treat you with great respect. It will be hard. The bar for a criminal conviction is reasonably (but not unreasonably) high. If you're honest and forthright you'll get a fair shake in court.

– Wente (*Globe & Mail*, March 25, 2016)

The case of *R. v. Ghomeshi* (2016) evoked much public commentary and debate about whether the legal system achieves its professed ideals of fairness and balance in its treatment of sexual assault complainants. By examining the sexual assault trial from a Bourdieusian perspective through the concepts of configurational power and symbolic violence, we can consider the relations of domination embedded in and reproduced through narrative practices that exist without scrutiny as natural and legitimate components of legal witness examination. While they had narrative capital when narrating their experiences to the media, the narrative capital that the complainants possessed outside the courtroom did not translate into configurational power within the courtroom. As legal outsiders, they lacked both the cultural capital (e.g. accreditation) and the legal habitus or practical sense (as an embodied form of legal capital) to legitimately engage in legal narrative configuration. The extensive publicity that the *Ghomeshi* case received makes it especially relevant for considering how certain relations of domination were reproduced as the lawyers struggled both to assert the legitimacy of their own narrative configurations and to uphold the legitimacy of the legal system in general. As I mentioned in the introduction to this dissertation, law was on display in this trial, perhaps making it even more imperative for the legal professionals to play by the rules of the legal game. In this sense, the *Ghomeshi* trial is

particularly useful for examining the symbolic violence of narrative practices in the courtroom, that is, the ways in which certain relations of narrative domination exist and are reproduced as natural and beyond questioning.

In this chapter, I introduce the *Ghomeshi* case and outline the main narrative practices of domination and symbolic violence that I identified during examination of the court transcripts. I begin by providing an overview of the events surrounding the public allegations of sexual assault and the unfolding of the *Ghomeshi* trial. Next, I outline some overarching themes that emerged in the newspaper coverage of the trial and then return to the concepts of narrative capital, doxa, and symbolic violence, briefly discussing how putting these concepts to work can help us examine what happened in the trial. In the second half of this chapter, I turn to the court transcripts. Drawing on a detailed analysis of the practices of narrative construction that occurred during the *Ghomeshi* trial, I demonstrate how the lawyers exercised significant configurational power during witness examination and explain how their narrative practices constituted a form of symbolic violence.

1. Scandalous Allegations, a Discrediting Trial, and Divided Media Coverage: An Overview of *R. v. Ghomeshi*

1.1. A Scandal Breaks

On October 26, 2014, the Canadian Broadcasting Corporation (CBC) issued a brief statement³⁸ indicating that they had ended their relationship with Jian Ghomeshi, the well-known host of their radio show *Q*. That same day, Ghomeshi's public relations representatives stated that he would be filing a lawsuit against the CBC for breach of confidence and issuing a

³⁸ Available on the CBC website at: <http://www.cbc.radio-canada.ca/en/media-centre/2014/10/26/>

grievance through his union for reinstatement (Tucker, May 11, 2016). In the evening of October 26, 2014, Ghomeshi published a lengthy post³⁹ on Facebook about his dismissal from the CBC. In the post, he stated that he was “fired from the CBC because of the risk of [his] private sex life being made public as the result of a campaign of false allegations pursued by a jilted ex-girlfriend and a freelance writer”. He indicated that his preferences for aggressive sex and “forms of BDSM” were always “mutually agreed upon, consensual, and exciting for both partners”. Attempting to pre-empt the emerging allegations, Ghomeshi stated that any insinuations about his sexual acts being non-consensual would be “lies” and “salacious gossip in a world driven by a hunger for ‘scandal’”. According to Ghomeshi, he was fired from the CBC for his “tastes in the bedroom” and consensual sexual activity in his private life. After this Facebook post, Ghomeshi did not provide another public statement regarding the allegations⁴⁰ until a year and a half later when he read out an apology in court as part of a peace bond for his second set of charges.

The same evening as Ghomeshi’s lengthy Facebook post, *The Toronto Star* published an article detailing the experiences of three separate women who claimed Ghomeshi had “physically attacked them on dates without consent” and a fourth woman who said Ghomeshi had harassed her verbally while she worked at CBC (Donovan & Brown, October 26, 2014). The article indicated that *Toronto Star* reporters had been looking into allegations of Ghomeshi’s sexual violence since the beginning of the previous summer and had conducted multiple detailed interviews with several women, none of whom had reported to the police or agreed to go on

³⁹ Available on the *Toronto Star* website at:

https://www.thestar.com/news/gta/2014/10/27/jian_ghomeshis_full_facebook_post_a_campaign_of_false_allegations_at_fault.html

⁴⁰ The only exception to this was a Facebook post on October 20, 2014 in which he thanked people for their support, said he would “meet these allegations directly”, and clarified that he would not “discuss this matter any further with the media”. This Facebook post is available on the *National Post* website at:

<https://nationalpost.com/news/canada/jian-ghomeshi-a-timeline-for-the-scandal-involving-the-former-cbc-radio-host>

record. According to the article, the women described how Ghomeshi had “struck them with a closed fist or open hand; bit them; choked them until they almost passed out; covered their nose and mouth so that they had difficulty breathing; and [...] verbally abused [them] during and after sex” (Donovan & Brown, October 26, 2014). Bolstering the legitimacy of the women’s allegations and by extension the news article, the *Toronto Star* reporter described the women as “all educated and employed” (Donovan & Brown, October 26, 2014). This demonstrates how certain forms of capital, in this instance cultural and economic, can contribute to agents’ narrative capital, improving their chances of not only being believed, but being heard in the first place.

In the ensuing weeks and months, several more women came forward both anonymously and publicly to report to the media that they had also been sexually assaulted and/or harassed by Ghomeshi (e.g. Donovan, November 3, 2014; November 29, 2014). On October 30, 2014, then-Toronto Chief of Police Bill Blair issued a public statement encouraging anyone who had been victimized by Ghomeshi to come forward and report their victimization to the police so that an official investigation could be launched. The next day, the Toronto police announced that two women had come forward to provide official complaints and that an investigation into the allegations had begun (Donovan, Hasham & Khandaker, November 2, 2014). On November 26, 2014, Ghomeshi was officially charged with four counts of sexual assault and one count of overcoming resistance by choking, and was released on bail (Fine, November 27, 2014). Video footage of Ghomeshi and his lawyers leaving the courthouse demonstrates how much media attention the case had attracted; he and his lawyers were surrounded by a circle of police officers who had to slowly clear a path for them to exit amidst an onslaught of journalists and cameras. On January 8, 2015, Ghomeshi was charged with three new counts of sexual assault as more

women had come forward to the police. On May 12, 2015, two counts of sexual assault were dropped by the prosecutors and the dates were set for two judge-alone trials. The first trial would take place in February 2016 and deal with four counts of sexual assault and one count of overcoming resistance by choking that had allegedly occurred in intimate contexts with three separate women. The second trial would occur in June 2016 and involve the final count of sexual assault which had allegedly occurred in the workplace (Tucker, May 11, 2016). On October 1, 2015, Ghomeshi officially pled not-guilty to all counts (Hasham, October 2, 2015).

1.2. The Trial and Acquittal

The trial began on February 1, 2016 in a packed courtroom that many reporters and members of the public had waited in line for hours on the courtroom steps to get a seat in. After the trial judge, Justice Horkins, heard submissions from a lawyer for the media⁴¹, a complainant's lawyer, the defence, and the Crown on how the process of disclosing submitted evidence to the media should work throughout the trial, the Crown began to call witnesses⁴². The first complainant⁴³ called to the stand by Crown prosecutor Michael Callaghan testified that she had met Ghomeshi in December 2002 and initially found him "sweet and humble and charming". After chatting at a pub for a bit, Ghomeshi drove the complainant to where her car was parked and when they arrived they sat for a few moments in his car and began kissing, at which point he allegedly grabbed her hair and pulled it hard. The complainant testified that she was shocked and confused but went out with him again because he went back to being nice and she was unsure if

⁴¹ Specifically, she represented the Toronto Star, CTV, Global News, and CBC.

⁴² Description of the trial throughout this section is based on the trial transcripts.

⁴³ The names of the complainants were protected by a publication ban, which essentially required that their names and identifying information not be published. Although both the first and second complainants in the February trial, as well as the complainant in the second trial, ended up waiving the publication ban and coming forward publicly, I have continued to withhold their names in this dissertation.

he had intended to hurt her. A few weeks later, she went with a friend to see the taping of Ghomeshi's show and afterwards went back to Ghomeshi's home alone with him. According to her testimony, while they were kissing in his living room, Ghomeshi went behind her, aggressively pulled her hair, and punched her in the head multiple times. After this, he called her a cab and asked her to leave. She testified that she never reported this non-consensual violence to the police at that time because she was upset and did not think anyone would believe her. She also stated that she may have drafted emails to Ghomeshi, but she never saw him again and felt re-traumatized each time she heard his voice or saw his face on television.

During a two-day cross-examination, Ghomeshi's defence lawyer, Marie Henein, questioned the first complainant on, among other things, the media interviews the complainant did before going to the police, alleged inconsistencies between her accounts, and information that had not been previously disclosed. The crux of Henein's defence came at the end of the second day of cross-examination, when she revealed two emails that the complainant had sent to Ghomeshi on January 16, 2004 and June 22, 2004; the second email included a bikini photo of her. The emails and the attached photo were presented as evidence that the complainant was still romantically interested in Ghomeshi after the alleged attack and that she had withheld that information from the police and the Court. The complainant explained that she had sent the emails and the photo in an attempt to get Ghomeshi to call her so she could ask him why he had assaulted her. The cross-examination ended with Henein emphasizing that, despite the complainant's emails, Ghomeshi never called her.

The second complainant, called by Crown prosecutor Corie Langdon, met Ghomeshi in June 2003 at a conference, after which they maintained contact and exchanged a few emails and calls, as they were living in different cities. The complainant testified that she thought Ghomeshi

was interesting and worth getting to know better. In July 2003, she visited him while in Toronto. They went out for dinner and then went back to Ghomeshi's place. According to the complainant's testimony, after a tour of Ghomeshi's house, they began kissing and then he took her by the throat, pushed her against the wall, and slapped her three times in the face. She testified that she was shocked and that she stayed for an hour or so afterwards in an attempt to make things feel normal again. She and Ghomeshi saw each other several more times that weekend, going for brunch together, attending an art show with a mutual friend, and going to a barbeque hosted by Ghomeshi's friend. After the weekend in Toronto, they stayed in touch for a little while, primarily via email, and occasionally saw each other in person because they were involved in the same industry. The complainant testified that she did not contact the police immediately after the assault because she did not think her experience qualified as sexual assault and she did not understand the reporting process. According to her testimony, when she came forward in October 2014 to speak about her experience in media interviews she did not initially plan to speak with the police, but when Bill Blair gave his press statement she thought she had information that might be helpful to the police so she made an official report.

In another two-day cross-examination, Henein began by extensively questioning the second complainant on the many media interviews she had done both before and after reporting to the police. Henein then questioned the complainant on alleged inconsistencies in how the complainant had described the assault and her time with Ghomeshi both before and after the assault. Ending the first day of cross-examination on a cliff-hanger, Henein asked the complainant if she would like "to tell His Honour the real conversation that was going on", to which the complainant replied she was "not sure what [Henein] mean[t]". In the second day of cross-examination, Henein showed email after email that had been exchanged between the

complainant and Ghomeshi after the alleged assault. The final two pieces of correspondence Henein revealed were a message the complainant sent to Ghomeshi the day after the assault in which she said “You kicked my ass last night and that makes me want to fuck your brains out” and a handwritten letter the complainant sent five days after the assault that ended with “I love your hands”. In a very brief re-examination, the complainant emphasized that the letter did not change the fact that Ghomeshi had assaulted her and she explained that she had forgotten about the letter and had experienced conflicting feelings at the time she wrote it.

The third and final complainant, examined by Callaghan on February 8, 2016, had been acquaintances with Ghomeshi for many years because of their mutual involvement in the arts and entertainment industry, but she did not know him very well. In July 2003, they met at a festival and ended up going out for dinner together. A few days after the dinner, they saw each other again and walked together to a more secluded area in the park where they had met. The complainant testified that, while they were kissing on a park bench, Ghomeshi put his hands on her shoulders and his teeth on her neck in a rough manner and then squeezed her neck with his hands, causing her some difficulty breathing. According to her testimony, the complainant was shocked by Ghomeshi’s sudden actions and she left at that point. She testified that she went out for dinner with him again afterwards because his charm caused her to second-guess herself. On this next outing, Ghomeshi came back to her home and they engaged in consensual sexual activity. The complainant did not mention this sexual activity in her initial police statement or her subsequent conversations with the Crown lawyers; on February 5, 2016, three days before testifying in court, she provided another police statement in which she disclosed the sexual activity. During in-chief examination, she indicated that she had not mentioned it before because she did not think it was relevant and was embarrassed. After the occasion at the complainant’s

home, she and Ghomeshi saw each other once more and got into an argument that ended with her telling him not to call again. The complainant testified that she has encountered him since that time at events they were both attending, but that she has tried to move on from the incident, which is part of why she did not report the assault to the police for over a decade.

During cross-examination, Henein began by questioning the complainant on the people she spoke with in the fall of 2014 before providing a police statement, including a reporter, a publicist, the second complainant, and a lawyer. Henein also questioned the complainant on the seeming lack of clarity in her account of the assault and on inconsistencies between her statements to the media, police, and Court. Showing messages obtained through a third-party records application, Henein focused a large part of the cross-examination on the correspondence between the second and third complainant, which began in October 2014 and included hostile comments about Ghomeshi and discussions of lawyers, publicists, the legal process, and meetings with Crown lawyers. Towards the end of cross-examination, Henein summarized all the information that the complainant had told the police and then questioned her on her late disclosure of the sexual activity she engaged in with Ghomeshi after the alleged assault. The cross-examination ended with an emphasis on the complainant's omission, which the defence framed as evidence of intentional manipulation.

Three days after the final cross-examination, closing arguments were heard and then the trial adjourned for six weeks so that Justice Horkins could write his decision on the case. The defence's case rested entirely on discrediting the Crown's witnesses through cross-examination; Ghomeshi did not testify and the defence called no witnesses. On March 24, 2016, Justice Horkins acquitted Ghomeshi on all counts. Indicating that his decision "is not the same as deciding in any positive way that these events never happened" (para. 140), Justice Horkins

stated that “serious deficiencies in the evidence leaves the Court with a reasonable doubt” (para. 139), thereby compelling him to acquit. In his decision, Justice Horkins indicated that the case relied completely on the complainants’ reliability and credibility and that cross-examination had “dramatically demonstrated that each complainant was less than full, frank and forthcoming” (para. 132). In Chapter Five, I examine how the defence configured narratives of manipulation that successfully undermined the complainants’ claims of victimization.

After his acquittal, Ghomeshi still faced one more charge of sexual assault against a co-worker. However, this charge never resulted in a trial, as the Crown agreed to withdraw the charge on the condition that Ghomeshi provide a prepared apology in court and enter into a recognizance to keep the peace and be of good behaviour for 12 months, refrain from contact with the complainant, and not possess any weapons. On May 11, 2016, Ghomeshi delivered his apology, which was negotiated by the Crown and defence counsel. In the apology, Ghomeshi acknowledged that his “conduct in the workplace was sexually inappropriate”, mentioned his “position of privilege” at the CBC and the “power imbalance” between him and the complainant, apologized to the complainant for his conduct, and apologized to his family and friends “for letting them down” and placing a burden on them (transcript, May 11, 2016). The apology was brief (two pages) and the entire proceedings of May 11, 2016 comprised less than 12 pages of transcript. With the apology delivered and the recognizance signed, Ghomeshi was officially cleared of all charges.

1.3. The Media Coverage

Since the initial *Toronto Star* article reporting allegations of Ghomeshi’s sexual violence (Donovan & Brown, October 26, 2014), the case has received a great deal of media and public attention. For instance, a search on the *Canadian Major Dailies* database returns 1,554 articles

that include the search terms “Ghomeshi” and “sexual assault” between October 1, 2014 and December 31, 2018. This does not include international media coverage, television or radio coverage, the live reporting that took place during the trial⁴⁴ or the extensive attention the case received on social media sites. Analyzing the discourses emerging on Twitter in the aftermath of the Ghomeshi verdict, Coulling and Johnston (2018: 6) archived 21,743 tweets that contained “#Ghomeshi”. The authors mapped out the complex and emotional diversity of the Twitter response: some tweets upheld the rational truth-seeking capabilities of the legal system, some blamed the legal professionals for the unjust outcome, several pointed to the inadequacies of the legal system to deal with sexual assault, many expressed empathy and love for survivors, many explained the legal system in a patronizing manner directed at those who had expressed support for survivors or disapproval of the verdict, and some denounced the necessity for legal scrutiny of complainant testimony (Coulling & Johnston 2018: 7-15). Over the course of the emerging allegations against Ghomeshi, the trial, and his acquittal, several other Twitter hashtags also became extremely popular, such as “#IBelieveSurvivors”, “#BeenRapedNeverReported”, and “#MeToo”. It is important to note that although the phrase #metoo received a great deal of global attention in the aftermath of Ghomeshi’s acquittal and several other recent high-profile cases (e.g. Harvey Weinstein, Bill Cosby, Larry Nasar and Bill O’Reilly), the term was coined in 2006 by Tarana Burke, an American civil rights activist, as the basis of a movement she began with young Black women and girls to build resources and support for women in particularly disadvantaged positions who have experienced sexual violence⁴⁵.

⁴⁴ During the trial, reporters packed the courtroom and lived Tweeted or live blogged the unfolding action. Many tweets provided as close to direct quotes as possible, some mentioned details about body language, expressions, or tones of voice, and some even commented on attire.

⁴⁵ See the #MeToo movement’s website at: <https://metoomvmt.org/about/#history>

Although the focus of this dissertation is on the juridical field and the power dynamics occurring during the courtroom narrative practices of the sexual assault trial itself, I did read the news articles published between January 25, 2016 (the week before Ghomeshi's trial) and May 18, 2016 (the week after his official apology and peace bond) in three major Canadian newspapers: The *Globe & Mail*, the *National Post*, and the *Toronto Star*. Doing so provided a sense of the extended conversations surrounding the trial, which complemented my examination of the transcripts. While I provide some of the key themes and arguments that emerged in the newspaper coverage in rather broad strokes, my purpose is not to conduct a systemic analysis of mediated content; rather, I aim to offer greater context for the detailed examination of courtroom narrative practices that follows.

In the build-up to the *Ghomeshi* trial, much of the newspaper coverage commented on the difficulties women have reporting their experiences of sexual assault, as well as the aggressive examination tactics that they might be subjected to if they do (Brean, *NatPost*⁴⁶, January 30, 2016; Donovan, *TorStar*, January 30, 2016; Houpt, *G&M*, February 2, 2016). Feminist legal scholars such as Constance Backhouse and Elizabeth Sheehy were quoted in some of these articles raising concerns about how women who report sexual assault are often disbelieved (Brean, *NatPost*, January 30, 2016; Houpt, *G&M*, February 1, 2016). Articles also discussed how the police, lawyers, and judges may continue to rely on rape myths and stereotypes when it comes to investigating, prosecuting, defending, and deciding sexual assault cases (Brean, *NatPost*, January 30, 2016; Hasham, *TorStar*, January 30, 2016).

⁴⁶ Throughout the dissertation, I use *NatPost* to specify articles from the *National Post*, *TorStar* to specify those from the *Toronto Star*, and *G&M* to specify those from the *Globe & Mail*.

As the trial began, however, the conversation seemed to quickly shift towards the unexpected inconsistencies revealed in the complainants' accounts during cross-examination (e.g. Donovan & Hasham, *TorStar*, February 2, 2016; Menon, *TorStar*, February 2, 2016). Although there was certainly some discussion about the difficulties of reporting sexual assault, the trauma of testifying, and the different ways that women might react to sexual assault, many of these articles qualified their comments by pointing out that examination practices, while at times unpalatable, are nonetheless essential to justice and that complainants need to be encouraged to reveal everything before the trial and should never withhold information (Davies, *TorStar*, February 2, 2016; Gallant, *TorStar*, February 13, 2016; "How to restore", *G&M*, March 25, 2016; McLaren, *G&M*, March 25, 2016; Menon, *TorStar*, February 13, 2016; Rusonik, *TorStar*, February 21, 2016; Timson, *TorStar*, February 18, 2016; April 7, 2016; Urback, *NatPost*, February 3, 2016). For several journalists, the inconsistencies and lies in the complainants' accounts made it impossible for the judge to do anything other than acquit ("Consent is still the key", *TorStar*, March 25, 2016; "For the defence", *TorStar*, March 31, 2016; Gurney & Wells, *NatPost*, March 29, 2016; Urback, *NatPost*, March 26, 2016). The underlying tenor of this coverage was that, while the criminal justice system may be flawed, the women did lie under oath and the legal process uncovered their deception and therefore delivered a just outcome, albeit an unsatisfying one. Overlooked in this rendering of events are the ways in which unequal distributions of narrative capital and configurational power contributed to the apparent exposure of the complainants as inconsistent and deceptive, as I discuss further later in this chapter and again in Chapter Five.

As the trial unfolded, some articles used the case as a springboard to talk about issues such as sexual harassment, women's responses to sexual violence, the silencing of women, the

injustice of the legal system, and assumptions about what qualifies as sexual assault (Balkissoon, *G&M*, April 1, 2016; Bielski, *G&M*, March 21, 2016; Donovan, *TorStar*, April 24, 2016; Heuser, *NatPost*, February 19, 2016; Lederman, *G&M*, February 6, 2016; Levitt, *NatPost*, February 11, 2016). There were also several articles that condemned the trial as appalling and strongly disapproved of the judge's decision, pointing to how the trial and its outcome reinforced problematic cultural expectations about women who have been sexually assaulted and demonstrated how women are victim-blamed and silenced (Birenbaum, Cross & Dale, *TorStar*, February 8, 2016; Blaze Baum, Fine & White, *G&M*, March 25, 2016; Gray, *TorStar*, March 25, 2016; Lederman, *G&M*, February 6, 2016; Leventhal, *TorStar*, March 25, 2016; Mallick, *TorStar*, February 6, 2016; February 10, 2016; Porter, *TorStar*, March 25, 2016; Todd, *NatPost*, March 26, 2016). Drawing on comments from defence lawyers, legal scholars, and representatives of sexual assault crisis centres, some articles also discussed the ongoing debate as to whether aggressive cross-examination practices are problematic or necessary (Andrew-gee, *G&M*, February 4, 2016; Fine, *G&M*, February 13, 2016).

Several journalists were quite scathing in their accounts of the complainants' testimonies, presenting the women as deceptive, intentionally manipulative, and untrustworthy, at times in a rather sarcastic manner (Blatchford, *NatPost*, Feb. 2, 2016; Feb. 3, 2016; Feb. 9, 2016; DiManno, *TorStar*, February 3, 2016; February 12, 2016; February 13, 2016; March 25, 2016; March 26, 2016; Donnelly & Erickson, *NatPost*, Feb. 10, 2016; Menon, *TorStar*, March 25, 2016; Wente, *G&M*, February 9, 2016; March 25, 2016). In these articles, the complainants were held responsible for the fact that the case fell apart and the legal process was presented as fair and capable of uncovering the truth despite the dishonesty of Ghomeshi's accusers. At several points in the newspaper coverage, the complainants were also cast as infatuated and star-struck

women who unabashedly pursued Ghomeshi (Blatchford, *NatPost*, Feb. 6, 2016; DiManno, *TorStar*, February 2, 2016; March 26, 2016; Wente, *G&M*, February 9, 2016). Furthermore, several articles suggested that those who declared that the complainants should be believed, protested the verdict, and critiqued cross-examination tactics were unconcerned with the truth and posed a threat to the fairness and integrity of the legal process (Blatchford, *NatPost*, Feb. 12, 2016; DiManno, *TorStar*, February 4, 2016; February 12, 2016; February 13, 2016). In the face of the “roiling, restless mob” who presume women have “the patent on truth-telling” (Blatchford, *NatPost*, May 12, 2016), the legal system was presented as having delivered both a fair trial and just outcome (Black, *NatPost*, April 2, 2016; DiManno, *TorStar*, March 25, 2016; Gurney & Wells, *NatPost*, March 29, 2016; Kay, *NatPost*, March 31, 2016; Menon, *TorStar*, March 25, 2016; Wente, *G&M*, April 2, 2016).

Reading newspaper coverage provided me with a different angle on the struggles over narrative meaning and narrative configurations that I was mapping out in the transcripts. That said, the focus of the dissertation was not on the public or media attention the *Ghomeshi* case received, but rather on configurational power and symbolic violence in the courtroom narrative practices of the trial. In later chapters, I make occasional reference to the newspaper coverage to complement my arguments about the trial, but it does not comprise a substantial component of this dissertation. Instead, I focus on theoretically and empirically examining the symbolic violence bound up in the narrative practices of the courtroom and the doxic elements that underpin, organize, and are reproduced through these narrative practices. That is, I am concerned with mapping out how narrative is implicated in the misrecognized domination, implicit rules, unequal positions, and stakes of the legal game.

1.4. Thinking in Terms of Narrative Capital, Doxa, and Symbolic Violence

In this dissertation, I examine the symbolic violence and domination that conditioned the narrative practices of the *Ghomeshi* trial. The embodied dispositions of an agent's habitus provides them with different narrative sensibilities, which translate (or *fail* to translate) into narrative capital in the legal field. The lawyer's habitus is privileged in the legal field, providing them with authority over the narrative configuration of the complainant's own experiences. This constitutes a form of symbolic violence in that the lawyer's configurational power and narrative domination are misrecognized as the legitimate elicitation and examination of the *complainants'* accounts. The lawyer's role as narrative configurator exists without question and the domination that the complainants experience during witness examination is perceived as a legitimate relation that the complainants have *chosen* to undergo simply by participating in the legal game. The symbolic violence of the courtroom narrative practices is "gentle [and] hidden" (Bourdieu 1977: 196) because it exists as an unquestionable outcome of choosing to tell one's story in court. As the different courtroom agents struggle to construct their narrative accounts, the rules of engagement, stakes, valuations of habitus, unequal distributions of capital, and practices of narrative configuration within the legal field are experienced as natural. That is, the conditions of domination in the legal field exist as doxic elements. By examining these doxic conditions and their connection to narrative practices in the sexual assault trial, I consider why it is that certain narratives of sexual assault become not only possible but privileged during the *Ghomeshi* trial.

As aforementioned, properties and dispositions of habitus always act as capital *within specific fields* and thus agents' capital shifts as they move between fields. Recognizing this allows us to acknowledge how a complainant's narrative capital might change as she enters different spaces, rather than assuming that her narrative work is always disqualified.

Furthermore, some of the same properties and dispositions that augment one's ability to tell an

accepted narrative in one field may negatively impact one's narrative capital in another field.

Although I argue throughout the dissertation that the complainants' narrative dispositions during the *Ghomeshi* trial did not translate into narrative capital when they were testifying in court, it is important to point out that they had a great deal of narrative capital outside the courtroom, as their ability to do multiple media interviews demonstrates. In fact, the media interviews the complainants did prior to the trial became a key point in the defence's cross-examination, as they were used to identify inconsistencies and to suggest ulterior motives for reporting. In this sense, the complainants' narrative capital when speaking with media outlets *negatively* impacted the legitimacy and credibility of their narrative practices within the courtroom. Since properties that are valued as capital in one field may be rendered meaningless in another, it is difficult for agents to successfully move between fields (Bourdieu 1996: 264). For instance, while the second complainant's status as a known actress contributed to her narrative capital during media interviews, this had a negative impact on her credibility in the legal realm, as discussed in later chapters.

Using Bourdieu's notion of capital also helps us acknowledge the various ways that agents may be both disadvantaged *and* advantaged. Despite how their non-legal habitus⁴⁷ did not afford them much narrative capital or symbolic power in the courtroom, the complainants in the *Ghomeshi* trial had social, economic, cultural, and linguistic capital that may be unavailable for

⁴⁷ In speaking about the non-legal habitus of the complainants, I avoided assigning a label such as "victim habitus" or "complainant habitus". For one, I do not want to reduce the women's habitus to victimhood. Terms such as "victim" or even "survivor" can reduce into a single word the diverse experiences of those who have been sexually assaulted and, as Doe (2012: 360) points out, "severely limit [...] narrative agency". Throughout this dissertation, I use the term "complainant" because I focus upon the women's role specifically in the courtroom narrative games. However, I do not want to reduce their habitus to that role through a term such as "the complainant habitus", nor do I want to suggest that there is a particular set of dispositions that are shared solely by complainants of sexual assault. While the term "legal habitus" captures the internalization of shared professional expectations, the complainants do not necessarily share a set of field-specific dispositions, making it inappropriate to speak of a "complainant habitus". That said, in later chapters I speak of a collective socio-political and cultural habitus in order to discuss the stock stories and gendered tropes that function as internalized schemes of sense- and meaning-making.

many other victims of sexual assault. Women who are economically disadvantaged, racialized, or deemed mentally unstable are more likely to have their allegations disbelieved or not treated seriously than women who more closely resemble the risk-managing, rational, white, heterosexual, able-bodied and resisting image of the 'ideal victim' (Anderson 2010: 646-7; Busby 2014: 273, 286; Gotell 2008: 879; Johnson 2012: 625-6; Larcombe 2011: 37; Ruparelia 2012: 684-5; Vandervort 2012: 113-114). The complainants in the *Ghomeshi* trial were white, middle-aged, able-bodied, articulate, affluent enough to afford a lawyer, and had access to a national media audience. It is thus important to keep in mind that even as their narrative practices were subjected to the symbolic violence of the lawyers' configurational work, the complainants had other forms of capital that may have allowed them to more easily claim legitimate victimhood and increased the perceived credibility of their accounts.

Thinking in terms of capital can also help us understand Ghomeshi's position throughout the trial. He was a man of Iranian descent being accused of sexual assault by three white women. As scholars have repeatedly pointed out, racialized men accused of sexual violence against white women have been constructed as especially dangerous and are often subject to increased hostility, higher likelihoods of conviction, and more punitive responses than white men accused of sexual violence (Balfour & DuMont 2012: 722; Bumiller 2008: 38-9; Ruparelia 2012: 684-5; Tanovich 2012: 551). Despite the disadvantages and discrimination that racialized men tend to experience in the legal system, Ghomeshi had various forms of capital that contributed to the symbolic power of his legal defence during the trial. In particular, his economic capital enabled him to hire top-notch legal representation and his cultural and social capital as a Canadian celebrity helped his lawyers narrate his accusers as infatuated and scorned women who were after him for his fame and connections. Ghomeshi's successful legal defence did not depend on

whether his habitus afforded him legal capital, but rather on his ability to have his interests represented by skilled lawyers possessing the dispositions and practical know-how valued in the legal field.

Examining the *Ghameshi* trial through a Bourdieusian approach facilitates consideration of how courtroom narrative practices are intertwined with symbolic violence and relations of domination. A Bourdieusian lens turns our attention to the conditions, practices, and unequal power relations that exist without scrutiny as agents struggle to narrate events and strive for specific legal outcomes. Given the media and public attention it received, the *Ghameshi* trial is particularly useful for considering how the practices of legal agents contributed to reproducing the legal process, its premises, and its power relations as self-evidently legitimate. As agents attempt to participate legitimately in the legal game, the validity of certain valuations, methods, delimitations, and rules of engagement remain doxic and beyond questioning. I use the *Ghameshi* trial as an empirical lens to examine the doxic structures of the legal field that underpin courtroom narrative practices and their relations of domination. In the remainder of this chapter, I begin my examination of the court transcripts by discussing the organization of configurational power during the trial and the symbolic violence of the lawyers' key narrative practices and techniques. It is important to note that although my analysis investigates the strategies, narratives, and practices of the specific individuals involved in the *Ghameshi* case, I do so in order to examine what they can tell us about the structuring relations and internalized structures of habitus through which they are conditioned and which they reproduce. In this sense, I follow Bourdieu and engage in a structural analysis of narrative practice.

2. Symbolic Violence and Configurational Power in the *Ghameshi* Trial

In developing the concept *configurational power* during my examination of the court transcripts, I was inspired to engage in another re-reading of the transcripts focused specifically on how the episodic and configurational dimensions of the courtroom narratives were constructed and struggled over. This was not an analytic approach I had planned when I first conceived of this project or sat down with the transcripts; indeed, I could not have pre-emptively designed this as a data analysis strategy since the importance of the episodic and configurational dimensions and the very idea of configurational power only emerged after several readings of the transcripts and ongoing consideration of theoretical material. I found that much of the analytic process functioned in this manner for me – transcript examination combined with theoretical brainstorming and reading would inspire and structure subsequent readings of the transcripts. In this manner, I repeatedly read and re-read the transcripts with an eye to different aspects each time⁴⁸ and what I learned during each reading and theoretical foray informed my examination moving forward. Of course, this approach also led to several dead-ends and unfruitful analytic detours⁴⁹, but in the end these were an important part of helping me discover what was theoretically and empirically pertinent to my consideration of the power relations structuring courtroom narrative practices.

⁴⁸ Other reading angles and analytic approaches included: tracing, paraphrasing, and writing out the main narrative trajectories of the in-chief and cross examinations; making note of each moment of conflict during witness examination; a close reading of the closing arguments and judicial decision to identify the narrative ending imposed by the legal professionals; and using QDA Miner (a coding software similar to NVIVO) to identify (typically large) sections of transcript that spoke to the issues I had been noting (e.g. legal positivism, responsible sexual subjectivity, women with ulterior motives, memory, negotiating vulnerability, and romantic/sexual interest). Importantly, the use of QDA Miner occurred during one of the later readings because I used it pragmatically to pull out the main themes I noticed in previous readings. The purpose of this reading was neither to identify all the themes in the transcripts nor the frequency of each theme, but rather to organize the transcripts so that I could more meaningfully write about the specific content of the courtroom narratives in conjunction with the power dynamics of narrative configuration.

⁴⁹ For example, I began trying to categorize each question type (e.g. “what” questions; “prosodic yes/no” questions; “how” questions; etc.), its topic, and the length of the response it elicited from the complainant. I soon realized that I was lapsing into a rigid method that was causing me to view language as an “object of contemplation rather than as an instrument of action and power” (Bourdieu 1991: 37) that rendered one-dimensional the relational power dynamics involved in questioning.

To look at the episodic and configurational dimensions of the *in-chief* examinations, I identified the episodic stories and evaluative comments provided by the complainant, attending to how they were elicited and organized by the Crown's questioning. I also made note of moments where the complainant attempted to configure episodic stories or evaluations in relation with one another and examined how the Crown, and occasionally the defence lawyer and judge, interrupted and negotiated these situations. To examine the episodic and configurational dimensions of the *cross-examinations*, I considered how Henein *pre-configured* and *pre-emptively* provided interpretive framing for certain events or issues. I identified moments of *pre-configuration*, where details were presented in a way that would be used to imbue later events with particular meanings, as well as *pre-configured* events, which were framed through reference to previous details. Of course, there were also moments that were simultaneously *pre-configuring* and *pre-configured*, that is, interpreted through previous details *and* used to frame later events. Since I had already read through the transcripts multiple times at this point, I was already familiar with the cross-examination as a whole, making it easier to recognize how Henein used particular events, details, and statements to *pre-configure* the points she would raise later. As I re-read the cross-examinations, I also made note of things such as summarizations, suggestive topic transitions, sudden twists in the narrative, and moments of struggle where the complainant attempted to resist the implications of Henein's configurational work.

In the remainder of this chapter, I demonstrate the configurational power that the lawyers exercised⁵⁰ during the *Ghomeshi* trial and outline the symbolic violence of their narrative

⁵⁰ When I speak of the "lawyers' configurational power" or the configurational power that they exercised, I do not mean to suggest a form of possession. Instead, I use these turns of phrase as a shorthand for how the relations of symbolic power and narrative capital in the courtroom bestow the legal professionals with configurational power based on their legal habitus and position. Symbolic and configurational power are not possessed by individuals, but distributed amongst relational positions in a given field.

techniques and practices. During the trial, the complainants were kept from configuring overall narrative mosaics about their own experiences even as they were relied upon to provide the episodic stories comprising the narrative mosaics of the legal professionals (i.e. the statements upon which the lawyers and judge based their narrative configuration). First, I argue that during in-chief examination the complainants' episodic stories were often disconnected from one another as the Crown lawyers attempted to expound each event one at a time. Second, I discuss how the complainants were positioned during cross-examination as unknowing characters in the defence's narrative and the ways that the defence lawyer made use of this positioning to configure dramatic narrative twists that further undermined the complainants' credibility. Third, I outline some of the ways that the defence lawyer configured inconsistencies in the complainants' accounts. Finally, I argue that the doxic processes of witness examination in the courtroom limited the complainants' ability to proffer a final viewpoint for retrospectively evaluating the events as a narrative whole.

Each of these practices are bound up with symbolic violence in that the control the lawyers exercise over the configuration of the complainants' episodic stories operates as a misrecognized and naturalized form of domination that involves the complainants playing a role in their own subordination. This is *not* to suggest that the complainants are "falsely conscious", passive, or oblivious to their disadvantage in the legal field. As discussed in the previous chapter, symbolic violence and domination are inscribed in agents' habitus, that is, their *practical* and *embodied* sense of how they and others should act in a given situation. Answering the questions posed during witness examination and deferring to legal authority is a requirement of the complainants' participation in the legal field that lies outside the realm of that which can even be questioned. Despite their non-legal habitus, the complainants had a set of embodied

dispositions inculcated from the cultural privileging of legal authority that made complicity with their legal role and recognition of the lawyers' narrative control *feel* natural and self-evidently legitimate, even if at times undesirable.

Although in the following subsections I do provide some excerpts from the court transcripts to exemplify the techniques discussed, the majority of my work unpacking the transcripts appears in later chapters where I discuss the doxic elements that underpinned the symbolic violence of the courtroom narrative practices. The purpose of this section is to demonstrate the lawyers' configurational power during the trial and introduce several key narrative techniques through which they manipulated the connections between and implications of the complainants' episodic stories. In Chapters Four, Five, and Six, I provide detailed discussions of the court transcripts, further examining these narrative techniques and how they depended upon and reproduced doxic misrecognition.

2.1. Disconnecting Episodic Stories and Interrupting Configurational Work

During in-chief examination, the complainants were asked many open-ended questions and given many opportunities to provide lengthy explanations of what they experienced and what they thought about a particular incident. However, their non-legal habitus, position in relation to the legal professionals, and role in the legal process did not afford them the opportunity to *configure* these episodes and explanations into a meaningful whole. Prompted by various forms of the question 'what happened next?', the complainants in the *Ghomeshi* trial were asked by the Crown to provide the episodic stories or succession of events that would comprise the *Crown's* narrative configuration. The complainants, however, were typically not permitted to flow from one episode into the next. Instead, series of close-ended questions tended to interrupt the narrative flow, disconnecting their episodic stories. Throughout this process, it

was the Crown who had the power to decide when more detail was required and when the next episode should be recounted. In so doing, he or she⁵¹ exerted control over the connections that were or were not drawn between the various episodes. That is, the Crown exercised configurational power throughout in-chief examination.

For example, in the following excerpt from the court transcripts the second complainant is asked about the events leading up to the alleged assault. In her response, she attempts to configure the pre-incident consensual kissing in relation to the later assault:

Excerpt 3.1

Q. And who initiated the kissing?

A. He did.

Q. And were you consenting to the kissing? Did you –

A. Yeah.

Q. – agree to the kissing?

A. Yes, I was. I was not able to consent to the choking or the slapping because that's sort of – I was just respon – I was just receiving it.

Q. We're going to go through this slowly. So you were consenting to the kissing, and what kind of kissing was it?

A. Open mouth kissing. (February 4a⁵², 2016: 29-30)

The complainant's attempt to juxtapose her consent to the kissing against her *non*-consent to the alleged choking and slapping is interrupted by the Crown, Corie Langdon, who controls how the details and evaluations are configured in relation to one another. The Crown later asks whether the complainant consented to the choking and slapping but does not do so until after she asks a lengthy series of close-ended questions about such things as which hand Ghomeshi used, what side of the complainant's face was slapped, where his hand was, where he was standing, and so

⁵¹ There were two Crown lawyers in the *Ghomeshi* trial, Michael Callaghan, who examined the first and third complainants, and Corie Langdon, who examined the second complainant.

⁵² The February 4th transcript was produced as three documents. What I'm referring to as February 4a contains the majority of the day's proceedings. February 4b contains the first 24 pages of the day's cross-examination. February 4c contains the judge's ruling on the public release of a photograph.

on; these questions take up four pages of transcript. In this way, the complainant's attempt to emphasize her *non*-consent by mentioning it in direct contradistinction to the consensual nature of the kissing is interrupted and her two evaluations of consent are separated by four transcript pages of specific questions about the mechanics of the incident. The Crown controls the unfolding of information such that the kissing and the assaultive behaviour are distinguished as seemingly distinct and separable events despite the fact that they occurred within seconds of each other and the complainant describes them in her police statement as "jumbled".

Although the complainants in the *Ghomeshi* trial do get opportunities for lengthy turns at talk during in-chief examination, at times occupying two or three uninterrupted pages in the transcript, they lack the narrative and legal capital required to legitimately "grasp together" (Ricoeur 1984: 66) the episodes that they recount and are therefore limited in their ability to impose meaning on the events. According to Ricoeur (1984: 67), the work of configuration "transforms the succession of events into one meaningful whole", such that the connections between events are seen as significant and explanatory, rather than merely successive. During the in-chief examinations of the *Ghomeshi* trial, the complainants' episodic stories were typically disconnected from each other through series of close-ended questions. When the complainants attempted to draw meaningful connections, the Crown would often interrupt and/or re-direct, leading the complainants to focus on providing the details of one event at a time. In this way, the Crown lawyers exerted configurational power and controlled the ways in which the complainants could legitimately recount or move between episodic stories. The complainants' episodic stories and evaluations were treated as distinct and separable as the Crown lawyers worked to "break [...] up" (February 4a, 2016: 29) events in order to expound on them one at a time. Although all acts of narration, including the complainants' work of recounting episodic stories, involve a

degree of selecting and evaluating the meaning of various events and details (Gubrium & Holstein 1998: 166; Herrnstein Smith 1980: 229; Onega & Landa 1996: 3; Riessman & Quinney 2005: 394), the complainants did not have configurational power in the legal field to legitimately bring the episodes together to form an overarching narrative.

The practices of interrupting, re-direction, and piecemeal elicitation engaged in by the Crown during in-chief examination can be understood as instances of symbolic violence. The complainants generally complied with the Crown's narrative domination and configurational power, recognizing it as a natural component of witness examination. For instance, in later examples from the transcripts we see the complainants checking in with the Crown to make sure their episodic stories meet the Crown's expectations. The Crown's control over how the complainants' episodic stories are configured into a narrative whole was perceived by the lawyers, judge, and complainants alike as inherently legitimate. As the Crown configured a narrative whole out of the complainants' episodic stories, the relations of domination upon which these practices rest and which they reproduce were misrecognized as nonviolent and simple adherence to legitimate legal procedure. In fact, the defence's frequent reference to how the Crown gave the complainants "every opportunity" to tell their stories demonstrates that the relations of configurational power that structured in-chief examination practices were rendered invisible in the courtroom.

The techniques of disconnecting episodic stories and re-directing configurational work appeared specifically during in-chief examination as the Crown attempted to elicit the complainants' accounts and evaluations of their experiences while simultaneously controlling the direction of the overall narrative. During cross-examination, however, the complainants were rarely asked to provide episodic stories, meaning that the defence lawyer did not need to work at

‘breaking up’ the episodes. Instead, the defence lawyer reorganized and imposed alternate meanings on many of the episodic stories recounted during in-chief examination. As discussed next, this was often done through the creation of narrative twists.

2.2. The Defence’s Narrative Twists and the Complainants’ Position as Characters

The doxic relations of legal witness examination positioned the complainants during cross-examination not as narrators of their own experiences, but as *characters* within a series of unfolding episodic events. By contrast, the legal capital and configurational power of the defence lawyer conducting the cross-examinations, Marie Henein, allowed her to act as narrator of the complainants’ experiences. In particular, she was able to configure events and evaluations in relation to narrative twists that she eventually presented to both the complainants and the courtroom audience. Despite the domination embedded in this dynamic (i.e. complainant as character and defence lawyer as narrator), the cross-examination process appeared as one in which the defence merely *revealed* inconsistencies in the *complainant’s* narrative. The complainant’s own words and previous accounts formed the basis of the defence’s cross-examination, obscuring, or at least downplaying, the fact that it was only through the defence lawyer’s configurational work that the events took on particular meanings.

Discussing Ricoeur’s work on narrative, Dowling (2011: 11, 48, 88) points out that the narrator position typically provides a perspective from which one can look back on events and thereby determine where they fit and what they mean within the narrative as a whole – a perspective that is not possible from the position of either a character or an audience member, who experiences or hears of the events as they unfold in real time. According to Ricoeur (1984: 99), past events, when they were experienced in the present, were “confused, multiform, and unintelligible” and it is only by looking back on them that we can organize and interpret them as

having purposeful and causal meanings. While characters move “forward [linearly] in a state of imperfect knowledge about the consequences of their action”, the narrator “gaz[es] backward on events from a fixed [...] perspective, hav[ing] arrived at certain conclusions about their meaning or significance” (Dowling 2011: 88). In other words, while characters guess at what certain actions or experiences might mean in the overall chain of events comprising the narrative, narrators are in the privileged position of knowing where the narrative is going and thus what a certain action or claim might mean in relation to other episodes.

During cross-examination, processes of legal questioning in which the defence lawyer exercised configurational control existed without scrutiny and the complainants’ continued participation in the legal game required them to occupy the position of *characters* who were uncertain of what their statements might mean in terms of the overall narratives being constructed by the defence. As Henein configured episodic stories into a narrative mosaic, the complainants existed in a state of “imperfect knowledge” (Dowling 2011: 88) about the trajectory or overall configuration of this unfolding narrative. Complainants differ from narrative characters in that they, like a narrative audience, are aware of the viewpoint and meanings that the process of narrativization is imposing. The experience of hearing a narrative involves being “pulled forward” (Ricoeur 1984: 150) by the expectation that events will be shown to have particular meanings in the overall narrative configuration (Capers 2013: 860-1; Dowling 2011: 49). The complainants in the *Ghomeshi* trial, like a narrative audience and unlike most narrative characters, were aware of Henein’s configurational work as it unfolded. The position available to the complainants during cross-examination was thus one of both characters within and audiences of narratives about their own experiences. A narrator’s configuration of events is also a “work of judgment” (Ricoeur 1984: 178; see also Dowling 2011: 48) that evaluates and imposes meaning

upon the characters and their actions in ways that may differ from the characters' own understandings of the events. Henein's legal habitus and legal capital provided her with significant configurational power in the courtroom, allowing her to occupy the narrator position and thereby to judge and interpret the complainants and their actions.

The construction of narrative twists or 'peripeteia' was one of the key techniques through which Henein exercised configurational control over the narrative mosaic constructed during cross-examination. Through narrative twists, she used the complainants' position as unknowing characters to frame them as deceptive, impose her interpretation of events, and configure inconsistencies (the specific focus of the next subsection). The notion of peripeteia, described in Aristotle's *Poetics*, refers to a sudden change or "reversal in circumstances" (Bruner 2002: 5; see also Ricoeur 1984: 43) that disrupts a narrative's expected sequence of events. During cross-examination, these sudden reversals or moments of peripeteia can occur within the span of only a few questions or they can be created by establishing certain pieces of information whose significance is not revealed until much later in cross-examination when another action, event, or detail is narrated. In the latter case, the initial information pre-configures the event to be described later, pre-emptively providing the later event with meaning so that when it is revealed its implications within the defence's narrative immediately become clear. The complainant and the courtroom audience, however, are unaware of what the initial information will eventually mean within the narrative the defence has grasped together or configured into a whole. For instance, throughout the cross-examination of the first complainant Henein repeatedly emphasized that the complainant told both the police and the court that after the alleged assault she had no further communications with Ghomeshi and found hearing his voice on the television or radio to be re-traumatizing. This pre-configuring work served to further dramatize Henein's

narrative twist when she later revealed two emails the complainant sent to Ghomeshi after the alleged assault took place.

When creating narrative twists within only a few lines of cross-examination, Henein typically asked the complainant to confirm a particular statement and then immediately provided a contradictory event, framing it as what was *really* going on. For example, in the following excerpt the second complainant's claim to have felt compassion for Ghomeshi is emphasized only to be immediately upended through reference to a message she sent to a friend:

Excerpt 3.2

Q. And as I understand it, what you told us today is that you wanted to protect Mr. Ghomeshi, right? You have compassion for him, right?

A. I did say that, yes.

Q. But you don't have compassion for him, right?

A. That's not true, I do have compassion for him.

Q. You do have compassion for him?

A. Yeah, I do.

Q. You feel sympathetic towards him?

A. Absolutely.

Q. All right. And that is why you told your friend [...] "I want him fucking decimated."
(February 4a, 2016: 79-80)

The way Henein organizes this section of cross-examination presents the complainant's claim to have felt compassion for Ghomeshi as a ruse that is suddenly exposed by the complainant's own words. By configuring the information in a particular way and emphasizing certain statements only to upend them through a sudden reversal, Henein constructs moments of peripeteia that dramatize the discordance between the complainants' claims and Henein's evidence. These narrative twists serve to discredit the complainant; they create the impression that things are not as they seem and, by extension, things are not as the complainant led the court to believe.

Although the second and third complainants⁵³ were briefly re-examined by the Crown, giving them an opportunity to respond to some of the interpretations and inferences presented during cross-examination, they did not have the configurational power to reconfigure the events or episodes. Furthermore, there was a degree to which the alternate explanations provided in re-examination seemed to fall flat in comparison to the rising crescendo and moments of peripeteia in Henein's narrative. By the time re-examination occurred, the defence's narrative twists had already been presented and the complainants' motives and actions, as characters in the defence's narrative, had already been interpreted and judged. Unlike the confusion, uncertainty, and unintelligibility of experiencing events in the present (Ricoeur 1984: 99), the narrator's perspective, which is revealed to the audience as the narrative unfolds, is one in which the narrative "already exists as a completed whole – outcome known, motives weighed, characters judged" (Dowling 2011: 48). Henein's legal capital and her position as a defence lawyer enacting her legal habitus provided her with significant configurational power during cross-examination, allowing her to draw together events to convey particular insinuations regarding the complainants, their actions, and their motivations. In this context, re-examination appears as an after-the-fact attempt at explanation by narrative *characters* whose actions and motives have already been interpreted via Henein's narrative.

Henein's narrative twists function as symbolic violence in that they are conditioned by a relation of domination whose legitimacy exists without question in the legal realm and which involves the continued participation of those in positions of subordination. Although her control over the trajectory of the cross-examinations would have been apparent, the fact that Henein, as a

⁵³ The first complainant is not re-examined, though during cross-examination she is given a very brief opportunity to explain the post-incident emails she sent to Ghomeshi.

cross-examining defence lawyer, had configurational control and that the complainants were narratively disadvantaged existed as part of the doxic realm of that which is beyond scrutiny or question. The domination of the defence lawyer over the witness during cross-examination and the implications that this has for narrative configuration is embodied within the legal habitus as a natural and inherently legitimate relation. To continue participating as witnesses in the legal field, the complainants had to occupy the positions available to them, even if that meant occupying the position of a character within and audience member for Henein's narrative.

As non-legal agents who did not have the embodied know-how privileged in the legal field and whose role in the legal process was to provide information and episodic stories for the use of legal professionals, the complainants did not have configurational power in the courtroom. Instead of being able to order and draw meaningful connections between statements and events, the complainants had to wait for Henein to reveal what she, as the defence lawyer and narrator, "has known from the outset" (Dowling 2011: 49) – that is, what events will be included, how they will be configured, and what they will mean within her narrative⁵⁴. During the brief opportunities they had to explain their actions and respond to some of the defence's claims, their explanations had limited symbolic power because of the discrediting force and symbolic violence of Henein's narrative twists and the inconsistencies she had configured throughout cross-examination, as I discuss in the next subsection.

2.3. Configuring Inconsistencies

⁵⁴ I do not mean to imply that the complainants forgot or were completely unaware of certain events until Henein revealed them. While the complainants may or may not have recalled the events themselves (e.g. corresponding with Ghomeshi; comments made to friends), the point is that they could not pre-emptively know how Henein would configure those events and statements in relation to each other to construct a particular narrative.

As several scholars examining law and narrative argue (e.g. Capers 2013: 860-1; Duncanson & Henderson 2014: 161-4; Jackson 1988: 58-9; Rideout 2008: 64-5; 2013: 75; Vogl 2013: 71), the stories of legal witnesses are expected to be consistent (i.e. told the same way each time) and coherent (i.e. able to fit together without contradiction). Discussing the narrative demands in refugee law, Vogl (2013: 75) argues that there is an assumption that “people conveying ‘true’ stories will tell the same story each time it is reproduced, and that [...] every inclusion or exclusion is by design, not by accident”. Consequently, any inconsistencies between a witness’s accounts of an experience or event could undermine their credibility (Baillot, Cowan & Munro 2009: 215-6; Vogl 2013: 74-5). Quoting from the Ontario Court of Appeal in *R. v. M.G.* (1994), Henein states in her closing arguments that inconsistencies in a witness’s testimony can sometimes be indicative of the witness’s “carelessness with the truth” (February 11, 2016: 77). On the other hand, *consistency* in a witness’s account may not necessarily contribute to her perceived credibility; Henein argues in her closing arguments that “a witness who simply repeats the same story over and over does not or is not necessarily credible or reliable [...] A concocted statement repeated on more than one occasion remains concocted” (February 11, 2016: 69-70). While *inconsistencies* in a witness’s testimony can undermine her credibility and present her as “careless with the truth”, *consistencies* do not necessarily increase her perceived credibility and may be dismissed as insignificant.

Furthermore, the perceived plausibility of legal narratives often hinges on the degree to which the events and details recounted are internally ordered such that the various events contribute to an overall point and fit together without contradiction (Jackson 1988: 58-9; Rideout 2008: 64-6; 2013: 75); any sense of haphazardness or ambiguity could make a narrative seem implausible (Bennett & Feldman 1981: 88; Vogl 2013: 76). Speaking of how the discordance of

peripeteia threatens, but does not overcome, concordance in Aristotle's notion of tragedy, Ricoeur argues that the art of narrative configuration "consists in making this discordance appear concordant" and that "[t]he discordant overthrows the concordant in life, but not in tragic art" (1984: 43). Similarly, White (1980) points out that "real events do not offer themselves as stories" (8) and that it is the process of narrative construction that allows events to "display the coherence, integrity, fullness, and closure of an image of life that is and can only be imaginary" (27). That said, Ricoeur (1984: 73) also argues that we must not assume in a binary fashion that lived experiences are *discordant* and narratives are *concordant*, as "[e]mplotment is never the simple triumph of 'order'". If narrative configuration involves creating the appearance of concordance out of discordance, then we can speak of narrative as having a sort of "discordant concordance" (Ricoeur 1984: 42); for example, narrative configurations can mobilize moments of sudden discordance to create narrative twists.

Legal narratives are often interpreted through standards associated with literary drama, wherein a sense of coherence or concordance is created and each event or piece of information is expected to have a purpose in the overall action or meaning of the story (Capers 2013: 801; Dershowitz 1996: 100-2). However, this expectation, which is implied in rules of evidence that require all information be relevant to the case (Swiss 2014: 398, footnote 6), does not reflect how events in real life "can be out of sequence, random, purely accidental, without purpose" (Dershowitz 1996: 100). Although there are literary works that challenge narrative demands for closure and coherence (Richardson 2012: 80), law tends to be fairly traditional in its narrative expectations; as Yovel (2004: 130) argues, "[c]ourts are adherents to Aristotelian poetics of 'unity' of plot, action, and closure, and have little if no use in waiting for Godot". In this sense, the law tends to demand a narrative coherence that contradicts the complexity, confusion, and

lack of closure typical of lived experience. Furthermore, expecting witnesses' accounts to be consistent and coherent overlooks how the organization of narrative capital and configurational power in the courtroom affords them very little control over how events are configured.

Unsurprisingly, a key defence tactic in sexual assault cases involves demonstrating inconsistencies and contradictions in a complainant's accounts (Busby 2014: 262; Gotell 2002: 282-3; Matoesian 1995: 679). Although expecting an account to be told the same way each time and free of contradictions may create unreasonably high narrative standards, particularly given the complainant's lack of configurational power in the courtroom and the confusion that can characterize lived experiences, any indications of inconsistency may be used to undermine a complainant's credibility. I argue that inconsistencies are not simply uncovered nor do they exist independent of context, but instead are *made meaningful* through the defence lawyers' configurational work (Matoesian 2001: 157). This is not to suggest that complainants' accounts would otherwise be somehow perfectly coherent and consistent and that the defence creates inconsistencies out of nothing; as pointed out above, events and lived experiences do not inherently possess the coherence that narrative attempts to impose on them. Nor is it to suggest that the complainants in the Ghomeshi case did not attempt to withhold information or to mislead the police, as this is not something about which I can make any definitive claims. Instead, I suggest that inconsistencies in how a complainant recounts events do not signify on their own. They must be configured and imbued with particular meanings. Moreover, inconsistencies must be presented in a way that impedes potential explanations and appears to supersede *consistencies* in the complainant's testimony. During the cross-examinations of the *Ghomeshi* trial, there were several techniques that Henein employed to configure inconsistencies.

When configuring inconsistencies during cross-examination, Henein discredited the complainants' attempts to voice inferences about what was said or speak to what was *meant* by a particular action or statement. As aforementioned, a key aspect of narrative configuration involves "making [...] discordance appear concordant" (Ricoeur 1984: 43). Consequently, configurational power involves the ability to legitimately make sense of a discordant collection of circumstances, events, motives, actions, and so on, in a way that imbues them with concordance. For instance, when narrating one's own experiences, seemingly discordant events or actions can be brought into concordance through reference to what they *meant* or the *intention* behind them. In the cross-examinations of the *Ghomeshi* trial, however, the complainants are typically denied the opportunity to legitimately explain what they thought an action or statement meant. Often this occurs through Henein dismissing what was *intended* and strongly emphasizing what was actually *said*. This contributes to the defence's configuration of inconsistencies by discrediting the complainants' attempts to configure concordance out of apparent discordance.

Conversely, Henein's legal capital and configurational power allow her to make pointed inferences about the meanings of particular actions and statements. In fact, making inferences about what an event, action, or statement *meant* is central to her work of configuring inconsistencies. For example, in the following excerpt Henein conflates the meaning of the phrases "in shock" and "being shocked" in order to create discordance:

Excerpt 3.3

Q. Now, you told Mr. Callaghan yesterday that you weren't *in shock*. I'm going to quote you. You said, "I wouldn't say I was *in shock*, but I wasn't sure what had happened. He had been so nice." Do you recall giving that evidence under oath?

A. I do.

Q. All right. And do you recall that when you were speaking to the media, to The Star and to CBC, that you described yourself as *being shocked*?

A. I don't remember, but I believe you. (February 2, 2016: 11, emphasis added)

The terms “in shock” and “being shocked” may be understood as having very different meanings; in particular, “to be *in* shock” can refer to a profound state of mental or emotional disturbance and even to a medical condition, whereas “to *be* shocked” can refer simply to the experience of surprise. It is thus possible for the complainant to have been “shocked” without being “in shock” – an interpretation that would suggest no discordance in what she said. To configure an inconsistency, however, Henein treats the meanings of these terms as interchangeable: “you told Mr. Callaghan yesterday that you weren't in shock [...] [but] when you were speaking to the media [...] you described yourself as being shocked”. In this way, Henein discredited the complainants' attempts to explain inconsistencies through reference to and inferences about what something *meant*, even as her own process of configuring inconsistencies relied upon making key inferences about meaning.

Topic transition and summarization were two key techniques that Henein drew on throughout the cross-examinations to configure and highlight inconsistencies. Moments of transition between topics allowed Henein to have the final word on the meaning of the preceding topic and to pre-emptively frame the next topic. For example, Henein frequently used phrases such as “Let's talk about something else you add” (February 1, 2016: 125) to transition between discussions about information the complainant provided in some accounts but not others. In so doing, she suggested and emphasized an inconsistent and potentially untrustworthy pattern of disclosure.

Similarly, the relations of configurational domination in the courtroom underpinned Henein's successful use of summarization, or what Fairclough refers to as “formulation”. This

technique privileged Henein's interpretation of events and allowed her to configure several events or statements so that their implied meanings build upon one another. According to Fairclough,

Formulation is either a rewording of what has been said [...] or it is a wording of what may be assumed to follow from what has been said, what is implied by what has been said. Formulations are used for such purposes as checking understanding, or reaching an agreed characterization of what has transpired in an interaction. But they are also used for the purposes of control [...] leading participants into accepting one's own version of what has transpired, and so limiting their options for future contributions. (1989: 136)

By rewording and summarizing the complainants' statements, Henein imposed her own version of an event or series of events while simultaneously using phrases such as "just so I understand" (February 4a, 2016: 61) to present her configuration merely as an attempt to "check understanding". Since each *event* in Henein's formulation was typically a rewording of the complainant's own statements about what transpired, it was difficult for the complainant to do anything but confirm the accuracy of Henein's statements, thereby participating in her own subordination. As she confirms the accuracy of the *events* in Henein's formulation, the complainant also implicitly states her agreement with the formulation's underlying meanings and implications. For instance, Henein may summarize additional details disclosed through the examination process, referring to each detail as something else the complainant "added", again implying intentional deception.

By pre-emptively framing the inconsistencies she will present later on, Henein also added weight to inconsistencies and limited the complainants' ability to explain them. For instance, Henein established early on during each cross-examination that the complainant knew she needed to disclose everything to the police and that she felt safe when providing her police statement and therefore had no reason not to be candid. In so doing, Henein pre-configured the

inconsistencies between the police statement and the in-chief examination that she later raises, making it more difficult for the complainants to claim they were simply confused or afraid when speaking with the police. Furthermore, pre-emptively establishing certain points, such as the complainants' understanding of their oath to tell the truth, lent further legitimacy to Henein's claims about what the inconsistencies *meant* once revealed.

A key part of Henein's configurational work involved interpreting and imposing particular meanings on inconsistencies in the witnesses' accounts so that they made sense within and contributed to her overarching narrative. In particular, inconsistencies were not simply presented, but framed as the result of the complainant's deliberate attempts to mislead criminal justice professionals – as the intentional and deceptive actions of an agent who was given “all the opportunity to tell” (Henein, February 5, 2016: 24) everything before it was revealed in cross-examination. This interpretation and narrative configuration obscured other possible explanations for inconsistencies, such as embarrassment, unequal power relations, and confusion. Moreover, it obscured the role that Henein herself played in configuring and dramatizing these inconsistencies. In this sense, the techniques through which Henein configured inconsistencies constituted an exercise of symbolic violence. Not only was her narrative and configurational control misrecognized as a natural component of legal process, but the exertion of her configurational power was obscured as the inconsistencies appeared as the outcome of the *complainant's* narration.

2.4. The Complainants' Inability to Impose a Narrative Ending

According to Ricoeur, the configurational dimension of narrative “imposes the ‘sense of an ending’ [...] on the indefinite succession of events” (1984: 67) or “open-endedness of mere succession” (1980: 179), providing a viewpoint from which the successive episodes can be

retrospectively understood as forming a congruent whole. In order for a narrative to be understood, its ending must be recognized as compatible and congruent with the narrative's episodes, and therefore as acceptable even if not desirable or predictable (Ricoeur 1984: 67). Similarly, Hayden White (1980: 27) argues that narratives provide past events with a sense of closure that enables them to be evaluated as morally meaningful. With respect to legal narratives, however, the conflict or struggle comprising the action of the narrative typically remains unresolved until the case has been decided; a legal narrative's ending or resolution is not provided until the end of the legal process when an official decision is rendered (Foley & Robbins 2001: 467; Kaiser 2010: 166). As James Boyd White (1985: 36) points out, legal processes involve "telling a story about what has happened in the world and *claiming a meaning for it by writing an ending to it*" (emphasis added). In this way, legal narratives retain a sense of incompleteness until the fact-finder writes an official ending, and thus an official set of meanings about the events.

During in-chief examination, the courtroom relations of configurational power did not permit the complainants to provide closure or a "sense of an ending" onto the events recounted. Instead, the in-chief examinations abruptly ended when the Crown had no more questions, leaving a lingering sense of open-endedness or incompleteness. During closing arguments, the Crown lawyer had the opportunity to configure the events such that they advocate and point to a seemingly appropriate resolution. In fact, some legal scholars argue that by portraying their desired legal outcome as the appropriate or fitting resolution to the main conflict of a compelling narrative, lawyers can propose outcomes that appeal to the judge's emotions and provide a sense of poetic justice (Chestek 2008: 161; Foley & Robbins 2001: 467, 472; Kaiser 2010: 165-166). The complainant, however, had no such opportunity.

In this way, the close of an in-chief examination was not the end of the Crown lawyers' narrative work and thus did not need to propose an "end point" or "point of view from which the story can be perceived as forming a whole" (Ricoeur 1984: 67). It was during closing arguments that the Crown lawyers tied together the narrative strands from the three complainants' testimonies in order to imply the moral and legal correctness of a particular ending – that is, the finding of Ghomeshi as guilty. The sense of incompleteness and open-endedness at the cessation of the in-chief examinations therefore constitutes another instance of symbolic violence in which the Crown's configurational power and the relation of narrative domination between the complainants and the lawyers was misrecognized. While the complainants supplied the episodic stories, it was the Crown lawyers who configured them towards a particular ending. At the end of the in-chief examination, the complainant's role in the Crown's narrative has come to end, but the narrative itself has not. The complainant's narrative contribution of episodic stories therefore ended with a sense of incompleteness that did not characterize the Crown's overall configurational work.

Unsurprisingly, each cross-examination in the Ghomeshi trial ended in a way that punctuated the driving point of Henein's narrative configuration and plot twists. Her cross-examinations of the first and second complainants ended with an emphasis on their flirtatious post-incident correspondence with Ghomeshi, which they did not disclose to the police, Crown, or judge. Similarly, Henein ended her cross-examination of the third complainant by highlighting how the complainant did not disclose that she engaged in post-incident sexual activity with Ghomeshi until after the trial had already started and, according to Henein, because she thought she might get "caught". In this way, Henein provided a final viewpoint for retrospectively understanding the events and evaluating them as a whole, namely, one that viewed the

complainants as deceptive and manipulative. As aforementioned, even when the second and third complainants were given the opportunity during re-examination to respond to some of the defence's claims, they were not in a position to reconfigure the events. They did not have the legal capital and configurational power to provide an alternate viewpoint for reinterpreting and retrospectively evaluating the recounted events.

As James Boyd White (1985: 175) points out, legal narratives “are told as grounds of action” such that “injury requires revenge; innocent suffering requires compassion; and so on”. He argues that narratives told in particular ways can create “our most important ‘oughts’: our sense that a particular story is incomplete without a certain ending, which we can supply” (J.B. White 1985: 175). Although it is the judicial opinion that supplies the official ending for the legal narratives recounted during trial, the organization of configurational power in the courtroom allows the Crown and defence lawyers to order and present events such that a particular course of action or ending (i.e. judicial decision) seems appropriate; the complainants do not have this power. Instead, their in-chief testimonies end rather abruptly and retain a distinct sense of incompleteness, the close of each cross-examination contributes to Henein's narrative about their deception, and the two re-examinations do not provide an opportunity for re-configuration or narrative closure.

Conclusion

During the *Ghomeshi* trial, unequal relations of configurational power structured the courtroom narrative practices and allowed the lawyers to manipulate the complainants' episodic stories into coherent narrative mosaics. The particular narrative practices that occurred during witness examination depended on and reproduced misrecognized relations of domination, thereby constituting instances of symbolic violence. Although the complainants were relied upon

to provide the episodic dimensions of the narratives produced during in-chief examination, they were not in a position to control how the events were configured in relation to one another during either the in-chief or cross-examination. Their relational position in the courtroom afforded them very little configurational power, that is, they were limited in their ability to configure events into a legitimate narrative mosaic. During both the in-chief and cross-examinations, the know-how or embodied legal capital embedded in the lawyers' legal habitus and the authority of their position within the courtroom allowed them to legitimately redirect the complainant, transition between topics, summarize a series of episodes, decide when the examination was complete, and create implicative connections between events. In this sense, the lawyers' legal capital functioned as narrative capital in the courtroom by allowing them to legitimately control the configurations constructed from the complainants' episodic stories. Moreover, since narrative configurations order and impose meanings on events in a way that communicates a particular point about what happened, configurational power functions as a form of symbolic power, namely, the power to legitimately assert definitions, meanings, and visions of the social world.

The narrative practices discussed in this chapter are instances of symbolic violence. In particular, the unequal relations of configurational power were misrecognized as the natural enactment of the lawyers' legal role. Moreover, the complainants' ability to legitimately participate in the legal game required them to comply with their position of subordination in relation to the lawyers and judge. According to Bourdieu (1987b: 835), legal professionals possess a monopoly over "the tools necessary for legal construction"; as I have argued, this includes the ability to create legitimate legal narrative configurations. To be misrecognized as legitimate, this monopoly must be experienced as a natural component of legal process. With respect to the complainants, this means that the lawyers' ability to control and manipulate the

narrative during witness examination was *experienced* as something that cannot be questioned. Moreover, the practices through which the lawyers exercised their configurational power depended on the ongoing participation of the complainants, who supplied the episodic stories that were then configured, discredited, rendered inconsistent, and manipulated to form the Crown's and the defence's competing narrative mosaics.

As discussed in the previous chapter, narrative capital and symbolic power can be *struggled over* as agents attempt to impose their own account of events and vision of the world. During the *Ghomeshi* trial, this struggle primarily took place between the Crown and the defence who competed to have their narrative configurations accepted as the basis of the judge's decision. That said, the complainants also struggled at several points during the trial to configure events despite how the unequal distributions of legal capital and configurational power limited their ability to do so successfully. In particular, the complainants did struggle to exert their own configurations and interpretations of the episodic stories and resisted the defence lawyer's narrative configurations. In the following chapters, I discuss these moments of struggle and demonstrate both their doxic elements and the ways in which the legal professionals reasserted configurational and symbolic power. Although there were key struggles over narrative configuration, the legitimacy of the underlying relations of configurational power existed without scrutiny during the trial. In other words, the complainants attempted to shape the *content* of the Crown's narrative configuration and they questioned the *content* of the defence's configuration, but the relations of domination underlying, enabling, and reproduced through these configurations remained unquestioned. When the complainants disrupted a particular narrative configuration, the lawyers' misrecognized configurational power allowed them to authoritatively

reassert narrative control and dismiss or discredit the complainants' attempts to impose their own narrative configurations.

The techniques of narrative domination and the symbolic violence of narrative configuration discussed in this chapter are not necessarily specific to sexual assault trials; in fact, these narrative structures and practices are intricately connected to doxic elements of legal positivism and objectivity, which I explore in the next chapter. However, the manifestation of this symbolic violence within the particular context of a sexual assault trial influences both their poignancy and their implications. Discussing the linguistic strategies mobilized by defence lawyers in rape trials, Conley and O'Barr (2005: 32) state that these are "strategies of domination employed in the service of one accused of domination". In other words, the physical violence involved in sexual assault parallels the symbolic violence of the trial, contributing to complainants' experiences of re-victimization. The narrative strategies through which the lawyers' exercised configurational power during the *Ghomeshi* trial may therefore be particularly poignant given that the allegations involved acts of physical violence about which each of the women remained silent for over a decade. In the next three chapters, I explore the doxic logic and rules of the game underlying and reproduced through the narrative practices of the *Ghomeshi* trial. In so doing, I provide many more substantive examples of the different narrative practices outlined above, paying particular attention to their doxic underpinnings.

Chapter Four – Playing the Game: Narrative Domination and Law’s Doxic Standards of Impartiality, Autonomy, and Objectivity

Introduction

Throughout the *Ghomeshi* trial, notions of legal impartiality, autonomy, and objectivity functioned as doxic elements contributing to the symbolic violence of misrecognized configurational power in the courtroom. These elements were embedded in the juridical habitus of the legal professionals and were thus enacted and reproduced through their practices. In this context, the relations of configurational domination that enabled the lawyers to legitimately manipulate the complainants’ episodic stories into narrative wholes were misrecognized as a necessary part of keeping the legal process impartial, objective, and untainted by the legally irrelevant. Even as they competed with each other for narrative capital, the Crown and defence lawyers worked together to maintain the legal/extra-legal boundary and the legal capital that it bestowed upon them. The reproduction of symbolic domination in the courtroom was not achieved through deliberate planning or through uniform practices, but rather was “the result of innumerable actions which do not intend to implement that function and which may even be inspired by contrary objectives” (Bourdieu 1987b: 852). In fact, Bourdieu (1987b: 852; 1991: 58) suggests that the organization of a field tends to be reproduced through struggles over particular stakes within that field (e.g. competition between lawyers over narrative capital and the official outcome of a legal case). These struggles tend “to produce and reproduce the game and its stakes by reproducing, primarily in those who are directly involved, but not in them alone, the practical commitment to the value of the game and its stakes” (Bourdieu 1991: 58). Although this is similar to Smart’s (1989: 161) argument that using the language, methods, and procedures of law to produce legal reforms means accepting and reinforcing law’s power and legitimacy, what a Bourdieusian analysis adds is consideration of how the reproduction of law’s

legitimacy and relations of domination depend on the unspoken and unthought practical sense of juridical habitus and its functioning in the juridical field as a form of embodied capital. As the lawyers' struggled to assert specific meanings and competed over particular outcomes, they also enacted the dispositions of their shared juridical habitus and reproduced the legal game and its relations of narrative domination.

This chapter examines how doxic standards⁵⁵ of legal impartiality, autonomy, and objectivity underpinned the relations of configurational power in the *Ghomeshi* trial and were reproduced as the legal professionals enacted the dispositions of juridical habitus. In other words, I am concerned with the doxic logic that is bound up in the symbolic violence of courtroom narrative practices and the ways in which women's accounts of sexual assault are discredited. In the first section, I examine how the lawyers and the judge in the *Ghomeshi* trial presumed that the legal process was capable of operating in an impartial and fair manner that excludes stereotypes about sexual assault and provides a haven of rationality and certainty against the biases and passions of the extra-legal realm. Next, I argue that the interruption and redirection of the complainants' attempts at configuration and interpretation during in-chief examination were misrecognized as legitimate practices of excluding the potential emotionality and partiality of the legally irrelevant. I also show how the complainants attempted to carve out opportunities for narrative configuration while simultaneously complying with the Crown's narrative control. Finally, I examine how the Crowns, the defence, and the complainants mobilized the language of objectivity for different purposes and with varying degrees of success. In the analyses offered in

⁵⁵ In referring to these doxic standards, I do not mean to suggest that law is always seen as impartial, autonomous, and objective. Instead, I mean that these operate as taken-for-granted standards or goals of the juridical field that, when attained, are presumed to render legal practices, decisions, and procedures legitimate. Playing the legal game means accepting that, despite the ways that human beings may fail, the legal process is legitimate precisely because it privileges impartiality, rationality, and autonomy.

this chapter, I am particularly interested in how the tenets of liberal legalism (see Chapter Two) existed as doxic elements in the courtroom and how they contributed to the disqualification of the complainants' practical sense of narrative relevance and the legal professionals' misrecognized monopoly over narrative configuration.

1. “Courts don’t play favourites”: Legal Impartiality and Equality before the Law

During the *Ghomeshi* trial, there was some acknowledgement by legal professionals that stereotypes about sexual assault and problems during procedures of reporting or testifying can tarnish the impartiality of the legal process. These potential points of partiality or unfairness, however, were treated as inapplicable to the case at hand. The implication was that, although it can happen, the legal process was not compromised in this case. Defending the legal practices involved in examining and evaluating witness testimony, for instance, Henein states in her closing arguments that “[c]ourts don’t play favourites with one kind of a witness or another” (February 11, 2016: 78). In this section, I consider how during the *Ghomeshi* trial the legal professionals reproduced impartiality and procedural fairness as doxic standards that legitimize legal truth-seeking practices and their underlying relations of domination. In reproducing these standards, the lawyers and judge enacted the practical sense of their juridical habitus that “constitutes the entry ticket into the juridical field” (Bourdieu 1987b: 820). I begin by examining how stereotypes about sexual assault were treated as though they could be accounted for and excluded from rational processes of legal reasoning. Then, I consider how law’s methods of testing evidence were misrecognized as fair, impartial, and set apart from the passions and prejudices of the extra-legal realm.

1.1. Accounting for and Discounting Stereotypes about Sexual Assault

As discussed in Chapter One, feminist legal scholars have long pointed to the prevalence of gendered cultural stock stories and presumptions that impact how the criminal justice system processes sexual assault cases. Over the past 30 years in Canada, there have been several amendments to sexual assault law in an attempt to address some of these stereotypes and the difficulties they present when prosecuting cases of sexual assault. The present discussion concentrates on judicial recognition and consideration of stereotypical assumptions about sexual assault. Within judicial spaces, including the *Ghomeshi* trial, legal professionals sometimes expressly discuss rape myths. The Supreme Court, for example, has decried the lower courts' reliance on "inappropriate myths and stereotypes" (*R. v. Ewanchuk* 1999: 336), stating that stereotypes about how victims react to sexual assault (e.g. reporting the incident in a timely fashion) should not count against a complainant's credibility (*R. v. D.D.* 2000: 304; *R. v. W.(R.)* 1992: 136). In *R. v. Ewanchuk* (1999), Justice L'Heureux-Dubé stated that "[c]omplainants should be able to rely on a system free from such myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions" (*R. v. Ewanchuk* 1999: 336).

Within the context of this increased acknowledgement of how biased assumptions can compromise the impartiality of adjudication, knowing how to appropriately raise and address the issue of stereotypes can function as form of legal capital. In their discussions of rape myths, the lawyers and judge in the *Ghomeshi* trial drew on the embodied know-how of their juridical habitus to present themselves as adhering to the legal standards of impartiality. In so doing, they not only obscured how cultural stock stories are internalized within agents' habitus in ways that allow certain narrative trajectories and explanations to be experienced intelligible (see Chapter Five), but they also reproduced legal impartiality as a doxic standard that can be attained through

legal process. In particular, they suggested that problematic stereotypes and assumptions can be excluded from the legal reasoning process.

During his closing arguments, Callaghan stated that “the law is [...] clear that everyone reacts differently to sexual assaults and that post-assault behaviour should not necessarily be used in the assessment of a complainant’s credibility” (February 11, 2016: 14). Citing several prior decisions, he argued that “stereotypical assumptions of how one should react after a sexual assault” (February 11, 2016: 12) and negative inferences about delayed disclosure should not be used as a basis for dismissing the complainants’ evidence. In their closing arguments, the defence lawyers also raised the issue of stereotypical assumptions, though they did so in order to suggest their immateriality to the case at hand. For instance, Robitaille argued that the defence’s submissions are “not based on any stereotypical assumptions or anything having to do with how it is women should behave after being assaulted” (February 11, 2016: 42), but rather are “based on the witness’s own paradigm” (43). She asserted that post-incident correspondence was significant not because of assumptions about post-assault behaviour, but because of “the witness’s adamant evidence under oath” (42). Henein argued that “the relevance here is not how do we expect people to behave. The relevance is you, as a witness, said ‘This is what I did’, and the evidence shows that was a lie” (February 11, 2016: 74). In this way, the defence attempted to create distance between their submissions and stereotypes about sexual assault. The ways in which the Crown and defence lawyers discussed the issue of stereotypes constituted both externalizations of their legal habitus and instances of struggle over legal capital. Regardless of whether they actually thought that legal impartiality was possible, the importance of expressing their conformity to this legal standard formed part of their embodied and practical juridical know-how. By stating that legal decisions should not be based on stereotypes, the Crown warned

the Court of a possible source of bias and signaled his own commitment to upholding legal impartiality. Explaining that their arguments do not rest on stereotypes, the defence lawyers signaled that their discrediting of the complainants' accounts did not threaten legal impartiality. In both instances, the lawyers spoke out of a practical awareness that openly opposing the potential biases of stereotypes in the legal field is an important source of legal capital.

The doxic element of legal impartiality underpinned and was reproduced through the lawyers' discussion of stereotypical suppositions about sexual assault. Their attempts to expunge sexual assault stereotypes relied on the unspoken assumption that it is possible for the legal process and legal professionals to operate in a rational and impartial manner (Munro 2007: 43; Valverde 2006: 9). Furthermore, the lawyers reproduced liberal legalism's dichotomization of rationality/irrationality, facts/values, and objectivity/subjectivity (Matoesian 1995: 693; Naffine 1990: 26). Upholding law's claim to be on the rational, fact-based side of this divide, the Crown mentioned stereotypical expectations in order to suggest that they should be excluded from the decision-making process and the defence raised the issue of stereotypes in order to argue that they were not at play in the submissions being made. In making these statements, the lawyers enacted their legal habitus, specifically their practical sense that legal process should strive for impartiality and biases should be excluded and rendered inert through legal rationalization.

This was echoed in the judge's decision, where the potential impacts of false assumptions were also framed as a matter of balance:

Courts must guard against applying false stereotypes concerning the expected conduct of complainants. I have a firm understanding that the reasonableness of reactive human behaviour in the dynamics of a relationship can be variable and unpredictable. However, the twists and turns of the complainants' evidence in this trial, illustrate the need to be vigilant in avoiding the equally dangerous false assumption that sexual assault

complainants are always truthful. Each individual and each unique factual scenario must be assessed according to their own particular circumstances. (March 24, 2016: 23-24)

Not only does the judge suggest that false stereotypes about post-assault conduct are not at play in his decision because he has “a firm understanding” of the unpredictability of human behaviour, but he also indicates that there is an opposing bias that judges must be careful not to lapse into: “the equally dangerous false assumption that sexual assault complainants are always truthful”. According to Valverde (2006: 52), presenting oneself as occupying the “middle ground” between opposing positions lends one’s position and arguments the appearance of “reasonableness, fairness and objectivity”. Indicating his careful avoidance of stereotypes about post-assault conduct on the one hand and presumptions of truthfulness on the other, the judge presents himself as balanced and focused on the “factual scenario” of the case. Moreover, his concern about how “equally dangerous” it is to presume complainants’ truthfulness reproduces the doxic legal notion that the compassion and emotion elicited by allegations of sexual assault may pose a particular threat to legal impartiality (Larcombe 2005: 103-109). As mentioned at the end of Chapter One, the recent surge in high-profile and widely publicized allegations of historical sexual assault, as well as the emergence of social media hashtags such as #IBelieveSurvivors, may create a conjuncture in which legal suspicions are heightened. Indicating his ability to focus on the “factual scenario”, the judge demonstrates that he will not be swayed by the emotionally-charged nature of women’s accounts of sexual assault nor, presumably, by the case’s public attention or calls to believe survivors. Like the lawyers, the judge enacted a legal habitus that predisposed him to equate balance, impartiality, and rationality with fair and legitimate decision-making.

Unsurprisingly, stereotypes about sexual assault were also a frequent point of discussion in the newspaper coverage. Although there were many news articles that discussed how

stereotypes about sexual assault might keep women from reporting or cause them to be disbelieved (e.g. Hasham, *TorStar*, January 30, 2016; Levitt, *NatPost*, February 11, 2016; Mallick, *TorStar*, February 10, 2016), there were also several articles that suggested stereotypes were avoided in the *Ghomeshi* case (e.g. DiManno, *TorStar*, March 25, 2016; Wente, *G&M*, March 25, 2016). For instance, commenting on the defence's closing arguments, DiManno (*TorStar*, February 13, 2016) states that Henein "largely steered clear of victimhood stereotypes". Discussing how the *Ghomeshi* trial might go, Donovan (*TorStar*, February 1, 2016) quotes John Rosen, a Canadian criminal defence lawyer, who stated that "[n]ow we understand, as a more sophisticated society, that women have many reasons why they do not come forward [and] [...] [c]ourts have to be cognizant of that". This suggests that stereotypes about women who report sexual assault are offset by the enlightened understanding of our "more sophisticated society". While some applauded the court's impartiality and unwillingness to "be swayed by mob rule" (DiManno, *TorStar*, March 25, 2016), others viewed the *Ghomeshi* trial and verdict as replete with rape myths, as demonstrated by protestors with signs reading "[r]ape myths have no place in court" (Blatchford, *NatPost*, May 12, 2016). In this sense, the notion that stereotypes about sexual assault were excluded from the decision-making process in the *Ghomeshi* case was certainly not universally accepted; instead, the presence of these stereotypes was a source of contestation and debate. What existed without scrutiny as a doxic element in these debates over whether stereotypes played a role in this particular case was the notion that it is possible to separate cultural beliefs from rational assessments of fact. That is, legal impartiality, objectivity, and rationalization were reproduced as doxic standards of due process.

By treating stereotypes about sexual assault as something that can be accounted for and expunged from the legal reasoning process, the different legal agents overlooked how cultural

stock stories of sexual assault function by virtue of their being embedded in a shared socio-political and cultural habitus⁵⁶, which renders intelligible certain ways of narrating and interpreting accounts of sexual violence (e.g. as the sudden attack of a stranger)⁵⁷. Stereotypes do not have to be expressly stated, but rather are often entrenched in the narrative organization of events, that is, in the apparently factual account of what happened (see Chapter One). As narrators and audiences attempt to make sense of a series of events, they make inferences about which events are significant, what they might mean, and how they are causally connected (Cammiss 2006: 78; Rideout 2013: 73-4; Sherwin 1996/2009: 104-5). Since they are used to give the events an intelligible shape in the listener's mind and often enact unstated but pervasive cultural assumptions and stock stories (Berger 2011: 278), these inferences cannot be simply identified and separated from the reasoning process. This work of making inferences, drawing causal connections between juxtaposed events, and interpreting actions is facilitated by the stock stories and gendered relations of power that are inculcated as unthought dispositions of a collective socio-political and cultural habitus. When meaning-making schemas, such as gendered binaries and stereotypes about sexual assault, are internalized within the practical sense of habitus, they do not need to be thought about or consciously known (Bourdieu 2001: 33-42;

⁵⁶ The reason I chose to speak of a broader socio-political and cultural habitus is that the internalized stock stories, gendered binaries, heteronormative tropes, images of womanhood, and assumptions about memory that I analyze in this dissertation are not unique to the habitus formulated in any particular field (e.g. the juridical habitus). Instead, this socio-political and cultural habitus is shared by the various social agents in the courtroom (e.g. the complainants, lawyers, and judge). This reference to a broader socio-political and cultural habitus finds support in how feminists using Bourdieu's work have argued that "gender – like class – is part of a field, but that this field is the general social field, rather than any specific field of gender" (Moi 1991: 1034; see also Adkins 2004: 6; Lovell 2004: 49; McCall 1992: 842-3). In other words, these internalized dispositions are inculcated through the general social field. While there are moments that demonstrate the complainants' lack of legal habitus and the disadvantages that this creates for them in the courtroom, the legal professionals are able to externalize the know-how provided by both their legal habitus and the shared socio-political and cultural habitus.

⁵⁷ In the next chapter, I examine the gendered tropes and expectations embedded in the courtroom narrative practices of the *Ghomeshi* trial (e.g. feminine passivity and complicity with legal process), arguing that facts and evidence were narratively organized in a way that perpetuated certain stereotypes about sexual assault and women who claim to have been assaulted.

Lovell 2000: 27). When stereotypes are embedded in habitus, they are not easily shaken off even through express critique of rape myths because they operate at the level of *unthought* impressions and inferences that are experienced as part of how things are in the world.

Several legal scholars argue that it is impossible to step outside value judgements, moral evaluations, or cultural presumptions to make neutral claims about the social world (Cotterrell 1992: 13; Dworkin 1996: 128; Hunt 1989: 162; Matoesian 1995: 693-4). As Matoesian (1995: 694) points out, “fact and value or description and evaluation are inextricably intertwined and not isolable [...] [a]nd when legal participants mobilize descriptions as testimony unfolds, they simultaneously and irremediably activate culturally bequeathed moral judgments about its contents”. In fact, Hunt (1989: 163) argues that “the quest which motivates adherents of value neutrality” might be better achieved by *abandoning* notions of value neutrality and instead working reflexively to make our standpoints and perspectives explicit.

In the *Ghomeshi* trial, the lawyers’ and judge’s treatment of myths and stereotypes as *excludable* (if not always excluded) from legal reasoning disregards the inseparability of facts from values and narrative events from culturally-shaped interpretive work. This is not to say that stereotypes about sexual assault should not be addressed in the courtroom, but rather to point out that the way these stereotypes were raised in the above examples reproduced doxic standards of legal rationality and impartiality and the courtroom’s underlying relations of narrative domination. While the legal professionals spoke about the importance of accounting for and carefully avoiding stereotypes, there was a simultaneous emphasis on the legal irrelevancy of the first complainant’s attempt to reference the stigma of reporting sexual assault, as discussed in a later subsection. Stereotypical assumptions about sexual assault were thus legitimately raised only by those whose relational position afforded them configurational power and only in the

context of separating and removing stereotypes from the rationality of the legal process, upholding the doxic element of legal impartiality.

According to Bourdieu (1987b: 820), the rhetoric and language of neutrality forms part of the “juridical sense”. In other words, the development of a legal habitus, which is necessary for legitimate participation in the juridical field, requires adopting the language and standards of neutrality. When the lawyers and judge in the *Ghomeshi* case reproduced legal impartiality in their comments, it was not necessarily that they were trying to legitimize law or legal process, but rather that they were enacting the dispositions of their legal habitus, which provided them with a practical sense that in the juridical field there are certain ways that one should speak, act, and reason. Furthermore, their ability to frame their arguments and statements in alignment with legal impartiality constituted a key source of legal capital.

1.2. Procedural Fairness in a World of “Tweets and press releases”

As Hunt (1993: 109) argues, liberal notions of procedural justice suggest that equality before the law is achieved through internal legal processes that adhere to “the principle of ‘treating like cases alike’”. Due to the individualization and abstraction that it relies on, “[t]he heightened awareness of social inequality in all its diverse forms attacks the doctrine of ‘treating all alike’ at its philosophical and political [A]chilles heel.” (Hunt 1993: 109). During the *Ghomeshi* trial, legal procedures were upheld, particularly by the defence, as impartial and just. Pre-empting any insinuations that the processes of reporting and testifying in this case were unequal or biased, Henein repeatedly established that the complainants had “every opportunity” (February 5, 2016: 15) to disclose everything to the police, the Crown, and the court, as well as “every opportunity to explain” (February 2, 2016: 37) their side of things. This rests on the

notion that legal processes give everyone an equal chance to “have [...] their say” (Stuart & Quigley 2016: 581) in front of an impartial judge.

Furthermore, Henein emphasized that the complainants were all aware of their obligation to be truthful when speaking under oath – something she characterized as “real simple” and having “nothing to do [with] not knowing about the intricacies of the legal system” (February 11, 2016: 74-75). This argument was echoed by the judge who stated in his ruling that “[n]avigating’ this sort of proceeding is really quite simple: tell the truth, the whole truth and nothing but the truth” (March 24, 2016: 20). As they presented the process of testifying truthfully as straight-forward, the defence and the judge enacted the inculcated dispositions of their legal habitus, specifically the sense that legal procedures make it possible for all of the relevant facts to be clearly recounted. By extension, any inconsistencies and gaps in the complainants’ testimonies could be attributed to the complainants themselves, rather than to the relations of configurational power in the courtroom or problems of legal procedure.

For instance, Henein frequently asserted that the complainants could have easily brought forward more information or corrected any mistakes in their accounts in the months between their police report and the trial. This presumes that the complainants had considerable configurational power and narrative capital throughout the legal process, disregarding the unequal power dynamics and negative assumptions that shape practices of telling when women report and testify about sexual assault (Comack & Peter 2005: 301; Johnson 2012: 634; Marriner 2012: 429, 445; Matoesian 1993: 99). In the following excerpt, Henein challenges the first complainant on the fact that she did not clarify to the police or Crown that she was incorrect when she emailed the police to say that she vaguely remembered Ghomeshi smashing her head against the window when pulling her hair in his car:

Excerpt 4.1

Q. Well, [...] wouldn't you want to correct it? Wouldn't you want to say, you know what, I've got to correct something; I know I was under oath and I know this is going to be important, you know that head smash, that just, that didn't happen?

A. I was under the impression this is where it would come out.

Q. You were waiting for me to ask you?

A. No. I was waiting to tell my story in court.

Q. You didn't correct it even if you told your story in court, right? Do you agree with me about that? You didn't correct it [...] until I put it to you, until I said to you, look what you told the police, and you said, oh, that didn't happen... (February 2, 2016: 7)

As argued in Chapter Three, the relations of configurational power in the courtroom did not afford the complainants opportunities to legitimately configure their experiences, even during in-chief examination. The complainant's statement in the above excerpt – that she “was waiting to tell [her] story in court” – suggests that she thought she would have more configurational power and narrative capital while testifying than she did. In response, Henein emphasizes that when the complainant was telling her story in court she did not make the requisite correction. The discrediting force of her question rests on the doxic element of legal fairness, namely that there is a sense of balance that underpins legal practice and witness examination: in-chief examination allows complainants to tell their story, which is subsequently tested and challenged during cross-examination. This sense of balance, which is internalized as part of legal habitus, facilitates the symbolic violence of the juridical field by helping to obscure the complainants' lack of configurational power during in-chief examination and position of subordination to the Crown's narrative control.

Unequal distributions of legal capital and relations of narrative domination limit the ability of legal witnesses to legitimately raise a topic for the purposes of correction in the manner that Henein implies the complainant should have in Excerpt 4.1. During in-chief examination, the first complainant was not directly asked about her email to the police, making it difficult for

her to say she was wrong about the head smash, but the complainant *did* correct her account insofar as she did not mention a head smash when she recounted the incident in the car. Henein, however, highlighted that the complainant did not *directly* state that the email was incorrect and framed this failure as the deliberate act of someone who withheld the truth until the defence “put it to [her]”. Underlying this accusation are two key presumptions: that the complainant’s amended account (i.e. without mention of the head smash) does *not* count as a correction and that the complainant had the configurational power necessary to legitimately bring up the email during in-chief examination, despite not being asked about it while on the stand at that time.

Similarly, Henein repeatedly pre-empted any insinuation that the complainants were silenced or disadvantaged during the police interview, as demonstrated in the following excerpt from the cross-examination of the first complainant:

Excerpt 4.2

Q. All right. And you were interviewed by two police officers, a male and a female police officer, on November 1st, do you remember that?

A. I do.

Q. And they were professional.

A. Very.

Q. And they were courteous to you.

A. Yes.

Q. All right. And do you remember that you even emailed them the next day and you said that you [...] “...made me feel safe in reporting my story,” do you remember that?

A. I remember that.

Q. So they did not give you any reason not to be completely truthful and candid with them, did they?

A. No. (Feb. 1: 73-74)

The “professional” and “courteous” behaviour of the police officers is used here to suggest that the problems women might have in reporting sexual assault were not at play in this case – the complainant was given no reason “not to be completely truthful and candid”. Like the way that

stereotypes were raised and dismissed as irrelevant to the decision-making process of the current case, this excerpt implies that barriers to reporting, such as fear of being disbelieved, cultural assumptions about what constitutes ‘real rape’, and notions that women’s irresponsible behaviour may have contributed to what happened (Johnson 2012: 625; Weiss 2009: 816-821), are off-set and rendered inert when police officers make the complainant “feel safe”. Of course, I do not mean to suggest that police officers treating women with courtesy and respect when they report sexual assault is unimportant, but rather to point out that the dispositions of stock stories embedded in the socio-political and cultural habitus and the relations of domination associated with unequal distributions of capital cannot be so easily eliminated. Arguing that there was nothing wrong in the reporting process, Henein suggests that the complainant is solely to blame for any missing evidence or inconsistencies in her testimony.

As I discuss later, the complainants’ testimonies were frequently abstracted from the interactional, institutional, and social contexts in which they spoke; establishing that “there was nothing wrong in th[e] police interview that would cause [the complainants] not to tell [...] the truth” (Henein, February 2, 2016: 17) conditioned this decontextualization. According to several feminist scholars (Cowan 2007: 95-7; Gotell 2010: 216; Randall 2010: 409), the legal process tends to decontextualize sexual assault, treating instances of sexual violence as individualized incidents in which specific things, such as consent-seeking, went wrong, rather than as part of a wider pattern of gendered power relations. Thinking in Bourdieusian terms, the issue of sexual violence is perceived as one of individualized consent and legal believability, contributing to the misrecognition of patriarchal relations (e.g. female consent to male initiation) as hidden and naturalized relations of domination. Similarly, fairness when reporting sexual assault was perceived in the *Ghomeshi* trial as a case of following procedure and respecting complainants,

allowing doxic relations of narrative domination and the practices through which they are reproduced to remain unscrutinised. Henein's questioning during cross-examination presented the practices involved in reporting and investigating sexual assault allegations as problematic only under certain circumstances (e.g. the officers acting rudely) and decontextualized the police interview from some of the more fundamental problems that feminists have critiqued, such as complainants feeling that they need to "prove" their victim identity (Comack & Peter 2005: 292) and the influence of stereotypes about sexual assault on police screening practices (Johnson 2012: 625; Lees 1997: 185). Once it was established that the specific police interview in question was professional, safe, and followed procedure, it was presented as having had no meaningful or relevant impact on the complainant's account.

Even when particular cross-examination techniques are characterised as abusive or aggressive, the legal process itself may still be perceived as held in check by the rules and principles of legal rationality. For instance, in a front-page (A1) *Globe & Mail* news article that discusses Henein's cross-examination of the complainants, the practice of "whacking the complainant" is shown to be a source of "sharp disagreements" among legal practitioners (Andrew-Gee February 4, 2016). The article attributes the potential problem of "aggressive grilling" to the styles and strategies of individual lawyers and presents legal rules and the oversight of an impartial judge as potential safeguards against overly aggressive cross-examination. For example, a University of Windsor law professor is quoted saying "[t]he ground rules are clear... [t]he question is whether the ground rules are being respected" and the vice-president of the Criminal Lawyers' Association is quoted saying that "[j]udges don't let us [criminal lawyers] abuse people". In this sense, the rules of the game are upheld as just and balanced and any problems with "whacking the complainant", if they exist, are attributed to the

“bruising style” of particular lawyers or the failure of individual judges to apply legal safeguards. This misrecognizes the relations of configurational domination that structure courtroom narrative practices and that enabled Henein to meaningfully configure inconsistencies in the complainants’ accounts (discussed in greater detail later). Moreover, it reproduces the notions of legal impartiality, objectivism, and abstracted individualism that allow this configurational domination to exist as an unquestioned, inherently legitimate part of legal process, that is, that allow it to exist as a form of hidden symbolic violence.

In fact, the *Globe & Mail* article ends with the following quote by the vice-president of the Criminal Lawyers’ Association: “[w]e don’t give a free pass to any witness [...] just because it’s about sex doesn’t mean we change the ground rules”. This sentiment, which upholds the aforementioned notion of abstracted equality before the law, was echoed in several articles:

No double-X chromosome pass just because the complainants are females who may have been done terribly wrong (DiManno, *TorStar*, February 12, 2016)

If you’re honest and forthright you’ll get a fair shake in court (Wente, *G&M*, March 25, 2016)

Inside the courtroom where the evidence was heard [...] there was never a blanket guarantee on belief. There was no blind faith. There was only a rigorous testing of truth. (Menon, *TorStar*, March 25, 2016)

When it is taken for granted that equality and impartiality are achieved through treating everyone the same and not giving out “free pass[es]”, the procedures and narrative domination of cross-examination are perceived as legitimate, even if sometimes unsavoury. Moreover, the above comments imply that emotions such as compassion or indignation may encourage “blind faith”, cause changes to the “ground rules”, or provide sexual assault complainants with a “double-X chromosome pass”. Reproducing the notion that the emotional force of sexual assault allegations poses a particular threat to legal impartiality and fairness, the comments imply that it may be

necessary to subject the testimony of sexual assault complainants to more intense scrutiny than other types of witnesses.

A key component of the doxic legitimacy of legal procedures and structural relations is their juxtaposition against the presumed partiality and limitations of non-legal forms of justice and truth-seeking. Bourdieu (1987b: 820) argues that the juridical habitus or juridical sense involves an attitude that “claims to produce a specific form of judgment, completely distinct from the often-wavering intuitions of the ordinary sense of fairness because it is based upon rigorous deduction from a body of internally coherent rules”. In other words, the juridical habitus provides legal professionals with a practical sense that the impartial procedures and coherent rules of legal process distinguish legal fairness and justice from non-legal intuitions of fairness. Legal procedures may also be juxtaposed against the partiality and limitations of the information that legal professionals have to work with. Even as legal processes rely on witnesses recounting episodic stories that constitute the content to be manipulated and configured into legal narratives, legal professionals may experience the impartiality of legal procedures as always already threatened by the necessary involvement of those without the dispositions of a legal habitus, that is, by legal outsiders. In this context, the limitations of legal knowledge can be acknowledged while legal procedures continue to be perceived and experienced as the most impartial and just option in a world of uncertainty.

This point is exemplified in Stuart and Quigley’s book, *Learning Canadian Criminal Procedure* (2016: 580), which describes the court’s reliance on witness testimony about past facts as a “large impediment to our search for truth”. They state the following:

Th[e] personal “knowledge” [of witnesses] might perhaps better be described as personal beliefs about what they now remember of facts which they believe they observed. The

trier of fact then has to regard to what the witness says and, based on her observations of what the witness said and of his manner of saying, she comes to her own opinion as to whether that is an honest belief. She can do no more. She cannot, as the scientist might, duplicate in his laboratory the actual facts and test the hypothesis proposed. Facts as found by the court are really then only guesses about the actual facts. (Stuart & Quigley 2016: 580-1)

On the one hand, this quote demonstrates Valverde's (2003: 13) point that legal institutions and legal professionals tend to recognize the incompleteness of their knowledge. Furthermore, Stuart and Quigley (2016: 580) point out that the adversarial method may advantage the more powerful party and prevent certain evidence from being brought forward. Investigations can be biased, evidence can be ambiguous, witnesses may misremember, and judges may make decisions in accordance with legal standards of proof while still acknowledging a lack of knowledge about the events that actually transpired. In the *Ghomeshi* case, for example, the judge made it clear that his "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" (March 24, 2016: 24). In this sense, the notion that legal processes can access the truth of what happened is qualified by a recognition that legal professionals must make educated guesses because they cannot "duplicate [...] the actual facts" like a scientist.

On the other hand, the very notion that legal processes can access the truth of what happened functions as a doxic element in the juridical field, despite the ways that this claim may be qualified. In fact, in many ways the doxic presumption that legal procedure provides "the royal road to truth and justice" (Valverde 2006: 9), albeit one with limitations, ties together the other doxic elements of impartiality, objectivity, rationality, and fairness. It is because of the doxic standards embedded in juridical habitus that legal procedures can exist without scrutiny in the juridical field as the most legitimate means of seeking the truth. As legal procedure and its

underlying structural relations are misrecognized as components of an inherently legitimate truth-determining process, any limitations to truth-seeking are located in extra-judicial problems, biases, and dispositions.

In the above quote by Stuart and Quigley, the key barrier to law's search for truth seems to be the quality of the information and knowledge *brought to the courtroom*, that is, in the biases, opinions, and faulty memories that taint witness testimony. Even the sneer quotes placed around the word "knowledge" when referring to a witness's observations suggest a suspicion towards the evidence brought by non-legal agents. According to Bourdieu (1991: 145), "groups of specialists seeking to secure a monopoly of knowledge" may divide words against themselves, such as when the same word is used in both a sacred and profane way. One way this division occurs is through inverted commas that indicate a word "does not signify what it appears to signify" (Bourdieu 1991: 145). By placing the word *knowledge* in inverted commas in the quote above, the authors suggest that they do not mean knowledge in any legitimate sense. The use of inverted commas here can thus be understood as an instance of symbolic violence. In particular, a hierarchical distinction between the presumably insufficient "knowledge" of witnesses and the actual knowledge produced through adherence with doxic standards of impartiality and objectivity is misrecognized as inherently legitimate.

While it is entirely reasonable not to automatically accept evidence at face-value, particularly given the high stakes of criminal trials, the notion that it is the beliefs, memories, and opinions of *witnesses* that prevent judges from achieving the ideal of the objective scientist referred to by Stuart and Quigley in the above quote suggests that problems of bias are brought into legal processes from the outside. Given stereotypes about untrustworthy women who falsely allege sexual assault (Busby 2014: 279; Tanovich 2012: 558-9), legal concerns about the

emotional effect of sexual assault accounts (Larcombe 2005: 107), and the presumed unknowability of feminine desire (Lees 1997: 76), the testimonies of sexual assault complainants may be treated as especially problematic, biased, and suspicious. The presumed *partiality* of the information and testimonies brought to law is juxtaposed against the *impartiality* of legal methods and the judges who oversee them, reproducing the legitimacy of legal processes.

This understanding is also reflected in Altman's (1990: 76, 80-2, 86-90) defence of liberal notions of legal neutrality⁵⁸. Challenging critical legal scholars who presume "that *some* infiltration of moral and political judgment into the process of legal interpretation is sufficient to defeat the liberal view" (Altman 1990: 89, original emphasis), he argues that "every liberal model of the rule of law allows for some infiltration of that sort". By suggesting that liberal models make room for the possibility of moral and political judgments "infiltrating" legal processes and interpretations, Altman takes for granted that the processes themselves are neutral and upholds the notion that moral values residing *outside* the legal realm can intentionally⁵⁹ or unintentionally be *brought into* processes of adjudication. Although Altman (1990) recognizes that legal rules embody moral or political views⁶⁰ (87) and that liberal theory is normatively committed to values such as formal procedures and individual autonomy (100-1), he argues that the notion of legal neutrality requires legal reasoning to be distinct from "open-ended ideological or philosophical dispute about the basic terms of social and political life" (90). This maintains the image of legal processes as separate from, though sometimes infiltrated by, moral and

⁵⁸ Altman (1990: 76) describes legal neutrality as the interpretation and application of legal rules "in a way that is insulated from the influence of any fresh assessment of the contending normative views".

⁵⁹ For example, Altman (1990: 89) suggests that in cases where there are multiple decisions that are good fits with settled law, judges "often appeal, implicitly or explicitly, to their own moral or political convictions in selecting among those potential grounds of decision".

⁶⁰ Within the liberal view of political neutrality, however, moral and political views are written into legal rules "as a result of fair processes that involve compromise, negotiation, and accommodation" (Altman 1990: 88).

political questions and misrecognizes the relations of domination embedded and reproduced through practices of legal neutrality and universalization (Bourdieu 1987b: 845; Naffine 1990: 55-6; Smart 1989: 33). Altman's arguments express the "rhetoric of autonomy, neutrality, and universality" (Bourdieu 1987b: 820) that is fundamental in distinguishing the practices of the juridical field and the dispositions of juridical habitus from "the simple counsels of common sense" (828).

The notion that legal processes, even if limited in their ability to definitively determine what happened or to prevent the infiltration of moral judgments, can achieve an inherently more legitimate degree of fairness than non-legal judgments is a key doxic element, both in Henein's closing arguments and in the practices and symbolic struggles that I discuss below. As Bourdieu (1987b: 828) argues, the "professional competence" and "technical mastery" of juridical habitus contradicts and disqualifies "the non-specialists' sense of fairness". Within the juridical field, the dispositions of the juridical habitus and the technical processes of legal procedures are valued as contributing to fairness, while the dispositions of the non-juridical habitus are consistently held in suspicion by legal actors.

Quoting Supreme Court Justice L'Heureux-Dubé, who was quoting well-known American jurist John Wigmore, Henein stated in her closing arguments that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth" (February 11, 2016: 76). Legal methods of testing evidence were presented as the best path to the truth when all one has are the imperfect memories of biased witnesses. This statement reproduces the doxic element of autonomy, which leaves unquestioned the notion that legal processes operate (or should operate) at a distance from the prejudices and passions of the extra-legal realm. Wrapping up her closing arguments, Henein argues that,

Criminal trials do test evidence in a way that other institutions may not. [...] That's why we have trials, because nothing is evidence until it's been tested in this way, and an allegation is not true until it has been tested this way. It is not proven by Tweets and press releases. And that's not something particular to charges like these in this case. It's how every criminal trial in this country runs. Witnesses testify. Their evidence is tested. Sometimes, it is believed. Sometimes, it is not. But it is done by an impartial judge. And there is simply no other way to do it. (February 11, 2016: 81-2)

Unlike the one-sided bias of "Tweets and press releases", Henein characterizes the legal process as the best available method for sorting through and testing accounts; presumably in-chief examinations and police interviews give the complainants every opportunity to tell their story and cross-examination tests and challenges this evidence. In describing the legal process this way, Henein enacts her juridical habitus, specifically her practical mastery of the doxic standards of legal impartiality, fairness, and autonomy. Upholding an image of the trial as a balanced process overseen "by an impartial judge", she misrecognizes the symbolic violence of the lawyers' configurational control. Her practical sense of what sets legal procedure apart from the extra-judicial realm of "Tweets and press releases" also functions as legal capital, allowing her to demonstrate her commitment to legal standards and frame her practices of discrediting as the inherently legitimate testing of evidence.

The notion that legal examination processes *test* evidence suggests that evidence and alleged facts are brought from *outside* law and put through legal tests, much in the way that scientists might bring an object into the lab to be studied. This overlooks how facts are *constituted* through legal processes (see Valverde 2003: 5-6) and the ways that pieces of evidence are made meaningful through the configurational work and symbolic struggles of legal agents with varying degrees of legal capital. Through the language of evidence-testing, the trial is likened to a technical process that, though unable to achieve the scientific ideal of replicability, may nonetheless incite confidence in its uniformity, predictability, and fairness. The underlying

doxic implication is that although legal methods may not arrive at an absolute determination of what happened, we can at least rest assured that legal procedure achieves a level of impartiality and upholds a standard of procedural fairness that sets it apart from the irrational, biased, and emotionally-driven world of “Tweets and press releases”.

Furthermore, the emphasis on procedural fairness misrecognizes as legitimate aspects of legal procedure that feminists have problematized as *unfair*, such as the ways that law’s binary thinking disqualifies the complexity of women’s experiences (Gotell 2002: 257-9; Matoesian 2001: 227; Smart 1989: 33), the privileging of criminal conviction as a response to sexual violence (Flynn 2015: 94; Lees 1997: 9), and assumptions that to be victimized is to be traumatized and cast as psychologically damaged (Walklate 2016: 8-9, 11-12). As legal procedures are upheld as a balanced means of seeking truth, the legitimacy of law as a response to sexual violence is misrecognized as self-evident and natural. The question becomes one of whether procedural fairness and impartiality was maintained in a given case, rather than one of whether the juridical field is even an appropriate space for addressing gendered violence. As I explore in the following section, relations of configurational domination and practices of policing the complainants’ narrative work were misrecognized as legitimate through the doxic elements of legal autonomy, procedural fairness, and impartiality embedded in juridical habitus.

2. The Threat of the Legally Irrelevant: Keeping Her from “Drift[ing] off into It”

Those without the practical mastery of juridical habitus have difficulty articulating their experiences according to law’s doxic standards, which contributes to their position of subordination within courtroom relations of configurational power. Their explanations are typically policed and their episodic stories are fragmented and manipulated into narrative configurations by legal professionals. While the complainants’ explanations or attempts at

configuration during the *Ghomeshi* trial were treated as always in danger of “drifting off” into the extra-legal realm of partiality, the narrative configurational work engaged in by the legal professionals was misrecognized as a legitimate part of the legal process and framed as the revelation of objective facts. The legal/extra-legal boundary can be understood as part of law’s “rites of institution”, which involve “consecrat[ing] an *arbitrary boundary*, by fostering a misrecognition of the arbitrary nature of the limit and encouraging a recognition of it as legitimate” (Bourdieu 1991: 118, original emphasis). The boundary between the legally relevant and the legally irrelevant is reproduced as self-evident and legitimate through ongoing institutional practices. In the sections that follow, I examine how the symbolic violence of the lawyers’ configurational power and the courtroom narrative practices that occurred during in-chief examination rested on the doxic element of legal autonomy, that is, the legal/extra-legal divide and notions of law as a rational, “self-contained system” (Naffine 1990: 36) that operates at a distance from the outside world. In so doing, I also consider how the complainants struggled for opportunities to configure their episodic stories while simultaneously deferring to the Crown’s narrative control, as well as the ways that the legal professionals reproduced the boundaries and illegitimacy of the extra-legal.

2.1. Interrupting and Controlling Irrelevant Descriptions of Character

As argued in Chapter Three, during in-chief examination the Crown interrupted and re-directed the complainants’ configurational work, encouraging them to recount episodic stories one at a time in response to specific questions. Given the unequal relations of configurational power in the courtroom, the complainants were limited in their ability to legitimately transition between episodic stories or connect and explain them in relation to one another. This emphasis on eliciting the episodic dimension constituted symbolic violence. The relations of domination

reproduced through the Crown's narrative practices and the complainants' lack of configurational power were misrecognized as part of law's legitimate emphasis on what are considered to be the legally relevant facts. In this sense, legal positivism's fact/value and legal/extra-legal binaries (Cotterrell 1992: 9; Matoesian 1995: 693) functioned as doxic elements that contributed to the misrecognition of relations of domination.

While the complainants were unable to legitimately engage in the moral and ethical judgements bound up in narrative configuration (Dowling 2011: 12, 49; Ricoeur 1984: 66, 178), the legal capital and configurational power of the legal professionals gave them the ability to legitimately construct morally and legally relevant wholes out of the complainants' episodic stories. Valverde (2003: 185) similarly points out that common law courts rigidly restrict the admissibility of non-expert opinions, limiting witnesses to "describing what their observations were" and asserting that any inferences about those observations are "the province of the judge and jury", not the witness. In this section, I argue that the courtroom relations of configurational power and the doxa of legal positivism limited the degree to which the complainants could enact the dispositions of their socio-political and cultural habitus in a way that translated into legal capital. As law's separation from the interests and value commitments of extra-legal realms was perceived as an inherent marker of fairness and legitimacy, the complainants' attempts to speak of who they are and what they like were interrupted as extra-legal and irrelevant to the facts.

In the following two examples taken from in-chief examination, the first and third complainants are interrupted as they attempt to move from a description of events into an explanation of how they felt during the alleged assault and how it connects to what they like sexually and who they are:

Excerpt 4.3

Q. So what did you say when you got your – you had your hair pulled?

A. I was, I wouldn't say in shock, but I wasn't sure what had just happened. He had been so nice and I didn't really – I didn't really know what to do or say. But he had stopped. And then he said something along the lines – and I don't recall precisely – he said something like “Do you like it like that,” or “Do you like this?” And I don't like it like that, and I don't like this, and I don't like anything like this or that. Like it's not my style to be pulling hair or –

Q. So in terms of – I want you to go through the mechanics again. Can you remember which hand or which arm he used that went around your head?

A. Right. (February 1, 2016: 44-45)

Excerpt 4.4

Q. What happens in the sequence of events now?

A. Well, from there his – that was – at that – at that point his hand went up around my mouth, and then I – I – there was nothing about this that I wanted to be a part of, it was – it didn't feel safe or sexy, or any of the things that –

Q. And how long was his hand on your mouth?

A. Seconds. Some seconds.

Q. Did it impact on your ability to breathe?

A. Yes.

Q. And I think you answered this to some extent, but how were you feeling at this point in time?

A. Like I'm not safe. (February 8, 2016: 22)

In Excerpt 4.3, the first complainant attempts to explain that “it's not [her] style to be pulling hair” and that she did not like what Ghomeshi did. In Excerpt 4.4, the third complainant indicates that the strangling and smothering she described “didn't feel safe or sexy” and that there was “nothing about [it] that [she] wanted to be a part of”. By distancing themselves from any suggestion that they desired this type of sexual interaction, both complainants enact the dispositions of their socio-political and cultural habitus, speaking out of an embodied sense that certain characterizations of their desires or style might be discrediting. As discussed in the section on narrative capital in Chapter Two, narrative practices can be a crucial part of how we perform particular identities (Bano & Pierce 2013: 226; Goodson 2012: 7-8; Noy 2004a: 116-117; Polletta 2006: 7; Shoshana 2013: 174).

In keeping with Bourdieu's conceptualizations, however, it is important to recognize that the ways that we present ourselves through narrative practices are always externalizations of the cognitive structures of habitus. For Bourdieu, narrative practices cannot *create* identity since identity is constituted by the dispositions of habitus that have been inculcated through the internalization and embodiment of objective relations and innumerable practices over time (Bourdieu 1989: 18; Lovell 2000: 30; Truc 2011: 154). That said, I do think it is useful to consider how agents attempt to present themselves in certain ways through their narrative practices, bearing in mind that both their identities and their embodied sense of the appropriate ways to *present* their identities in a given situation are enactments of habitus. As agents tell narratives about their experiences, they use the practical sense of their habitus to present themselves in ways that not only feel appropriate, but which may function as capital in a given situation. For example, enacting the competencies of one's habitus to present oneself as the hero in an account of an averted crisis may translate into social capital by increasing one's social network or cultural capital by demonstrating proficiency. Importantly, habitus also gives us a sense of how we should *not* present ourselves.

In Excerpt 4.3, the complainant contextualizes her action (i.e. not saying anything when Ghomeshi pulled her hair) through reference to her character and "style"; she attempts to preempt any insinuation that her silence may have indicated consent or desire by not only stating that she did not like Ghomeshi's actions, but also suggesting how far removed from her character desiring such actions would be. In Excerpt 4.4, the complainant uses her response to a question about the events to clarify that she was not interested in Ghomeshi's aggressive actions or in anything that did not feel "safe or sexy". In this way, the complainants present themselves as women who are taken aback by and uninterested in aggressive sexual activity. In so doing, they

enact their practical sense of what characterizations might increase their credibility or conversely lead to negative insinuations. This sense is conditioned by the wider social and cultural context in which sexual passivity is misrecognized as a natural trait of heterosexual femininity, as discussed further in Chapter Five. The complainants' enactments of habitus in these explanations had the potential to function as a form of gendered cultural capital by demonstrating their adherence to dominant notions of womanhood.

Both of these complainant-initiated explanations, however, are interrupted by the Crown, who redirects the discussion to the mechanics of the incident. Although in Excerpt 4.4 the Crown does return to the question of how the complainant felt during the alleged assault, his interruption and emphasis on specific details disrupts the flow of her storytelling and moves her away from explanations of her character; instead of returning to her description of how the incident did not have "any of the things" that might have made her want "to be a part of it", the complainant provides a much narrower and more direct description of her feelings (i.e. "not safe"). Exercising configurational power and enacting his practical sense of the legally irrelevant, the Crown interrupts the complainants' attempts to configure certain events and how they felt about them. The complainants are not permitted to continue describing their consensual sexual wishes (or lack thereof) and what they mean in terms of the alleged assaults. In this way, unequal courtroom relations of configurational power prevent their attempts to characterize and describe their desires from lending legitimacy to their accounts.

Furthermore, the interruption of the complainants' explanations illustrates feminist claims that in sexual assault trials a woman's reasoning is often "regarded as subordinate to her body" (Smart 1995: 224) and her sexual desires are treated as elusive and unknowable – even to the woman herself (Larcombe 2005: 25-30; Lees 1997: 75-77; Sheehy 2012: 488; Smart 1989: 31).

Consequently, the legal gaze turns to the female body and the “mechanics” of the incident to determine the presence or absence of consent and assault (Bumiller 2008: 44-46; Cowan 2007: 96; Lees 1997: 78; Smart 1995: 224). In legal and forensic practices focused on the body and its mechanics, a woman’s discursive account and explanation of her experience of sexual assault can be presented as in conflict with the evidence provided by and/or found upon her body (DuMont & Parnis 2001: 73; Mulla 2014: 22).

The dismissal of the complainants’ explanations and the emphasis on the “mechanics” of each incident constitute symbolic violence in that the domination embedded in these practices is misrecognized as inherently legitimate attempts to keep the examination focused on legally relevant facts. In the above excerpts, the complainants’ attempts to speak of what they liked or disliked sexually are treated as irrelevant as the Crown interrupts and shifts the discursive focus to what their bodies were doing at the time. The emphasis on the event’s mechanics privileges the “forensic gaze” (Valverde 2003), which “is obsessed with physical detail” (55) and strives “to establish a purely empirical basis for a legal judgment” (58). The forensic gaze functions as a doxic element in the courtroom. Although the complainant’s attempts to characterize herself and her description of the event’s mechanics both involve memory, the latter more closely resembles law’s doxic ideal of neutral clues that “are simply there, for all to see” (Valverde 2003: 83). During in-chief examination, the Crown attempts to elicit the episodic stories in a piecemeal fashion that polices and excludes information that is perceived as irrelevant, such as the complainants’ values and descriptions of their character. In so doing, he enacts the dispositions of legal habitus that provide legal professionals with a practical sense of what is and is *not* relevant in the judicial field.

In the above excerpts, the relations of configurational power between the complainant and the Crown prevent the complainants from being able to present themselves in a way that aligns with their practical sense of what could improve their credibility. As I discuss in Chapter Five, during in-chief examination the complainants did have some opportunities to describe events in ways that aligned with tropes of passive and vulnerable femininity, though their efforts were undermined during cross-examination. At the same time, a key aspect of the configurational work engaged in by the legal professionals, particularly the defence lawyers, involved implicitly suggesting what kind of women the complainants were⁶¹. This was done through a questioning process that appeared to emphasize the objective facts, which I discuss later in this chapter. With the positivist privileging of bodily mechanics and facts functioning as part of the doxic backdrop in the courtroom, the symbolic violence of the legal professionals' control over how the complainants could be defined was misrecognized as a legitimate and necessary aspect of policing legally irrelevant statements that might threaten a fair and objective trial. Despite their lack of configurational power, the complainants did work to negotiate opportunities to configure during in-chief examination, though they did so in ways that respected and misrecognized the Crown's narrative control as natural and legitimate, as I examine next.

2.2. Negotiating Opportunities to Configure and Respecting the Crown's Configurational Power

According to White (1980), humans experience an "impulse to narrate" (5) that "arises out of a desire to have real events display the coherence, integrity, fullness, and closure of an image of life that is and can only be imaginary" (27). Similarly, Ricoeur (1985: 28) suggests that a "search for concordance" and intelligibility underpins the configurational dimension of

⁶¹ The way the defence's narrative configurations were made possible through gendered tropes and stock stories is the topic of the next chapter.

narrative. As aforementioned, narratives do not just chronologically recount a succession of events, but they configure events into a meaningful whole that makes a certain point (Barthes 1975: 271; Onega & Landa 1996: 3; Presser 2016: 138; Ricoeur 1984: 65; 1985: 61; White 1980: 9). In this sense, the practice of recounting events and experiences may involve an impetus or disposition in one's habitus to simultaneously provide them with significance and moral meaning, that is, to configure them. Despite their lack of configurational power during the legal process, the complainants likely still experienced an impulse to configure the recounted events into a meaningful whole that communicated what they understood to be the point or moral significance of their experiences. At the same time, their legitimate participation in the juridical field required that they defer to the Crown's interruptions, redirections, and narrative control. In this section, I examine how the complainants negotiated the tensions between the "impulse to narrate" and the expectations of courtroom testifying.

Though there were struggles over narrative configuration⁶² that occurred during in-chief examination, the complainants tended to respect the Crown's configurational power and misrecognize it as self-evidently legitimate. Experiencing their place in the courtroom as natural, they acted in accordance with the courtroom relations of narrative power, regularly deferring to the Crown's configurational authority. For instance, in the following example the third complainant recounts the incidents leading up to the alleged assault and waits for the Crown lawyer to order the events, rather than trying to do so herself:

Excerpt 4.5

Q. Okay. You're sitting on the bench, you're kissing, "making out" I think are your words. How does that kissing come to an end?

⁶² It is important to note that I speak here about how the complainants struggled over narrative *configuration*, not over configurational *power*. They try to influence how the Crown lawyers configure their narratives, but they do so without legal capital or configurational power and thus in a way that maintains deference to the Crown's narrative control.

A. I got up and left.

Q. Was there anything else that happened?

A. Yes.

Q. Okay. Can you indicate to His Honour what happened.

A. Well, at some point while we were kissing, he was kissing my neck, or I just felt – all of a sudden, I felt his hands on my shoulders and his teeth and then – and then his hands go around my neck and he was squeezing. (February 8, 2016: 19)

The third complainant provides direct answers to the Crown's questions and does not recount the assault until specifically asked to explain what else happened while she and Ghomeshi were kissing on the bench. In this sense, she seems to wait for the Crown to indicate when she should provide the next episode in the narrative. The following excerpt similarly demonstrates the complainants' recognition of the Crown's authority over narrative configuration. The second complainant explains why she spent time with Ghomeshi after he assaulted her and recounts the events that transpired during their time together:

Excerpt 4.6

Q. So you obviously spent some time with him for the remainder of the weekend. Given what happened, why did you decide to spend time with Mr. Ghomeshi again?

A. Because I promised that I would, and I wanted to get over what had happened the night before, and I wanted to, hoped that that was the one time, and it was how I dealt with a bad situation. Since he had never acknowledged it at the moment, then I guess I wasn't going to either. We – I also went to a barbecue at his [friend's] house, and before we – *oh, I'm sorry.*

Q. No, go ahead?

A. Before we went, Jian talked at length at how much of a big deal it was that he was taking me there... (February 4a: 42-43, emphasis added)

In this example, the complainant catches herself as her response to a question flows into recounting a connected story. The way that she apologizes for moving into another episodic story points to a tension between the narrative urge to configure events by flowing from one into the next and the complainant's compliance with courtroom relations of narrative domination. Instead of continuing with her account, the complainant recognizes that she has departed from the

question she was asked and stops to ask the Crown's permission to continue recounting the next episodic story.

While they tended to defer to the Crown's configurational control during in-chief examination, the complainants also struggled for opportunities to configure their episodic stories. In the next example, the third complainant attempts to explain how she experienced her post-incident interactions with Ghomeshi by trying to refer to an event that the Crown has not yet asked her about:

Excerpt 4.7

Q. So when you go to this party now, are you sort of going as a date with Mr. Ghomeshi?

A. You know, at that point I think there was – there was – between what he said to me at the bar, *which you haven't asked me about*, but the warning bells were getting louder.

Q. Okay. So at the restaurant – we asked about the restaurant. You said there was bar – a restaurant, bar on King Street, is that right?

A. Yes.

Q. Okay. What happened that evening at the bar?

A. He introduced me to somebody that he said was a writer for the New York Times – I think it was the New York Times – it was a newspaper or magazine of some kind from New York which he seemed quite impressed with. And after a few minutes of talking, this guy said “So how long have you guys been seeing each other,” and he said, “Oh, we're not seeing each other, we're just fucking.” (February 8, 2016: 28, emphasis added)

This excerpt shows the complainant negotiating the tension between her lack of configurational power and a disposition to configure the events in relation to one another. For the complainant, the incident at the bar was a relevant part of her overall narrative about how Ghomeshi mistreated her and her experience with him at the party. However, instead of launching into a discussion about this incident and configuring it in relation to her later experience at the party, she leads the Crown to ask her about it. She does get to explain the incident at the bar, but if her position in the courtroom had afforded her configurational power, she may have already recounted it, making it unnecessary for her to make the request and wait for the Crown's

question. The complainant simultaneously complies with the Crown's configurational power in the courtroom *and* attempts to draw meaningful connections between her experiences. Although this excerpt demonstrates how complainants may negotiate opportunities to configure events despite unequal relations of configurational power, it is worth noting that the incident at the bar is not mentioned in either the Crown's closing arguments or the judge's opinion, suggesting that, despite its significance to the complainant, it was insignificant in the overarching legal narrative. Furthermore, since eliciting the episodic events to be manipulated by the lawyers and judge into narrative mosaics requires the complainant's participation, the Crown may have simply been placating her rather than taking her configuration seriously. In other words, by asking the complainant about what happened at the bar, the Crown maintained narrative control while simultaneously contributing to the appearance of in-chief examination as the complainants' opportunity to tell their narrative and thus to the ongoing misrecognition of courtroom narrative domination.

Throughout in-chief examination, the complainants sometimes used their responses to depart from the Crown's specific question and recount an episodic story or provide evaluative comments that they viewed as relevant to the topic at hand. This is exemplified in Excerpts 4.6 and 4.7 as well as the excerpts in the preceding subsection (Excerpts 4.3 and 4.4); in answering the Crown's questions, the complainants attempted to show the significance of another event or explain their personal values, interests, and character. However, they typically did so in ways that adhered to the question/answer format of testifying and deferred to the Crown's configurational power. Navigating the unequal relations of configurational power in the courtroom, the complainants attempted to speak of details and events that might fall outside law's boundaries of relevancy while simultaneously misrecognizing as natural and legitimate the

legal professionals' monopoly over "the tools necessary for legal construction" (Bourdieu 1987b: 835). As they struggled for opportunities to legitimately recount certain experiences or provide commentary, the complainants misrecognized the relations of domination that conditioned their participation in the legal game.

As a form of symbolic violence, the relations of narrative domination that allowed the Crown to configure and manipulate episodic stories functioned through misrecognition and the compliance of the complainants. The Crown's manipulation of the complainant's episodic stories into a narrative mosaic was euphemized as a natural extension of the Crown's legal expertise and professional role that, instead of expressing a form of domination, appeared to constitute an act of supporting the complainants in their narrations. Although the complainants struggled during in-chief examination for opportunities to legitimately explain or connect events, they did so in ways that misrecognized the relations of narrative domination as legitimate and their attempts to configure were frequently treated as legally irrelevant. As I discuss in the next section, when the complainants attempted to narrate in ways that did not align with doxic standards of legal narrative construction, the Crown, judge, and defence used the configurational power afforded by their relational positions in the courtroom to police the complainants' explanations.

2.3. Playing by the Rules of the Game and Reinforcing the Boundaries of the Irrelevant

The legal/extra-legal divide and the relations of narrative domination in the courtroom are expressed and reproduced through the situated practices of legal agents. As argued in Chapter Two, structuring conditions and relations of domination exist and are (re)produced through agents' ongoing practices. At the same time, the practices that we engage in are shaped by these structuring conditions, which have been internalized to produce our habitus or practical sense of what is appropriate in a given situation. According to Bourdieu (1987b: 818-819, 831; see also

Hacker 2008: 4), law's symbolic power and the functioning of the juridical field depend on a shared habitus among legal professionals that allows institutional hierarchies and legal methods to be experienced as natural. Of course, this does not mean there is unanimous agreement about how things should be done; on the contrary, law is characterized by contradiction and struggles over meaning (Hunt 1993: 132-3; Naffine 1990: 101-2; Smart 1995: 144-5; Unger 2015: 48). However, legal professionals do tend to act in ways that take for granted the "internal logic", relations of domination, valuation of certain dispositions and forms of capital, and "rules of the game" that organize the juridical field (Hacker 2008: 4).

In addition to a "parallelism of habitus" (Bourdieu 1987b: 842) arising out of similarities in backgrounds, training, and professional milieus, legal professionals may have a vested interest in perpetuating the system that bestows on them various amounts of symbolic and cultural capital (Cotterrell 1992: 201, 204). In his discussion of language and power, Bourdieu (1992: 152) points out that by respecting the "elevated style" of philosophical discourse agents contribute to its authority while simultaneously sharing in its symbolic capital. Similarly, by adhering to legal methods and style legal professionals both reproduce *and share in* law's symbolic power. For instance, privileging legal language and policing non-legal talk contributes to the value of their linguistic capital and its accompanying "profit of distinction" (Bourdieu 1991: 55). Despite disagreements and struggles over interpretations of events and legal outcomes, the inculcation of a juridical habitus acts as an "entry ticket into the judicial field" (Bourdieu 1987b: 820). In other words, incorporating the rules and conditions of the legal game into their practical and embodied sense of how things are to be done in the courtroom is a prerequisite for legitimate participation in the juridical field. As Delgado (1996: 87) argues, "[t]he lawyer is trained to operate within the system" and thus to accept the power imbalances of its principles and practices.

Although the Crown and defence lawyers were working towards different legal outcomes and competing for legal and narrative capital, they both took for granted and reproduced the boundaries of legal relevancy and the relations of narrative domination in the courtroom. In other words, they misrecognized the structural relations that conditioned their struggle over legal outcomes. During in-chief examination, there were moments where Henein objected to a complainant's response and the legal professionals worked together to police the legally inappropriate or irrelevant. For instance, in the following excerpt the first complainant's attempt to configure her experiences in relation to broader social issues is interrupted and the legal professionals agree that she should not be allowed to "drift off into it":

Excerpt 4.8

Q. But back in 2002, did you ever turn your mind to, "You know what, I think I should call the police," was that anything that went through your head?

A. No, for a couple of reasons. First reason, I was very upset. I wanted to go home and curl up in a corner and cry. And second reason is I didn't think anyone would listen. I – I didn't create the stigma about reporting sexual assault, but I'm very aware –

Ms. Henein [objecting]: This is not an appropriate area, my friend knows that. This witness can talk about why she came forward, what prompted her to come forward *as it pertains to her* and that is all.

Mr. Callaghan: Yeah, I'm not specifically eliciting this area here, Your Honour, in terms of – but I think it's relevant to her state of mind in terms of why she didn't come forward, whether or not there's a broader societal issue that I don't think relevant, but if it affected her reasoning and it went to her state of mind, it may be relevant to that extent.

The Court: I think Ms. Henein just did not want to *her to drift off into it*.

Mr. Callaghan: *I don't plan to get into a social commentary.*

The Court: Okay. That is fine.

Mr. Callaghan: Q. Can I ask you the, after – okay, after this happened, did you ever see Mr. Ghomeshi again?

A. No (February 1, 2016: 66-7, emphasis added)

This excerpt exemplifies how unequal relations of configurational power between the lawyers and the complainants are misrecognized as part of what makes the legal process fair and impartial. As discussed in Chapter Two, practices of legal equality are based on "deal[ing] in

abstract individuals” (Naffine 1990: 22) to whom universal rules are applied in the same manner regardless of context (Comack 2014: 13-14; Norrie 2014: 15-18). According to Ewick and Silbey (1995: 217), “law’s insistent demand for personal narratives achieves a kind of radical individuation that disempowers the teller by effacing the connections among persons and the social organization of their experiences”. Similarly, Naffine (1990: 53, 65, 78) argues that law’s claim to treat people as decontextualized and interchangeable individuals is unfair because the particularities of our social environments and unequal positions within them so thoroughly influence our lives and how we are positioned in legal processes.

As aforementioned, feminist scholars have identified many social factors that contribute to women’s hesitation in coming forward to report sexual assault, including cultural stereotypes that frame women who allege sexual assault as untrustworthy or partially responsible for the assault (e.g. Temkin & Krahé 2008: 32; Weiss 2009: 812, 814-15; White & Du Mont 2009: 1). In Excerpt 4.8, however, the legal professionals deem references to social and cultural context inappropriate, thereby disqualifying the complainant’s knowledge and embodied sense of what is relevant. Henein interrupts the complainant’s attempt to explain her actions through reference to “the stigma about reporting sexual assault”, arguing that the complainant may only speak about why she came forward “as it pertains to her”. Although Callaghan does attempt to defend the complainant’s comment, he does so by emphasizing its potential relevance in terms of “her state of mind”, agreeing with Henein about the irrelevance of “whether or not there’s a broader societal issue”. According to the judge, the overriding concern is that the complainant might “drift off into it” – phrasing that implies irrelevant rambling.

Throughout this exchange, the legal professionals enact the practical mastery of their juridical habitus. In particular, they experience and reproduce the legal demand for

individualized narratives as a natural standard. In the process, broader gendered relations of power and how they shape practices of reporting are left unquestioned, contributing to their misrecognition. Furthermore, the legal professionals devalue and disqualify the practical sense of the complainant's habitus through which she experiences the broader social issue of stigma as relevant to her account. Although reference to social context may translate into narrative capital when narrating outside the courtroom, referring to stigma when testifying in court only served to showcase the complainant's lack of juridical habitus and legal capital, further justifying the relations of narrative domination and the lawyers' practices of narrative control. At the end of Excerpt 4.8, Callaghan clarifies that *he* does not intend to "get into a social commentary" and then moves into a series of close-ended questions, a narrative practice conditioned by the symbolic violence that affords him control over narrative configuration.

The ways that the legal professionals enacted law's doxic emphasis on legally relevant facts and rejection of "social commentary" were conditioned by relations of configurational power and legal capital. In particular, the configurational power of the lawyers and judge provided them with opportunities to make generalized comments about how the social world operates and why it matters to the issues at hand. For instance, during the defence's closing arguments, Robitaille, Henein's co-counsel, made a generalized comment about how memory operates: "We know – experienced trial judges know that memories don't get better over time" (February 11, 2016: 41). The complainants were expected to provide the episodic content, offer evaluative comments only when expressly asked, and avoid "get[ting] into a social commentary", even if commenting on social issues might have helped them explain their actions and experiences. Their attempts to configure events in relation to the social context in which they occurred were misrecognized as irrelevant and inappropriate and therefore disqualified. The legal

professionals, however, strategically mobilized generalized comments in order to increase the persuasiveness of their narrative configurations.

It was the complainants' lack of juridical habitus that demarcated their references to social context as legally irrelevant and subject to interruption. As they worked together to ensure that witness testimonies remained specific and individualized, the legal professionals "resist[ed] accepting that legal solutions to problems may depend on a foundation of non-legal knowledge; that is, knowledge outside lawyers' control through their recognised professional expertise" (Cotterrell 1992: 199). In particular, the complainants' habitus, specifically their practical sense of what may be relevant, was dominated by juridical habitus. The complainants' lack of juridical habitus or legal know-how caused their explanations to be treated as always at risk of partiality and irrelevancy and thus in need of being policed by legal professionals. Suggesting that the complainant in Excerpt 4.8 needed to be kept from "drift[ing] off into it", the legal professionals misrecognized their narrative domination as the enactment of their role as guardians of legal standards. In fact, the Crown's response – "*I don't plan to get into a social commentary*" – simultaneously emphasizes his configurational power and his commitment to policing the extra-legal by highlighting his control over the discussion.

The following excerpt also shows the legal professionals working together to reproduce relations of configurational power and police the courtroom narrative practices; the second complainant is attempting to explain why she decided to speak with the media about her experiences with Ghomeshi:

Excerpt 4.9

Q. And then you were going onto say you had received some information?

A. Yes.

Q. And was that information in relation to why you then decided to share your account with the press?

A. Absolutely. I read my – I read some things and then a friend – again, I was like that’s, that’s awful that they had to experience this thing that I also experienced; not exactly. There were big differences, but the similarities were aggression. A friend of mind contacted me who is a guy who cares very much about my wellbeing and he – I said, oh well – he said, “Oh, Jian got fired and what a crazy night,” and I said, “Yeah, well--”

Ms. Henein [objecting]: I’m sorry. Again, this witness is reporting hearsay statements, and I fail to see the relevance of this. If my friend wants to ask why she went to the media, she’s explained it, and what prompted her to go to the police, which is a fair question, that’s appropriate, but *it is not an opportunity for an entire analysis of [the complainant’s] thought process.*

Ms. Langdon: Perhaps what I’ll do, Your Honour, is *I think if I can just lead in this area, that will facilitate this.*

The Court: Okay.

Q. So is it fair to say [...] that you read some media accounts –

A. Yes.

Q. – related to Mr. Ghomeshi that caused you to provide your account to the media?

A. Yes. (February 4a, 2016: 54-55, emphasis added)

As the complainant attempts to explain her decision through reference to a series of interactions with a friend, she is interrupted by Henein, who argues that the comments are hearsay and that “it is not an opportunity for an entire analysis of [the complainant’s] thought process”. Not only is the complainant’s explanation cut off, but the Crown then “lead[s]” the testimony, feeding the complainant yes/no questions and, presumably, keeping her from continuing to analyze her thought process during the alleged incidents. In referring to the comments of her friend, the complainant enacts the narrative sensibilities of her habitus. According to Labov (2013: 31), quoting statements from a third party in this manner can increase the perceived objectivity and credibility of everyday narratives. Furthermore, in her examination of news stories, Schokkenbroek (1999: 81-2) argued that third-party witness quotations are a common legitimizing practice in journalistic narratives. Considered in this context, the narrative dispositions of the complainant’s habitus may have caused her to experience reference to others’

comments not only as a common feature of narrating, but as a potential marker of legitimacy. Her narrative dispositions, however, do not align with the doxic standards of the juridical field and therefore fail to function as legal capital. Instead of signalling objectivity or providing legitimacy like they might in a different field, her references to her friend's comments are disqualified as "hearsay statements" and treated as further indication that the lawyers need to exercise narrative control in order to achieve a fair trial.

Although in Excerpt 4.8 the first complainant is expected to focus on what pertained specifically to her and to her experiences, in Excerpt 4.9 it is the complainant's account of her own thought process that is objectionable. In this way, references to a series of interactions that influenced one's thought process, as well as references to broader social issues are both deemed legally irrelevant. The common thread in these two examples, however, is the domination of juridical habitus over the narrative dispositions of the complainants. In both excerpts, the complainants attempted to configure the events in terms of issues and experiences that they viewed as significant. The legal professionals, however, treated the complainants' attempts at configuration as antithetical to the law's purified, untainted procedures, and thus in need of constraint. This exemplifies the "separating out" that Gotell (2002: 258-9) identifies as part of the sexual assault trial:

The courtroom scene and the language of law create the image of law as separating out the "truth" from the hysteria of the victim. Prosecutors and the defence act as custodians of this order and are resistant to any form of dialogue that attempts to make sense of the sexual violence that does not fit legal models of guilt or innocence.

The relations of domination that underpinned the narrative practices of the legal professionals were misrecognized as central to the maintenance of legal order and doxic legal standards, specifically legal autonomy and impartiality. Moreover, gendered assumptions about the

emotionality and untrustworthiness of women who allege sexual assault made the complainants' explanations appear as especially suspicious threats to legal rationality, further legitimizing the symbolic violence through which their statements were constrained and their episodic stories manipulated to form the lawyers' overarching narratives. The unequal relations of configurational power in the courtroom rested upon the doxic elements of legal impartiality and autonomy and the ability of juridical habitus to position the legal professionals as distinct from "ordinary people [who are] too quickly "moved" by rape testimony" (Larcombe 2005: 109). Given the high-profile cases and wave of public support for those reporting sexual assault that emerged around the time of the *Ghomeshi* trial, appearing distinct from "ordinary people" by virtue of their juridical habitus may have been particularly important for the legal professionals in this case. The legitimacy of symbolic and configurational power exercised by legal professionals depends on them enacting legal objectivity and impartiality and appearing unswayed by public opinion or the emotionality of the accounts.

Despite the fact that they competed with one another for narrative capital in the courtroom, the legal professionals in the *Ghomeshi* trial possessed a shared habitus that provided them with a practical sense of what constitutes legitimate legal practices, as well as a common interest in reproducing law's symbolic power and thus its distinctions between the legally relevant and the extra-judicial. Accordingly, they worked together to reproduce relations of configurational domination as legitimate and police the complainants' configurational efforts. According to Bourdieu (1987b: 823), even as legal adversaries engage in hostile competition and defend conflicting interests and worldviews, their apparently divergent practices operate as "a subtle form of the *division of the labor of symbolic domination* in which adversaries, objectively complicitous with each other, fulfill mutual needs" (original emphasis). The competition

between the defence and the Crown contributes to the ongoing misrecognition of their domination over the complainants' narrative work; even as they struggle over narrative capital and legal outcomes, the legal professionals enact a shared practical mastery or know-how that they have a vested interest in reproducing as valuable and self-evidently legitimate. As I have demonstrated throughout this section, doxic assumptions about law's ability to distance itself from the partiality of external issues (Naffine 2009: 2) underpin and are reproduced through the symbolic violence of narrative practices that dismiss the complainants' explanations as legally irrelevant. In the following section, I further examine how doxic notions of objectivity contributed to the misrecognition of the courtroom relations of narrative domination.

3. Wielding Objectivity: Emphasizing the Facts during Witness Testimony

As discussed in Chapter Two, the courtroom is a site of symbolic struggle over meaning that is structured through unequal distributions of various forms of capital, including narrative and economic capital. Although the complainants' position in the courtroom did not afford them configurational power, the process of witness examination relied on their participation, that is, on their ongoing provision of the episodic stories that could be manipulated by the lawyers and judge into narrative configurations. Their requisite involvement in the narrative processes of witness examination created opportunities for them to challenge the configurations of the lawyers, though these challenges were rarely very successful. During cross-examination, the complainants frequently attempted to resist the implications of Henein's narrative configurations and to impose their own meanings on events and statements. One of the ways Henein invalidated the complainants' alternate interpretations was by wielding objectivity, that is, by enacting the practical mastery of the language of objectivity inculcated in her legal habitus to present certain points and their underlying insinuations as indisputable. In a different way, the Crown presented

their prosecution efforts as based upon objective facts rather than on emotions elicited by a woman's compelling account.

Instead of conceptualizing objectivity as “some kind of ‘real’ relation between the world and a text” or something which can be measured based on how closely an account corresponds to reality, I follow Valverde (2006: 50) in viewing objectivity as an *effect* that is created through particular practices. This aligns with Bourdieu's (1987b: 820) discussion of the “universalization effect” and “neutralization effect” through which legal processes are marked as impersonal, impartial, objective, and systematic “expression[s] of the *factual*”. Through the notion of “wielding objectivity”, I mean to suggest that objectivity is *achieved rhetorically* (or not) as agents enact the dispositions and practical sense of their habitus and struggle for legitimacy in their explanations and narrations. During in-chief examination, the Crown focused on the factual details of the alleged assaults and interrupted the complainants' attempts to provide accounts driven by how they experienced events. Furthermore, while Henein successfully used references to objective facts to legitimate her claims during cross-examination, the complainants' non-legal habitus and lack of legal capital caused their efforts to mobilize the language of legal relevancy and objectivism to be dismissed as biased attempts to manipulate the facts. In the following sections, I consider how doxic standards of legal objectivity contributed to the symbolic violence of the courtroom narrative practices. In particular, I examine how exercises of configurational power by the lawyers were misrecognized as legitimate emphases on objective facts and thus existed without scrutiny.

3.1. “We're just going to break this up a little bit”: Drawing out the Objective Facts during In-Chief Examination

Although the complainants were regularly asked open-ended and “why” questions during examination-in-chief, which Ehrlich (2012: 404) argues allows some space for the complainant to represent herself, the in-chief questioning was organized around a doxic privileging of objectivity and factual detail. As the complainants described the alleged assaults during in-chief examination, the Crown lawyers drew on their practical mastery of how objectivity is rhetorically achieved in the juridical field. Exercising the configurational power afforded by their position in the legal field and enacting their juridical habitus, the Crown focused on factual details that minimized the emotional force of the complainants’ accounts. In particular, they interrupted or redirected the complainants’ descriptions of the suddenness of the assault or their emotional reaction to it, focusing instead on details such as the mechanics of the incident, body positioning, and length of time. Consider the following examples from the in-chief examinations of the first, second, and third complainants respectively:

Excerpt 4.10

... he ends up behind me and he grabs my hair again really hard, harder than the first time he did it, and he’s pull – pulls my head down and at the same time he’s punching me in the head multiple times and I’m – I’m – I’m terrified. I don’t know why he is doing this. I don’t know if he’s going to stop. Can I take this pain? And my ears are ringing. My ears are ringing and I felt like I was going to faint. And I thought that I’m going to end up passed out on his floor. I’m going to start to cry, and –

Q. I’m going to go back and deal a little bit more detail here. So you’re sitting at the couch, you’re chatting, you’re flirting, you end up kissing. Do you remember how you get from being on the couch to being standing up in the apartment –

A. I was looking around at things. (February 1, 2016: 51)

Excerpt 4.11

Q. How did the kissing start?

A. It just started. There was no built-up. It was just sort of, from the way I remember it, he just started kissing me quite a, quite like suddenly, and then it was interrupted when he pushed me up against the wall, and the way I remember it, he hit me a couple of times and was looking at me, and then he hit me again, and then he stopped.

Q. Okay. So we’re just going to break this up a little bit, okay.

[...]

Q. Okay. And so the kissing happens, and you get pushed up against the wall and you've described, you made the hand motion that you've told us about or you've shown us?

A. Um-hm.

Q. Where was his hand on your body?

A. It was on my throat.

Q. So his fingers would have been facing in which direction?

A. So it's – um, can you say that differently, please?

Q. Sure. So I'm wondering if you can tell us how his hand was placed on your throat?

A. A thumb on one side of my throat and his palm on the front of my throat and his fingers on the other side of my throat.

Q. And where was he standing in relation to you when this happened?

A. He was standing in front of me. (February 4a, 2016: 29-31)

Excerpt 4.12

...I realized at that point that there was – there was something not right about that. Some kind of switch felt like it had happened, that it wasn't the same person that I was there with. And I – I think I tried to – I tried to get out of it and then his hand was on my mouth, sort of smothering me.

Q. Okay. I'm going to go back. So the hands were around your neck. How long were they around your neck?

A. Seconds. A few seconds. Ten seconds. I don't even – I don't – it's hard to know. It's hard to know. (February 8, 2016: 21)

Moving the discussion away from the complainants' descriptions of their experiences, the Crown asks close-ended questions that break the complex and confusing experience of sexual assault down into a series of sequential moments. In Excerpt 4.10, the complainant describes the alleged assault in the historical present verb tense, a stylistic device that "draw[s] past events into the here and now of the present [and] [...] mak[es] the past appear more vivid and immediate" (Matoesian 2001: 100). Narrating the assault as if it were unfolding in the present, the complainant also shares what she was thinking and indicates how confused and terrified she was. She produces a moving account that encourages listeners to emotionally identify with her experience at the time of the assault. However, her description is interrupted by Callaghan, who focuses on the details and begins by asking about the mechanics of how she went from sitting on

the couch to standing up in the apartment. Following the excerpt, the complainant is asked where she and Ghomeshi were in the house, where they were standing in relation to each other, how she got to the ground, where Ghomeshi's hand was positioned, and so on.

In Excerpt 4.11, the complainant describes the kissing, pushing, and hitting as all part of the same experience and occurring in quick succession. Stating that she is going to “break this up a little bit”, one Crown lawyer, Langdon, begins asking close-ended questions about the details of the event, including the positioning of Ghomeshi's hand and body. Similarly, in Excerpt 4.12 the complainant explains that the assault felt like a “kind of switch” and that she thinks she tried to leave⁶³, but Callaghan redirects the discussion to the length of time that Ghomeshi's hands were around her neck. The responses that these two complainants provide suggest that the details they were being asked about were not significant in terms of how they experienced the events. The second complainant is confused by Langdon's question about the direction of Ghomeshi's fingers and has to ask for the question to be re-worded. The third complainant's response to Callaghan's question – “A few seconds. Ten seconds. I don't even – I don't – it's hard to know” (Excerpt 4.12) – seems to indicate that the length of time was a difficult piece of information for her to ascertain and remember given the assault and sudden change of dynamics that she was experiencing. While the complainants focus on describing their *experience* of the assault, the Crown lawyers drew out isolated details that were presented as independent from how the events may have been experienced, despite the fact that the experience of being assaulted may have significantly impacted how details were perceived and remembered.

⁶³ In the next Chapter, I discuss how the complainants presented the assaults as sudden switches in Ghomeshi's demeanour, framing their accounts through stock stories of sexual assault and notions of responsible sexual subjectivity.

In these excerpts, the complainants and the Crown enact the dispositions of different forms of habitus. For the complainants, it feels natural to recount their traumatic experience of the assault and emotional response to it as an integral part of the events. Enacting the competence and dispositions of their juridical habitus, however, the Crown senses that these emotional representations conflict with the standards of legal objectivity they are striving to attain through the examination. Breaking the complainants' experiences down through a series of close-ended questions, the Crown takes for granted that sexual assault trials should be about disconnected actions, the positioning of fingers, and the number of seconds that elapsed during the assault. In so doing, they limit the emotional force of the accounts and make the discussion appear as objective as possible.

Interrupting and redirecting the complainants' emphases on how they felt, the Crown also demonstrated a practical awareness of legal concerns about the potential emotional bias introduced by the women's accounts of sexual assault. This is particularly apparent in the way that the first complainant was interrupted when using the historical present to describe the questions she was asking herself and the thoughts that she had at the time (Excerpt 4.10). As they exercised configurational power over and interrupted the complainants' accounts, the Crown operated on the doxic presumption that legitimate criminal prosecutions are those which adhere to legal ideals of objectivity and are not based on compassion or driven by emotional appeals. In this context, the symbolic violence of their configurational control is misrecognized as adherence to the factual objectivity and impartiality of legal order. In the next section, I consider how Ghomeshi's defence lawyer exercised configurational power by rhetorically achieving objectivity during cross-examination.

3.2. "You have no reason to disagree with that": Disagreements and Indisputable Facts

Doxic notions of objectivity contributed to the misrecognition of relations of domination during cross-examination and thus to its symbolic violence. As Henein framed her arguments through the rhetoric of objectivity, her discrediting narrative work was equated with the doxic legitimacy associated with empiricist notions that objective facts are fixed in time and place, exist separate from knowers, and can provide unmediated access to truth (Frauley 2016: 446; Richardson 1990: 122; Rigakos & Frauley 2011: 243-4; Smart 1995: 9). Within the courtroom, legal agents appeared to take for granted that objective facts exist independent of context or intention and can be brought into the legal process as unmediated indicators of what happened. As Valverde (2003: 6) argues, however, “facts do not exist in a pre-legal or pre-political world from which they can be borrowed for legal purposes” (Valverde 2003: 6). Critiquing the notion that facts can speak “for themselves” (1992: 45), which he refers to as “naïve objectivism” (1992: 274), Sayer argues that all factual statements are “thought objects” in the sense that they are “a particular way of talking about the world in some conceptual system, and therefore may be contested” (47). As demonstrated below, the assumption that there are objective facts that speak for themselves existed without scrutiny during the *Ghomeshi* trial, contributing to the misrecognized configurational power of Henein’s narrative position by allowing her arguments and interpretations to appear indisputable.

When the complainants tried to explain how they understood certain events or statements, Henein dismissed their references to context as irrelevant to the presentation of objective, indisputable facts. For instance, when Henein suggests that the first complainant’s police interview was brief and presumably insufficient, the complainant repeatedly emphasizes that she *experienced* it as long. In the ensuing symbolic struggle over how the interview length should be defined, Henein references the clock time of the transcript to add authority to her argument:

Excerpt 4.13

Q. All right. And do you recall that the [police] interview ends at 2:26? It's a brief interview, right?

A. I wasn't watching the time.

Q. Do you remember that it was a brief interview?

A. *It seemed long to me.*

Q. That's not what I asked you. Do you remember that it was a brief interview?

A. No, it wasn't a brief interview.

Q. You wouldn't disagree with me that if we looked at the videotape and it showed that your interview with the police ends at 2:26, that that's in fact what occurred right? *You have no reason to disagree with that.*

A. I don't disagree with that. (February 1, 2016: 75-6, emphasis added)

In this excerpt, Henein uses the word “brief” as though it has an objectively identifiable quality. When the complainant indicates that the interview “seemed long to [her]”, Henein treats this response as a departure from the question of whether the interview was brief; she states “that’s not what I asked” and repeats the question. Given that the word “brief” used in different contexts can mean very different lengths of calculated clock time, the complainant’s reference to how long the interview *felt* was certainly an understandable response to Henein’s question. The complainant challenges Henein’s characterization of the interview as brief by appealing to an experiential understanding of time in which the duration of events can seem to stretch or quicken based on one’s preoccupations and the narrative significance one attributes to it (Dowling 2011: 48, 69; Richardson 1990: 124-6; Ricoeur 1984: 52; 62-4). However, the unequal distribution of configurational power in the courtroom makes the complainant’s challenge unsuccessful in derailing Henein’s insinuations. To undermine the complainant’s disagreement about the interview being brief, Henein rephrases her question in a form that the complainant has “no reason to disagree with”, specifically, as a question about whether the complainant agrees with the objective time of the videotape. In so doing, Henein implies that the question of whether the interview was brief is answerable by reference to unmediated facts. Dismissing statements about

how long the interview “felt”, Henein presents the calculated time of the videotape (from 1:42 to 2:26) as indicative that the brief nature of the interview is objectively verifiable.

Similarly, Henein often justified her interpretation and exercised configurational power by referring to the indisputable facts of what was said, that is, the authority and apparent objectivity of transcribed statements. In the following example, Henein asks the third complainant about her description to the police of a post-incident interaction with Ghomeshi that made her realize that “there was something really off about [him]”. The complainant had gone to a party with Ghomeshi several days after the alleged assault and she told the police that Ghomeshi made some comments about her friend that made her realize “he was sick” and led her to tell him to leave her alone. Through this segment of cross-examination, Henein suggests that the complainant only found Ghomeshi to be “off” after he made these comments. The implication here is that if the alleged assault had actually occurred she would have found him to be “off” at that point, rather than days later when he made comments about her friend. To maintain this interpretation, Henein relies heavily on direct quotes from the police statement and dismisses the complainant’s attempts to assert what she *meant*:

Excerpt 4.14

Q. And what upsets you at the party, the thing that – the game ender on this is that he is trying to tell you that your friend is too controlling.

A. Yes.

Q. And that’s the thing that, to use your words when you’re speaking to the police, you realized “he was sick.”

A. It was the combination of things and that was the straw that broke the camel’s back for me, yes.

Q. Okay. Well, just so we have it, on page 12, do you recall telling the police: “It was at that point that I realized he was sick.”

A. Yes.

Q. So not before, it was when he’s insulting your friend saying she’s a bad influence, you say: “It was at that point that I realized that he was sick, that there was something really

sort of sick about this, that he was trying to manipulate me and isolate me. Just all those things sort of combined together.”

A. That’s right, all of those things, everything leading up to that.

Q. I’m reading verbatim –

A. That’s what I was referring to.

Q. I’m going to read verbatim what you tell the police. Page 12. You describe him saying that she was manipulating and controlling you. [...] And then you say: “And he just – and it was at that point that I realized that he was, ah, he was sick, that there was really sort of sick about – about this. That he was trying to manipulate me and isolate me and just all of these things sort of combined together. I just – he – he – he – it’s – I just realized he was – is there was something really off about this guy.”

[...]

Q. So do you recall that as you tell it there, that it is at that moment that you realize, at that point, to use your words, that you realized “he was sick.”

A. The combination leading up to that, yes, that’s what I meant, that the combination of those, all the incidents, that was the final straw.

Q. I know that’s what you’re saying now. What I’m asking you is do you accept that what you tell the police, your words are, “It was at that point...”

A. Yes. (February 8, 2016: 80-81)

In this excerpt, the complainant repeatedly tries to explain that when she was speaking to the police she intended to describe Ghomeshi’s comments as “the final straw” after a combination of incidents that presumably included the alleged assault. She states that it was Ghomeshi’s comments and “everything leading up to that” which led her to realize something was “off”. Emphasizing the complainant’s transcribed statements and “reading verbatim”, Henein suggests that this explanation is merely an attempt to twist what was actually said. In the last question of the exchange, Henein dismisses the complainant’s interpretation as merely “what [she’s] saying now”, juxtaposing it against the decontextualized content of the words recorded in the transcript. When Henein refers to the unchanging and seemingly unmediated words of the transcript, the complainant has little choice but to agree that those were her words and, in so doing, participate in her own narrative subordination by lending support to Henein’s interpretation.

In Excerpts 4.13 and 4.14, Henein responds to moments of struggle where the complainants' disagree with her interpretations by referencing the authority of textual evidence. According to Dorothy Smith (1999: 49), institutionalized relations of domination fundamentally depend on texts for their reproduction because texts⁶⁴ abstract interactions from their social contexts and universalize particular social relations. Furthermore, texts "have the generally neglected property of indefinite replicability" (Smith 1999: 79), creating the appearance of a "deceitful stasis" (75) that disregards the significance of the changing contexts in which texts are produced and interpreted. Similarly, Ricoeur (1988: 164) argues that the text is often regarded as "a structure in itself and for itself" and reading as "some extrinsic and contingent event" despite the fact that a narrative's *reception* and the context in which this takes place is vital to the work of configuration and interpretation. Discussing the use of quotations as a linguistic strategy in cross-examination, Matoesian (2001: 50-51; 110-112) points out that the persuasive force of direct quotations is based on a linguistic ideology⁶⁵ that views reported speech as an exact reproduction of past words and thus free of any interpretative work by the current speaker. This understanding of reported speech as particularly objective and authoritative assumes that speech can be decontextualized from both "the historical speech situation" (Matoesian 2001: 50) and the current speaker's "strategic (moral/evaluative/persuasive) purposes" (51). As Briggs (1996: 27) suggests, reported speech can render invisible the narrator's configurational position.

Assumptions about the "indefinite replicability" (Smith 1999: 79), apparent stasis, and unmediated reproduction of recorded statements functioned as part of the doxic legal standard of

⁶⁴ Smith's (1999) use of the term *texts* refers to more than written words – it can include "written, printed, televised, or computerized" (49) artefacts and involve practices such as "reading/watching/operating/writing/drawing" (75).

⁶⁵ Linguistic ideologies are cultural assumptions about how language operates, its role in society, and how it should be understood (Matoesian 2001: 40-1; 112). These ideologies have implications for how the linguistic practices of different speakers are evaluated and interpreted.

factual objectivity. That is, recorded statements were treated as indisputable facts that spoke for themselves. According to Eades (2012: 477), legal practice relies on the linguistic “ideology of decontextualized fragments” (Eades 2012: 477) that assumes statements can be understood without considering the context in which they were spoken. Explaining how the everyday functioning of the legal process contributes to the reproduction of neocolonial control in Australia, Eades (2012: 477) argues that by extracting decontextualized words and phrases from earlier statements, lawyers transform a witness’ story in a way that is very difficult for the witness to either comment upon or challenge. The video-taped police statements, unlike the complainants’ *experiences* of the police interview or what they may have *intended* when they spoke, were situated as existing in an unchanging and unmediated state over time, contributing to the authority of Henein’s arguments and making the inferences she drew from the recordings extremely difficult to refute. Enacting her practical sense of how to effectively wield indisputable facts in the courtroom, Henein lifts particular aspects out of the police interview in order to make her point and, in so doing, reproduces legal practices of decontextualization that obscure the social, interactional, cultural, and institutional contexts in which narrative telling occurs (Frank 2011: 33; Salmon & Riessman 2013: 199; Shuman 2011: 143-5; Vogl 2013: 71-2; Watkins 2013: 71).

Through the doxic language of objectivity, Henein presented her own statements as unmediated references to the unchanging facts of the police interview (e.g. the clock time, recorded words), obscuring how each iteration of a text “is the actual local practice of a particular individual” (Smith 1999: 75). That is, she contributed to the misrecognition of the relations of narrative domination that provided her interpretive and configurational work with authority. According to Matoesian (2001: 147-8), tape-recorded statements tend to be attributed

with an even higher degree of objectivity and authority than other textual sources, as the one who plays a tape-recorded statement appears completely distanced from, and thus unable to influence, the utterances it contains. In other words, a speaker's interpretive work may be obscured when referencing recorded and transcribed texts, helping them rhetorically achieve objectivity. In Excerpt 4.13, Henein points to the clock time of the video-taped police interview. In Excerpt 4.14, she "read[s] verbatim" what the complainant said to the police. The specific ways that she references the video-taped police statements – to imply that the interview was in fact brief or to suggest that the complainant only thought Ghomeshi was "off" after he made comments about her friend – are situated practices of interpretation made possible by her significant legal capital and the configurational power that her position in the courtroom affords her. The text comprising the police statements cannot speak for itself or communicate its own significance (Matoesian 2001: 139; 146), though it is treated as though it could. Its meaning within the context of the unfolding cross-examination must be inferred and could be constructed differently in a different context with different purposes. However, when the apparent authority, stasis, and unmediated self-evidence of the recorded police interviews exist without scrutiny, the symbolic violence of the defence's narrative manipulations can be misrecognized as the legitimate reference to objective facts.

The doxic element of objectivity also contributed to the authority of the main pieces of evidence that Henein used to undermine the complainants' accounts (e.g. the flirtatious e-mails⁶⁶). In her closing arguments, Henein argued that "the truth or portions of it [...] emerge[d] only when [the] complainants knew that they may be confronted with objective evidence, their

⁶⁶ Each of the complainants, particularly the first and second, sent e-mails to Ghomeshi after the alleged assaults. In her cross-examination of each complainant, Henein reveals these e-mails and points to their flirtatiousness. As discussed in Chapter Five, the emphasis on flirtatiousness draws on notions of predatory femininity and scorned women to discredit the complainants.

own words” (February 11, 2016: 72). Throughout the cross-examinations and closing arguments, Ghomeshi’s defence team presented their objective evidence as an unmediated window into what was really going on 13 years ago, thereby obscuring how this evidence was framed and interpreted to take on particular meanings. As I argue in the next chapter, the evidence raised by the defence was carefully configured within a narrative about the complainants’ manipulation of the legal process. The practical know-how of Henein’s juridical habitus allowed her to present her arguments as objective and indisputable facts, obscuring “how very malleable the realm of ‘fact’ may really be” (Mills 1959: 72), while simultaneously *making practical use* of the malleability of facts by configuring the objective evidence within a narrative of manipulation. Even as she interpreted and narratively configured the facts to serve particular aims, she rhetorically achieved objectivity.

By contributing to the misrecognition of configurational domination as inherently legitimate, the doxic element of objectivity and the defence lawyers’ practical mastery of its language underpins the symbolic violence of cross-examination. The ways that Henein’s references to decontextualized facts and textual documents negated the complainants’ explanations and alternate interpretations existed without scrutiny as part of law’s legitimate emphasis on objective facts. While the defence lawyers’ configurational work was perceived as a gradual revelation of legitimate objective evidence, the complainants’ testimonies were treated as potentially biased accounts whose interpretive work must be kept to a minimum. As I discuss in the next subsection, the ability to successfully wield the language of objectivism depends on the practical know-how of habitus and the relational position afforded by one’s legal capital.

3.3. Complainants’ Attempts to Mobilize the Language of Irrelevance and Objectivity

During the *Ghameshi* trial, the complainants occasionally attempted to frame their explanations or resist Henein's insinuations by speaking of decontextualized facts and legal relevancy. As suggested in Chapter Two, playing by the rules of the legal game can increase the likelihood of one's account being heard, understood, and deemed legitimate in the juridical field. The notion that law operates based on facts and legal principles that are objectively identifiable and can be separated from questions of morality operates as a doxic framework for interpreting the various phenomena raised during the legal process (Comack 2014: 13; Cotterrell 1992: 9-10, 13; Gotell 2002: 258; Hunt 1993: 141-2; Naffine 1990: 24-25, 34-36; Valverde 2006: 9-10). This doxic framework of objectivity helps unequal relations of configurational power exist as a misrecognized form of domination. Despite the ways that references to decontextualized, seemingly unmediated facts were used to undermine their interpretations, the complainants in the *Ghameshi* trial occasionally attempted to infuse their explanations with legitimacy or resist Henein's configurational work by drawing upon notions of legal relevancy and objectivity. However, the complainants did not have the practical mastery or legal capital of juridical habitus and thus their attempts to frame themselves as "stick[ing] to the facts" (second complainant, February 5, 2016: 9) often failed. Instead of adding legitimacy to their accounts, mobilizing the language of objectivity and legal relevancy actually supported the defence's efforts to frame them as manipulative.

In the process of cross-examination, complainants were questioned on events and details that they did not disclose to the police or the Crown. One of the explanations⁶⁷ used by the second and third complainants is that they did not think the excluded information was relevant to the facts of the assault. Henein frames this explanation as a nonsensical excuse intended to cover

⁶⁷ Other explanations include lapses in memory and embarrassment. These are discussed in later chapters.

up the complainants' deliberate manipulation. In the following examples, the second complainant is questioned on information she did not include in her police statements, such as kissing Ghomeshi good-bye and going to brunch with him the day after the alleged assault. When asked why she did not provide this information to the police, the complainant explains that she did not think it was relevant and that during her initial police statement she was trying to be succinct and "stick to the facts":

Excerpt 4.15

Q. And you never told the police about the brunch, right, until today?

A. That's true. I didn't know that any of that was relevant to my statement. I presumed that when they asked about what happened, they were speaking specifically about when Mr. Ghomeshi assaulted me. I didn't understand the relevance of after-incident contact.

Q. That is a very well-rehearsed answer [...] but I'm going to suggest to you the police were very clear about what they needed to know from you. They asked you specific questions about what you did, right?

A. They did, however, I did not understand the importance of what happened afterwards. (February 4a, 2016: 74)

Excerpt 4.16

Q. So when [the police] say to you, "Look, we want to know about your relationship with Mr. Ghomeshi before. We want to know about the incident and we want to know about after", you give them some information, right?

A. I gave them some information because I gave them what I thought they needed to know. I really partly because during the process of giving my statement to the police I felt like they wanted me to just stick to the facts, to the details. (February 5, 2016: 9)

Excerpt 4.17

Q. All right. And so your claim that you were rushed, do you accept that's not true? The police never rushed you?

A. I ... really ... so I felt that what was critical was brevity, succinctness. They didn't ... I can't remember if this was said to me or if this was ... this was something that was my impression, that ... yeah, being brief and succinct mattered and that the detail was regarding assaults and I didn't understand at that point the importance of after incidents stuff because as I indicated in an earlier comment, I thought that that was something that would be exposed later on by the Crown as they do an investigation which I have now come to understand does not happen.

Q. It's the Crown's fault and the police's fault?

A. It's no one's fault. It's just here's a mis-communication between people who aren't aware of the system.

Q. Accept that the police tell you to give them as much detail as possible?

A. They do say that, yes. (February 5, 2016: 23)

In the above excerpts, the second complainant states that she thought the police were interested in the facts surrounding the assault itself and that the details of after-incident interactions were less relevant and would be exposed later by the Crown's investigation. In other words, the complainant suggests that during her police statement she was trying to "stick to the facts" and exclude anything that might be irrelevant to the assault itself. Dismissing this explanation, Henein states that it is a "well-rehearsed answer" and presents it as the complainant's attempt to blame the police and the Crown (i.e. "It's the Crown's fault and it's the police's fault?"). In addition, Henein emphasizes what the police *said* (e.g. to provide "as much detail as possible") in order to suggest the illegitimacy of the complainant's *impression* of what the expectations were. This overlooks how narrative telling is shaped not only by an interlocutor's comments, but also by the narrator's perception of what matters to the immediate audience (Guy & Montague 2008: 390; Riessman & Quinney 2005: 394; Salmon & Riessman 2013: 199). As Labov (2013: 22) points out, it is rare for social sanctions about what matters in a narrative to be stated expressly and narrators work to meet implicit expectations so as to not "lose the audience". In this sense, narrative sensibilities are embedded within the practical sense of habitus, making certain narrative details feel relevant or irrelevant in a given situation.

In the context of providing a police statement, the complainant may have been externalizing her sense of what was appropriate in the legal game. The dispositions of her habitus, however, exist as a different class of habitus than that of the legal professionals and are thus marginalized in the juridical field. Just before Excerpt 4.17, the complainant explains that

she thought there would be opportunities after the police interview to provide more information; she states she did not understand the process because “[her] only experience with the law has been watching law shows on TV based on the American paradigm” (February 5, 2016: 22).

Unlike the lawyers, the complainant’s attempts to explain her exclusions through the language of legal relevancy do not possess the legitimacy stemming from years of inculcating the rules of the legal game into an embodied sense of how to act and speak in the juridical field. Without legal capital or the “entry ticket” of the juridical habitus, the complainant’s explanations are discredited as illegitimate posturing – as “very well-rehearsed answer[s]”.

Instead of providing legitimate explanations for excluded information, the complainants’ references to legal relevance were framed as implausible and manipulative. In closing arguments, Henein stated that she was troubled by the complainants’ decision “to reserve for themselves the authority to determine what is and is not relevant and to decide when and if ever it will be disclosed, and only when confronted with the truth and with their own words” (February 11, 2016: 80-81). Aligned with aforementioned assumptions about sexual assault complainants’ testimonies being emotional and thus inherently suspicious, this comment suggests that the complainants stepped outside of their limited legal role and attempted to usurp the court’s authority to determine relevancy. The complainants’ exclusion of certain information was presumed to be fundamentally opposed to both “the truth” and the objective proof of “their own words”. In this context, the suggestion that they were “stick[ing] to the facts” was presented as a manipulative, implausible, and illegitimate misappropriation of the language of legal relevancy.

The judge accepted the defence’s framing of the complainants’ withheld information and their explanations for it; speaking of the second complainant, he states that he “can understand being reluctant to mention it, but [...] do[es] not understand her thinking that it was not relevant”

(March 24, 2016: 10). While the legal professionals also work to exclude potentially relevant information (e.g. keeping the complainant from drifting into “social commentary”), they do so through enacting the embodied legal capital of their juridical habitus and their exclusions are thus perceived as legitimate attempts to uphold the ideals of legal process. By framing the complainants’ exclusions as manipulative and suspect, the defence lawyers and the judge misrecognize the unequal distributions of legal capital that render questions of legal relevance legitimately answerable only by legal professionals. Within the doxic framework of legal objectivity, the ideal witness is one whose account provides the episodic stories for the lawyers’ configurational work while appearing as free as possible from interpretive work or practices of selection and exclusion.

The complainants also mobilized the language of objectivity in their attempts to resist the insinuations of Henein’s configurations. In the following excerpt, the first complainant is questioned on an e-mail she sent to the police in which she stated that she remembered wearing hair extensions at the time the alleged hair pull took place. In court, she stated that she was not wearing extensions – an inconsistency that Henein used to imply manipulation of evidence:

Excerpt 4.18

Q. So where are we today now? Did you have extensions, did you not have extensions? What’s your evidence today?

A. I’ve answered that question a number of times. I did not wear extensions.

Q. All right. And so I take it you agree that if you had worn extensions, it’s something that you told the police, to use your words, you “very clearly remember now,” that it would be odd that your hair was pulled so hard and the extensions didn’t end up in Ghomeshi’s hands, right?

A. I was not wearing extensions.

Q. But that wasn’t my question.

A. *This is hypothetical.*

Q. All right. Do you agree with me – let me ask you this: Do you agree with me that when you write that email to the police and you say “I remember it, and I don’t just

remember it sort of, I remember it very clearly now that that was not true,” the false memory.

A. That was me trying to recall and not recalling at all correctly, that is true. (February 1, 2016: 114-5, emphasis added)

In this excerpt, Henein suggests that the complainant changed her evidence because of the implausibility of her initial statement: “it would be odd that your hair was pulled so hard and the extensions didn’t end up in Ghomeshi’s hands”. The complainant resists this insinuation by pointing out the hypothetical speculation of Henein’s question and restating the facts, namely, that she “was not wearing extensions”. Indicating that she had already clarified this “a couple of times” and refusing to answer “hypothetical” questions, the complainant contests the legitimacy of Henein’s questioning and resists her configurational efforts, prompting Henein to rephrase her question. Although the complainant’s appeal to the primacy of the facts and the irrelevance of speculation momentarily disrupts Henein’s questioning, the relations of configurational domination allow her to respond by pointing to the inaccuracy of the e-mail and the complainant agrees with the reworded question. In this sense, the complainant’s emphasis on the facts and dismissal of the hypothetical does not undermine Henein’s suggestion of unreliability or threaten underlying relations of configurational power. While the complainant momentarily resists Henein’s specific configuration and insinuation, the relation of narrative domination remains unquestioned and the complainant ends up conceding to Henein’s reworded statement.

Similarly, in the following example the first complainant attempts to correct Henein’s narrative by emphasizing the specificity of what was said in the police interview. In court, the complainant said her head was pulled towards the window, whereas in the police statement she agreed with the officer when he asked if her head was pulled back towards the seat. The

complainant tries to distinguish between what the *officer* said and what *she* told the police, but Henein conflates the two:

Excerpt 4.19

Q. And I put to you that what you told the police was that your head was pulled back towards the seat, right?

A. Correct – no, I – Detective Ansari said seat, I didn’t.

Q. And I put to you that you accepted what he said to you; you describe it, you agree with him, you’re not talking over each other, and you accept that your head was pulled back towards the seat?

A. I was nervous. (February 2, 2016: 4-5)

Despite her earlier emphasis on “reading verbatim” and presenting the transcripts as unmediated (Excerpts 4.13 and 4.14), here Henein treats the complainant’s *agreement* with or failure to correct the officer’s statement as equivalent to her making the statement herself. In fact, in the defence’s closing arguments Robitaille summarizes this conflict over the direction of the hair pull as follows: the complainant “was adamant that she did not tell police that her hair was pulled towards the back of the seat. [...] [She] refused to admit it and [...] had [...] significant difficulty [...] conceding that *that’s, in fact, what she told investigators*” (February 11, 2016: 38-39, emphasis added). Departing from verbatim recitation of what was said, though nonetheless mobilizing the video-taped statement to make their point, the defence drew upon the linguistic “ideology of narrator authorship” (Eades 2012: 477). According to Eades, this linguistic ideology obscures the interactive process that produces an account, such as a police statement, and instead views it as “the sole product of the interviewee” (2012: 478). The interactive back-and-forth between the officer and the complainant is concealed by the defence’s configuration; rather than the complainant *agreeing* with the officer in a highly stressful situation, the defence concludes that this is “in fact, what *she told* investigators”. Furthermore, the struggle over meaning in cross-examination is summarized as the complainant “conceding” to the facts, obscuring the

relations of configurational power that lend legitimacy and authority to Henein's configurations. Dismissing the complainant's attempt to emphasize what was said by whom, Henein's second question in Excerpt 4.19 implies that *accepting* the suggestion that her hair was pulled towards the seat has the same meaning as the complainant saying this herself. Appealing to her nervousness, the complainant accepts this conflation of meaning and by closing arguments the interactive context of the police statement and the specificities of what was said have been erased.

In this way, the defence lawyers enacted their practical mastery of legal objectivity and its language as the basis of different practices of configurational control. As Bourdieu (1977: 73) carefully clarifies, practices are not directly determined "mechanical reaction[s]" to the dispositions of habitus. Instead, habitus involves improvisation as the various elements of one's practical sense are differently enacted in different contexts towards different ends. As she enacted her practical mastery of legal objectivity, Henein alternated between appealing to decontextualized, seemingly unmediated facts (e.g. the objective time of the police interview) and basing her arguments on key inferences about meaning (e.g. that agreeing with a statement means the same as making that statement). This is not to suggest that these strategies exist in some sort of binary with the former representing objectivity and the latter representing interpretation; as suggested previously, all factual statements incorporate implicit conceptual and interpretive systems (Frauley 2016: 449; Sayer 1992: 47; Valverde 2003: 5-6). Henein does not merely present the facts, but imposes them with particular meanings within her narrative configuration. My argument, however, is that some of the defence's argumentation strategies, such as the proposal of a hypothetical scenario and the conflation of accepting or not correcting a statement with giving one's own statement, do not adhere with the tenets of objectivity. Instead

of suggesting that facts speak for themselves, the defence occasionally made key inferences that departed from the specific content of what was said by different agents and even dismissed the complainants' attempts to bring things back to the facts. Importantly, however, the defence's various argumentation strategies were improvised expressions of the cognitive structures embedded in their legal habitus.

For instance, in the following excerpt Henein configures an inconsistency between what the first complainant told the police (i.e. that after attending Ghomeshi's show it was too snowy to go anywhere) and what she said in court (i.e. that they briefly went to a pub after the show). In so doing, Henein departs from the very transcript that she is quoting:

Excerpt 4.20

Q. Well, I'm going to suggest to you, you didn't go to any pub; it was snowing and everything was closed as you told the police? Is it possible that that memory is just wrong?

A. What I told the police was – I'd have to look at that, but I remember it being very snowy and we weren't going to go anywhere far.

Q. Why don't you look at page 14 with me of your police statement [...] "But so we went down there and then after, he, he asked me to, to come out with him, but the, ah, there were, there was a horrible, horrible snow storm. We couldn't really go anywhere. It was a – it was treacherous, so he ended up driving [my friend] to the subway. [...]" and then you describe driving to his home?

A. That's it.

Q. All right. So you now see what you told the police, *that everything was closed*, there was nowhere to go, and that you went to his home after dropping [your friend] off?

A. But everything wasn't closed. I'm telling you, this [...] statement was done early with my memories and I was nervous. (February 2, 2016: 15-16, emphasis added)

The section of the police statement Henein quotes does *not* indicate that "everything was closed", nor does it necessarily contradict the complainant's later claim that they went to a pub. In the police interview, the complainant stated that they "couldn't really go anywhere" and the pub that she referred to during in-chief examination was just "across the street" (February 1,

2016: 49) from where the show took place. In other words, it is possible that they went to the pub *and* that they “couldn’t really go anywhere”. By summarizing the excerpt from the police statement as a claim that “everything was closed”, however, Henein makes a key inference about what the complainant said, thereby increasing the appearance of inconsistency: not only did the complainant fail to mention going to a pub with Ghomeshi, but she indicated “everything was closed”. Even as she departs from the transcript, Henein implies that she is allowing the complainant’s prior words to speak for themselves. In this way, she makes claims that are *not* based on the facts she cites, while simultaneously wielding objectivity.

At times the defence lawyers in the *Ghomeshi* trial signaled the legitimacy of their arguments by referring to objective and unmediated evidence, while at other times their claims depended on key inferences that departed from the evidence being shown. This suggests that the lawyers’ juridical habitus not only provides them with a sense of how to frame their statements through the legitimacy of legal objectivity, it also gives them a practical mastery of how to legitimately sidestep the emphasis on objective facts in order to make certain interpretive claims. Through these different enactments of juridical habitus, the defence imposed meaning on the information raised during cross-examination and effectively countered the complainants’ attempts to resist certain narrative configurations. Conversely, the practical sense of the complainants’ non-legal habitus did not function as legal capital and their attempts to speak in the language of legal relevance and objectivity were unsuccessful. While the complainants’ claims to “stick to the facts” were configured as deceptive misrepresentations, the defence’s inferences, interpretations, and enactments of configurational power were shrouded in the legitimacy provided by the precept of legal objectivity. In this sense, legal objectivity and the lawyers’ practical mastery of its tenets and language contributed to the misrecognition of

configurational domination and thus to the symbolic violence of the courtroom narrative practices.

Conclusion

Throughout this chapter, I have demonstrated how the doxic elements of legal impartiality, legal autonomy, and objectivity underpinned the misrecognition of relations of configurational domination, thereby contributing to the symbolic violence of courtroom narrative practices. Although the legal process, especially in cases of sexual assault, often depends on people recounting their experiences and episodic stories, those who lack the embodied legal capital provided by juridical habitus are likely to be treated with suspicion – that is, as having the potential to introduce biased and legally irrelevant information into the legal process. Given the perceived threat posed by the emotional force of women’s accounts of sexual assault, sexual assault complainants may be subjected to “an unusual level of scrutiny and suspicion” (Larcombe 2005: 107). In his judicial ruling, Justice Horkins states that,

One of the challenges for the prosecution in this case is that the allegations against Mr. Ghomeshi are supported by nothing in addition to the complainant’s word. There is no other evidence to look to determine the truth. There is no tangible evidence. There is no DNA. There is no “smoking gun”. There is only the sworn evidence of each complainant, standing on its own, to be measured against a very exacting standard of proof. This highlights the importance of the assessment of the credibility and the reliability and the overall quality, of that evidence. (Ruling, March 24, 2016: 23)

Unlike “smoking gun[s]” and DNA that are experienced as forms of “tangible evidence” that appear to speak for themselves, witness testimony is seen as mediated and lacking inherent credibility or reliability. By juxtaposing the self-evident relevance of tangible evidence against the need for legal measures that assess the quality of the “complainant’s word”, Justice Horkins overlooks the fact that *no* piece of evidence can signify on its own and must be configured within

narratives of human action and interpreted through cultural frameworks of meaning. After all, even DNA evidence must be integrated into a narrative in order to have significance; as Grunewald (2013: 367) puts it, “DNA doesn’t tell a story, but lawyers do”.

The presumed partiality of the complainants’ testimony, juxtaposed against the doxic standards of legal impartiality and autonomy, allowed the symbolic violence of the courtroom configurational domination to exist without scrutiny as a legitimate component of the legal professionals’ role as guardians of legal standards. While the dispositions of the complainants’ habitus failed to translate into legal capital and their attempts at configuration and interpretation were thus delegitimized, the legal professionals enacted their practical mastery of objectivity, legal relevancy, and impartiality in ways that legitimated their configurational work and domination over the complainants. Since they did not possess the legal expertise or embodied capital bestowed by the juridical habitus, the narrative domination that the complainants experienced could be misrecognized as part of the legitimate legal process that the complainants had *chosen* to undergo by the mere fact of their participation in the trial. As Bourdieu (1987b: 831-2; see also Smart 1989: 161) argues, “to agree to play the game, to accept the law for the resolution of the conflict, [...] is above all to recognize the specific requirements of the juridical construction of the issue”. When sexual violence is perceived as a legal issue that can be legitimately resolved only through legal processes and the adherence to certain legal standards, sexual assault complainants are expected to take part in a game where their participation is limited to providing the episodic stories for those with the capital to configure narratives. In the next chapter, I examine how tropes of feminine passivity, vulnerability, sexual interest, and manipulation were bound up with the narrative technique of peripeteia. I argue that the complainants’ attempts to create narrative twists centred on Ghomeshi’s actions were limited in

various ways, while the defence's employment of narrative twists presented Ghomeshi's accusers as manipulative threats to the legal process itself. In other words, I trace how the courtroom relations of configurational domination and broader patriarchal relations conditioned the gendered narratives that were (re)produced in this trial.

Chapter Five – A Victim of Mr. Hyde or the Wolf in Grandma’s Clothes? Conflicting Narrative Twists in the *Ghomeshi* Trial

Introduction

Cultural stock stories about sexual assault, dominant notions of femininity, and their underlying patriarchal relations form part of the practical sense of habitus. When inculcated in the dispositions of habitus, they do not need to be expressly stated or thought, but rather they provide agents with an embodied sense of what is significant, how to act, what should or should not be included in an account, how events are causally connected, and what is plausible. The narrative dispositions of habitus do not automatically result in certain narratives being told or evaluated in a particular manner. Engaging in “regulated improvisations” (Bourdieu 1977: 78), agents transpose the practical sense of habitus in ways that can generate a wide variety of practices and narratives. Cultural stock stories and gendered binaries are not directly or mechanically reproduced, but become part of agents’ narrative dispositions, which are enacted in different ways across different contexts.

During the *Ghomeshi* trial, the different legal agents enacted their practical sense of what events, details, and narrative ordering might lend legitimacy to their interpretations and arguments. Cultural stock stories of sexual assault and dominant notions of femininity formed part of the narrative dispositions of the shared socio-political and cultural habitus. As discussed in Chapter Two, framing events through cultural stock stories has the potential to augment one’s narrative capital by rendering an account more recognizable and thus more legitimate to a particular audience. As they strived for their accounts to be heard and deemed credible, the legal agents drew on their practical sense of what certain events, explanations, actions, and characterizations mean in the context of sexual assault. The complainants and Crown tried to

create narratives about an interested male pursuer who suddenly became aggressive; the defence lawyers tried to present the complainants as the interested pursuers who made up false allegations after being scorned. Throughout the competing narrative practices of the trial, passive femininity and compliance with legal processes were perceived as natural traits of genuine victimhood, contributing to the misrecognition of patriarchal relations that privilege male pursuit, rationality, and independence in heterosexual relationships. In this sense, embodied perceptions of what constitutes female vulnerability and legal compliance informed the legal agents' sense of how to legitimately make or discredit claims of victimhood.

During the trial, the narrative technique of peripeteia functioned as a key form of symbolic violence. As mentioned in Chapter Three, moments of peripeteia or narrative twist involve the sudden reversal or upheaval of circumstances in a narrative's trajectory (Bruner 2002: 5; Ricoeur 1984: 43). The ability to successfully create narrative twists depends on relations of configurational power and can be a significant source of symbolic power in that it can contribute to one's status as a knowledgeable narrator, which further legitimizes one's ascription of meaning to events. In particular, by successfully narrating plot twists, narrators claim to reveal what is *really* going on and what was hidden or unknown by the audience until that moment. Both the complainants and the defence narrated moments of peripeteia (i.e. narrative twists), but their unequal legal capital and configurational power greatly impacted the legitimacy and effectiveness of these twists. While the complainants' were unable to successfully create moments of peripeteia, the narrative twists in the defence lawyer's configurations contributed to their discrediting work by enabling them to frame the victimization narrative as a façade and their own evidence as the sudden revelation of what really happened. Importantly, these narrative twists were conditioned by the structural relations of narrative domination in the

courtroom and broader gendered relations of power that are misrecognized as natural ways of acting.

In this chapter, I examine how stock stories of sexual assault, courtroom narrative techniques and misrecognized relations of domination mapped onto one another in the *Ghameshi* trial. I begin by looking at how, during in-chief examination, stock stories of heterosexual male pursuit and sexually passive and responsible femininity informed the ways that the complainants framed their interactions with Ghameshi. I also discuss how they presented the alleged assaults as a “sudden switch” (February 1, 2016: 46) or “a Jekyll and Hyde thing” (February 8, 2016: 29), explain why their narrative twists were unsuccessful, and analyze how they described their motivations for reporting the assaults. In the second half of the chapter, I examine how Ghameshi’s defence team created narrative twists that re-characterized the complainants as infatuated, scorned, hostile, and attention-seeking women who misused the legal system to serve their own purposes.

1. “He’s very charming, you know. And you second guess yourself”: Gendered Narratives of Victimization

Although the relations of narrative domination in the courtroom did not afford the complainants configurational power throughout the trial, they did have opportunities to explain certain events and experiences. During in-chief examination, the complainants presented themselves and their experiences in ways that misrecognized sexual passivity, responsible risk-management, and compliance with legal processes as natural traits of female victimhood. In so doing, they enacted the gendered binaries and patriarchal relations internalized within their socio-political and cultural habitus. While certainly the things that we are told and the ways we are taught to speak are internalized in habitus, Bourdieu (1991: 51) argues that perhaps the most

influential factors of habitus involve neither language or consciousness but rather our internalization and tacit perception of “suggestions inscribed in the most apparently insignificant aspects of the things, situations and practices of everyday life”. As examples of these everyday injunctions that he describes as “silent and insidious, insistent and insinuating” (Bourdieu 1991: 51), he refers to “‘reproachful looks’ or ‘tones’, ‘disapproving glances’ and so on”.

After a lifetime of having their habitus formulated through passing comments about women who report sexual assault, looks or tones of disbelief, and expectations of how women should behave in their relations with men, the complainants would not have needed to be told how certain actions or events might discredit them. Instead, they would have developed a practical sense of what constitutes ‘normal’ relations between men and women, what is ‘appropriate’ behaviour in heterosexual relations, and what makes for a credible or untrustworthy account of sexual assault. In this way, dominant notions of womanhood, heterosexual relations, and female victimhood embedded in habitus not only make certain narratives and relations possible, but make them *feel* appropriate, plausible, and credible. In other words, decades of everyday looks, tones of (dis)belief, and insinuations are inculcated in the socio-political and cultural habitus, providing the embodied conditions within which experiences of sexual assault are narrated.

As they enacted their habitus and attempted to produce a credible account, the complainants emphasized their passive and vulnerable position in relation to Ghomeshi. Furthermore, the complainants tried to describe the alleged assaults as narrative twists in a way that might have helped them communicate to the legal audience some of the confusion they felt at the time. However, the unequal courtroom relations of configurational power and the symbolic violence of the defence’s configurational control during cross-examination limited their ability to

present themselves as responsible, passive women ambushed by Ghomeshi's attack. Although the complainants' references to their passivity and hesitant interest had the potential to function as a form of gendered capital lending legitimacy to their account, these references were conditioned by and (re)produced doxic assumptions about what constitutes an appropriate or natural relations between heterosexual men and women, as well as stock stories about sexual assault and the women who report it. I begin this section with an examination of how the complainants described pre-incident events by emphasizing Ghomeshi's interest and pursuit of them and pointing to their own initial hesitation. Next, I turn to their representation of the alleged assaults and consider some of the factors that may have limited their ability to create narrative twists that would have helped to legitimate their confusion. Finally, I examine how the complainants explained their decisions not to go to the police contemporaneous with the time of the assaults and their change of mind ten years later.

1.1. Setting the Stage: An Interested Pursuer and Hesitant Women

As they were asked to describe the interactions and events leading up to the alleged assaults, the complainants enacted their practical sense of the dominant gendered characterizations associated with heterosexual relations. When embedded in the dispositions of habitus, gendered relations of feminine passivity and reactivity to male pursuit and sexual interest (du Toit 2007: 61; Ehrlich 2001: 29; Frith 2009: 101; Lees 1997: 134) are experienced as natural and other ways of enacting or thinking about heterosexual relations are experienced as unusual or even inappropriate. Externalizing their practical competence in cultural narratives about women, the complainants distanced themselves from the various gendered tropes that could undermine their claims to having been victimized, including that of the seductive, manipulative woman (Busby 2014: 258; Weiss 2009: 827), the calculating, economically rational

woman (Matoesian 2001: 144-5; Smart 1995: 227), the irrational, emotional, and infatuated woman (Ellison & Munro 2010a: 797; Matoesian 2001: 42), and the irresponsible, risk-taking woman (Busby 2014: 289; Gotell 2008: 882; Randall 2010: 415). As discussed in Chapter One, the gendering definitions of consent and non-consent that underpin legal responses to sexual assault imagine women in a position of reaction to male sexual attention; it is women who consent or refuse to consent to the actions of men. Enacting a practical sense of the characterizations that were more likely to augment the plausibility and credibility of their account, the complainants presented Ghomeshi as the initiator and themselves as interested in him but hesitant. That is, in their episodic stories of the events before the assault, the complainants presented themselves in a position of vulnerability and responsivity to Ghomeshi's advances. This was conditioned by broader patriarchal relations internalized in the cognitive structures of socio-political and cultural habitus as natural.

Early in the in-chief examinations, each complainant pointed to Ghomeshi's interest and his attempts to pursue them. The first complainant described how he flirted with her throughout their interactions and emphasized that when she attended his show at his invitation "his eyes lit up and he smiled and he said, 'You came'" (February 1, 2016: 39). The second complainant contextualized her initial interactions with Ghomeshi by pointing to how he asked to stay in touch, responded quickly to her emails, tried to engage in phone sex with her, tried to kiss her, and made "cheesy" comments about wanting to "listen to music and just hold [her]" (February 4a, 2016: 24). The third complainant described an early interaction where Ghomeshi pretended they were engaged even though they barely knew one another; she stated that "it was taking ownership of [her] in some way that it was just surprising. It was a familiarity that was surprising" (February 8, 2016: 15).

In juxtaposition to Ghomeshi's interested pursuit, the complainants presented themselves as restrained and hesitant. In other words, they enacted their practical sense of the discrediting insinuations associated with notions of female emotionality, seduction, and manipulation by offsetting potential suggestions that they were *too* interested in Ghomeshi. When asked by the Crown whether she saw "any sort of future with Mr. Ghomeshi", the first complainant stated that she "was just exploring the idea of it [and] still getting to know him" (February 1, 2016: 58). Similarly, the second complainant explained that she stayed in touch with Ghomeshi because she "thought he was cute and interesting and [she] wanted to explore his personality a little bit more to see [...] if he was someone with whom [she'd] want to spend more time" (February 4a, 2016: 18). The second complainant was also asked to explain why she went to Toronto the weekend that the alleged assault occurred:

Excerpt 5.1

A. I went to Toronto for a few reasons. I've got a number of friends who live there, and part of the reason too was to spend time with Mr. Ghomeshi in person to see if he was someone that I wanted, I guess, to pursue a relationship with, so that was a motivator, but I also, as I stayed at an old boyfriend's house, and I spent time with other friends and it was – it's good to get out of Halifax sometimes.

Q. Okay. So part of your motivation obviously was, as you've indicated, that you wanted time to see Mr. Ghomeshi. When you're on your way here after this communication back and forth, how are you feeling about Mr. Ghomeshi?

A. I felt like it was, he was going to be an interesting person to get to know, and I was looking forward to it, and thought it would be fun.

Q. Were you thinking at all about him in any kind of romantic context?

A. Sure. I was thinking that – I don't date people ever. I will meet someone and then we'll just be in a relationship. I don't casually date various people, and so I, I guess I was little naïve, but I was like, huh, maybe, maybe we'll really hit it off and it will be awesome and we'll have a time together. I don't know. But I didn't know enough about him to make that jump, so I wanted to spend time with him and see if that was a potential thing. (February 4a, 2016: 21-22)

When describing her interest in Ghomeshi and motivation for going to Toronto and seeing him, the complainant is careful to present her interest in a non-committal manner. She emphasizes that there were other reasons for her visit to Toronto (i.e. seeing other friends and getting out of Halifax) and indicates her uncertainty regarding Ghomeshi; she thought he was interesting and was thinking about him in a “romantic context”, but she “didn’t know enough about him” to know whether there was “a potential thing” between them. Elsewhere, she also makes it clear that she was not after Ghomeshi for his fame or success, stating for instance that she “didn’t care about his career” (February 4a, 2016: 40) and that his talk about his success “didn’t really impress [her]” (February 4a, 2016: 24).

Through her disclaimers, the complainant demonstrates that embedded in her habitus are a set of practical competences and perceptions that cause her to experience insinuations of her own romantic interest as potentially discrediting. Stock stories that portray active female pursuit as fueled by promiscuity, irrational infatuation, fame-seeking, or gold-digging (Ehrlich 2001: 28; Mewett & Toffoletti 2008: 169-170; Sanday 1996: 215; Waterhouse-Watson 2016: 953) are embedded in the shared socio-political and cultural habitus, providing the complainant with a practical sense of the discrediting representations from which she should distance herself. Describing herself as a “little naïve”, the complainant explains her actions (i.e. going to Toronto and seeing Ghomeshi) in a way that misrecognizes “women’s vulnerability to men’s agency” (Bonnycastle 2000: 73) as a natural component of plausible narratives of sexual victimization.

The complainants’ attempts to frame themselves as the objects of Ghomeshi’s interest and pursuit is further exemplified in the first and second complainants’ descriptions of how they turned down his pre-incident sexual advances. In the following excerpts, both of which occur just

before the alleged assaults are described, the first and second complainants (respectively) explain the nature of their interactions with Ghomeshi leading up to the aggression:

Excerpt 5.2

Q. Okay. What happens then?

A. We stopped and we're talking and he's – you know, we're chatting for a bit about I don't remember what, and we're facing each other in the seat and he was getting playful and flirtatious and says, "Can you undo a couple of your buttons?" I said, "No." And he just says, "Oh, come on." And I said, "No," but not an angry "No," just "No."

Q. Okay. I'm going to stop for a minute there. You indicated that he was being playful and flirtatious. What was he doing that made you believe that?

A. Well, asking me to undo my buttons. But just, you know, the way he's talking. When someone's flirting, there's a certain energy they give off.

Q. Okay. And if he was flirting, were you flirting back?

A. Yes.

Q. So you've indicated he asked you to undo a button, or a couple of buttons. And where are you referring to, just so we're clear?

A. Where on my blouse?

Q. On your blouse.

A. Here.

Q. Okay. And I'm going to get you to pick it up from there, if you could. (February 1, 2016: 42-3)

Excerpt 5.3

Q. Okay. Do you recall where he was living at the time?

A. He was living in the Danforth. I think he lived on West Street, and as we were walking there, I remember he had his arms around my shoulder, and he commented that I was the right height for him if we were to start dating, and he kept trying to kiss me, but again, it was like it was, it was not the right time. It felt forced, and now when I say forced, I don't mean physically forced, but chronologically forced, if that's such a thing.

Q. Okay. So as you're walking home, you say he was trying to kiss you. Did you ever engage in any kissing on the way home?

A. I don't remember. (February 4a, 2016: 25-26)

Emphasizing how they turned down Ghomeshi's flirtatious requests and kissing attempts, both complainants describe Ghomeshi as the active pursuer and themselves as the objects of his sexual desire. Furthermore, they both highlight the limitations of their own desire. In Excerpt 5.2, the complainant presents herself as both interested in Ghomeshi and restrained. Clarifying

that her “no” was “not an angry “No”” and confirming that she was “flirting back”, she indicates that, although she was not willing to unbutton her blouse, she remained interested in him, thus explaining why she remained in the car even as she turned down his advances. Although the complainant does provide this episodic story and explains her hesitant interest, the Crown exercises the configurational power afforded by his position in the courtroom by asking her to stop so he can request further details and then deciding when she should “pick it up”.

In Excerpt 5.3, the complainant answers the specific question about Ghomeshi’s place of residence and then uses the word “and” to move into an account that emphasizes Ghomeshi’s interest in her (i.e. “he kept trying to kiss me, but [...] it was not the right time”). This episodic story supports the complainant’s claim a few lines earlier that when she went to Ghomeshi’s place she “didn’t have any interest in having sex with him” (February 4a, 2016: 25). By turning her response to a narrow question into an episodic story about how she turned down Ghomeshi’s advances, she negotiates an opportunity to configure, presenting Ghomeshi as the active pursuer and herself as hesitant just as the Crown’s narrative moves towards the alleged assault. In response, the Crown acknowledges the complainant’s story, while simultaneously exercising configurational power by asking a close-ended question about the *events* that occurred (or did not occur) on the walk: “Did you ever engage in any kissing on the way home?”.

Legal definitions and stock stories about sexual assault “reproduce a vulnerable feminine subject and a sexually controlling masculine subject” (Larcombe 2005: 55; see also Frith 2009: 101). In other words, they are conditioned by and reproduce misrecognized patriarchal relations. As the complainants described their interactions with Ghomeshi leading up to the alleged assaults, they contextualized and qualified their interest in Ghomeshi in ways that demonstrated their practical knowledge of cultural stock stories and their implications for the credibility and

plausibility of women's accounts of sexual assault. Given the naturalization and misrecognition of heterosexual relations as male sexual pursuit and female responsiveness to this pursuit, the complainants were careful to present themselves as vulnerable in relation to Ghomeshi's sexual desires and repeated advances.

Building on Bourdieu's work, several feminists have argued that gendered dispositions can operate as forms of embodied cultural capital that are valued differently in different fields or networks of relations (Huppatz 2009: 46-7; McCall 1992: 843; Miller 2014: 465-6). According to Huppatz (2009: 50; see also Miller 2014: 468), capital can be derived both from the gender one's body is perceived to have (i.e. whether one's body is seen as male or female) and from one's predispositions towards certain traits that are misrecognized as naturally masculine or feminine. In this sense, feminine capital can be understood as the field-specific advantages and legitimacy that may accrue from embodied dispositions that make it feel natural to engage in practices and present oneself in ways that align with culturally dominant expectations of femininity, such as emotionality, dependency, and skills in caring and nurturing. For instance, dispositions perceived as feminine may create advantages when seeking employment in certain caring fields, such as social work or nursing (Huppatz 2009: 53-5). Importantly, however, feminine capital can function as a "double-edge sword" (Huppatz 2009: 55); although it indicates the value attributed to women's abilities in certain fields, it is often difficult to convert into valued capital in other fields and it reproduces gendered relations of power in which masculinity tends to operate as a more recognized, instituted, versatile, and useful form of capital (Huppatz 2009: 59-60; McCall 1992: 845).

The ability to describe themselves and their actions in ways that align with dominant cultural tropes of passive and vulnerable femininity may operate for sexual assault complainants

as a form of embodied capital that contributes to the legitimacy of their claims. In particular, it may help them narrate their experiences of victimization in a way that is more likely to be recognized and perceived as plausible and credible by police investigators, lawyers, and decision-makers. In the *Ghameshi* trial, the complainants' enacted their practical sense of gendered relations and expected gender roles, describing Ghameshi as the interested pursuer and qualifying their own interest. Their presentation of themselves as passive, vulnerable objects of Ghameshi's pursuit had the potential to function as a form of feminine capital that could have helped legitimate their claims of victimization. At the same time, this feminine capital depends upon and reproduces the misrecognition of passive femininity in relation to masculine pursuit as a natural trait of womanhood and marker of genuine victimhood. Moreover, courtroom relations of configurational power and the symbolic violence of cross-examination limited the complainants' ability to successfully cast themselves as passive, vulnerable, and hesitant. As discussed later, their depictions of Ghameshi as the active pursuer and presentations of their own interest as restrained and uncertain were overturned by the defence during cross-examination and used to narrate them as manipulative. In this way, the complainants' disclaimers and contextualizing comments, which were informed by their practical sense of what might augment their credibility and offset certain negative insinuations given internalized binaries of passive femininity and male pursuit, were configured within the defence's narrative as acts of deception.

As the complainants enacted the dominant images of passive and vulnerable femininity embedded in their socio-political and cultural habitus, they also presented themselves as responsible risk-managers. In her examination of rape law and contemporary romance novels, Larcombe (2005: 46) argues that the heroine of romance fiction is idealized for her adherence to "a characteristically *liberal* version of femininity" (original emphasis) in which she manages to

“incorporate or balance the competing imperatives of femaleness and individualism”. Similarly, the complainants’ accounts during in-chief examination incorporated both lingering expectations of female passivity and doxic elements of neoliberalism that place individual responsibility on women to perpetually manage and modify their actions in order to avoid the risk of sexual assault (see Chapter One).

The first complainant repeatedly emphasized that Ghomeshi’s demeanour and actions made her feel “very safe [...] when [she was] with him” (February 1, 2016: 41). Explaining her decision to go to Ghomeshi’s house, the second complainant stated that “usually [...] when [she] spend[s] time with a man alone, [they] have friends in common and there’s sort of that check” (February 4a, 2016: 25). Although “there wasn’t that check” with Ghomeshi because he was from a different city and they “didn’t really have people in common”, she summarized her thought process in a way that highlighted her caution: “I remember thinking that enough people had seen us and that he was a known person, that [...] it’s not like he’s going to kill me when we go back to his house as lots of people have seen us together” (February 4a, 2016: 25). By emphasizing their cautious attitude and attentiveness to safety, the complainants enacted their practical and embodied competencies in neoliberal expectations of responsible femininity. Furthermore, the complainants’ descriptions of their restrained and hesitant interest in Ghomeshi (e.g. stating that they were still getting to know him) aligned with notions of the risk-managing female subject who “exhibits a reasonable suspicion of all men until their true character can be observed” (Larcombe 2005: 66). As I examine in the next subsection, doxic notions of vulnerable femininity and responsible risk management also underpinned how the complainants attempted to narrate the assaults as sudden and unexpected twists.

1.2. “There’s a Jekyll and Hyde thing happening”: Narrating the Alleged Assault as a Sudden Switch from Charm to Rage

When narrating the alleged assaults, each of the complainants in the *Ghomeshi* trial suggested that it was a sudden and unexpected switch that left them confused and uncertain how to respond. The way in which the assaults were described had the potential to create moments of peripeteia, namely, moments where “[s]omething goes awry [and] there is a breach in the expected state of things [...] that awakens response in the audience” (Riessman 2008: 4). By describing the alleged assaults as sudden reversals and “a Jekyll and Hyde thing” (February 8, 2016: 29), the complainants transposed cultural stock stories about sexual assault involving “strangers jumping out of the bushes” (Matoesian 2001: 100). Despite increasing acknowledgement that sexual violence is often perpetrated by acquaintances, accounts of stranger-perpetrated rape remain the dominant standard of credibility and plausibility. Enacting the cultural stock stories embedded in their habitus, the complainants transposed the stock story of stranger-perpetrated rape to produce a slightly different narrative, namely one in which an acquaintance suddenly becomes a stranger. In so doing, they further highlighted their positions of vulnerability and presented themselves as responsible sexual subjects who were unaware of the risk Ghomeshi posed.

Leading up to their descriptions of the assaults, the first and second complainant highlighted what Ghomeshi was like before the sudden aggression: “sweet and humble and charming” (February 1, 2016: 40), “a playful, fun person” (February 4a, 2016: 16), and “cheesy” (February 4a, 2016: 24). Although the third complainant did not spend time characterizing Ghomeshi in this way *before* recounting the assault, she emphasized later during the examination-in-chief that he can be “very charming” and “really nice” (February 8, 2016: 24). In

the following excerpts, the first, second, and third complainants (respectively) describe the alleged assaults, emphasizing the suddenness and unexpectedness of the violence:

Excerpt 5.4

A. I just – I didn’t – don’t remember a look in his eye or anything like that because I was getting my head yanked, but it felt like a – almost like a rage that wasn’t there the second before he did it.

Q. And what specifically can you point to that made you believe that there was this rage that wasn’t there prior?

A. Because it was painful and sudden.

Q. So after he stopped pulling your hair, you had that – he indicated those words to you, what happens next?

A. I remember we were just talking, I don’t remember about what, but I – he was right back to the sweet, charming, nice guy before he went into this sudden switch and then he’s back, back again to the nice guy. Like he was very nice. It was very confusing. Because had he been mean to me just before he goes to pull my hair, or had he done anything or said anything – but I’m with someone who’s sweet and kind, and opens doors, and drives a Disney car, and then the switch, and the switch back. (February 1, 2016: 45-46)

Excerpt 5.5

Q. How did the kissing start?

A. It just started. There was no built-up. It was just sort of, from the way I remember it, he just started kissing me quite a, quite like suddenly, and then it was interrupted when he pushed me up against the wall, and the way I remember it, he hit me a couple of times and was looking at me, and then he hit me again, and then he stopped.

Q. Okay. So we’re just going to break this up a little bit, okay. (February 4a, 2016: 29)

Excerpt 5.6

Q. Okay. So his hands are around your neck. What happens next?

A. Well, I mean I think I realized at that point that there was – there was something not right about that. Some kind of switch felt like it had happened, that it wasn’t the same person that I was there with. And I – I think I tried to – I tried to get out of it and then his hand was on my mouth, sort of smothering me.

Q. Okay. I’m going to go back. So the hands were around your neck. How long were they around your neck? (February 8, 2016: 21)

According to Ruparelia (2012: 675), a sexual assault complainant is expected to “effectively establish her weakness and her respectability and must show that her assailant is big, bad,

dangerous and *unknown to her*” (emphasis added). Even though they knew their assailant in the sense that they knew Ghomeshi, the complainants’ accounts suggested that assailant remained unknown to them because they could not anticipate the sudden switch. As the third complainant describes, “[s]ome kind of switch felt like it happened, that it wasn’t the same person that [she] was there with” (Excerpt 5.6). The complainants distinguished between the charming man they were on a date with and the violence exhibited by the stranger who assaulted them. By emphasizing their inability to foresee Ghomeshi’s violent side, the complainants distanced themselves from the image of the “risky woman [...] who places herself within [...] a space of risk” (Gotell 2008: 882). In Excerpt 5.4, for instance, when describing Ghomeshi’s “sudden switch” from the “the sweet, charming, nice guy” and back again, the first complainant provides an incomplete thought that suggests she might have been less confused or acted differently “had he been mean to [her] just before he goes to pull [her] hair”. Since they could not have anticipated this different person – a stranger – to suddenly jump out of Ghomeshi and assault them, framing the assault in this way potentially offsets insinuations about poor risk management.

Explaining why they went out with Ghomeshi again after the alleged assault, the complainants described how the suddenness of the assault combined with Ghomeshi’s calm and charming demeanour afterwards left them confused and unsure how to respond. The first complainant stated that she participated in a goodbye kiss after the first assault because “he had switched back to the nice guy and [she] questioned whether he actually meant to hurt her” (February 1, 2016: 46). The second complainant emphasized that if Ghomeshi had been “raging and totally mad” or “if [they] were involved in kinky sexy interplay” (February 4a, 2016: 39) she might have been able to make sense of what happened. She described how confused she was by

Ghameshi's demeanour during and immediately after the alleged assault: "It was like nothing happened, which further fed to my interest in downplaying things [...] It was like it didn't happen, so he was chill, hanging out, playing songs on his guitar, very relaxed, comfortable, breezy" (February 4a, 2016: 41). Explaining why she had Ghameshi at her house and engaged in sexual activity with him after the alleged assault, the third complainant pointed to his "Jekyll and Hyde" nature, as demonstrated in the following excerpt:

Excerpt 5.7

Q. And then the question is so after he had done that, why did you have him back at your house?

A. That's the question, isn't it? I mean, I think, you know, there's a Jekyll and Hyde thing happening. It was – on the one hand he was very charming and caring and attentive and sweet, and then – and then all of a sudden there's this other side, these words that come out of his mouth and these things that he does, and you just – I wasn't sure. And as I said before, I give chances and – you know, I think at that point, the "I'm sorry" and the whatever – or not even "I'm sorrys," but the – the things that he would have done would have worked to get me to not maybe not think about that, or brush it off, or –

Q. In any event though, you did have him come back to your house on that –

A. I did. (February 8, 2016: 29)

By emphasizing the discordance between the violence of the assault and Ghameshi's "nice", "chill", and "sweet" demeanour, the complainants' accounts invited listeners to identify with the confusion that they felt when experiencing these events. Presenting the assault as a sudden switch in which "Mr. Hyde" unexpectedly and briefly emerged helped the complainants frame their subsequent actions (e.g. seeing him again) within a narrative of vulnerability and confusion, rather than poor risk avoidance. The "Dr. Jekyll" side of Ghameshi caused them to feel "very safe [...] with him" (February 1, 2016: 41), to question "whether he actually meant to hurt [them]" (February 1, 2016: 46), to try to "brush [the assault] off" (February 4a, 2016: 35; February 8, 2016: 29), and to give him a second chance. In this sense, their interactions with "Dr. Jekyll" before the assault undermined their ability to anticipate the risk posed by "Mr. Hyde" and

the re-emergence of “Dr. Jekyll” after the assault left them confused by the violence. Describing the assault as a sudden upheaval or reversal of what Ghomeshi’s charm led them to expect, the complainants enacted the narrative sensibilities of their socio-political and cultural habitus and transposed the stock story of stranger-perpetrated assault. In so doing, they implied that their ability to avoid risk or respond in accordance with cultural expectations of responsible femininity was undermined by the confusion they experienced over the unexpected emergence of a stranger.

Despite the ways that they described the assault as an unexpected upheaval and sudden emergence of a violent stranger, the unequal relations of configurational power in the courtroom did not allow the complainants to successfully create narrative twists. At the end of Excerpts 5.5, 5.6, and 5.7 above, the complainants’ descriptions of the sudden assault are interrupted and redirected as the Crown exercises configurational control. In Excerpt 5.5, the Crown begins to “break [...] up” the components of the second complainant’s account that, when presented in juxtaposition, comprised her representation of the attack’s suddenness (i.e. no build-up, sudden kissing, violence, and then a sudden end to the violence). In Excerpts 5.6 and 5.7, the Crown interrupts the third complainant’s explanation of Ghomeshi’s sudden switch and redirects the examination to the mechanics of the incident (i.e. Ghomeshi’s hands on her neck) and the episodic events (i.e. whether she had Ghomeshi come back to her place). In this sense, the symbolic violence of courtroom narrative practices and the Crown’s configurational control undermines the complainants’ attempts to configure narrative twists and capture the suddenness of the assault. As courtroom narrative domination is misrecognized as a legitimate component of law’s autonomous and impartial search for truth (see Chapter Four), the complainants are redirected to focus on providing the episodic stories that can be manipulated into legally relevant wholes by the legal professionals.

In addition to the unequal distributions of configurational power, there were two factors that contributed to the complainants' inability to successfully narrate the assault as narrative twist or moment of peripeteia. First, the complainants' actions *after* the alleged assault contradict cultural assumptions about how sexual assault victims react to sudden assaults (see Chapter One), that is, what the women should have done if there really was a "Mr. Hyde" who jumped out of the metaphorical bushes. As I discuss further in the next subsection, the complainants explained their post-incident interaction with Ghomeshi and decision not to go to the police in ways that aligned with gendered notions of feminine passivity and vulnerability. However, doxic assumptions about the fear-inducing nature of sexual assailants and what women do (or do not do) when afraid limited their ability to reconcile the suddenness of the alleged assault with their post-incident behaviour. Matoesian (2001) identifies the following "double-bind ideology" (98) and its accompanying set of expectations, which I have slightly elaborated for the purposes of the present discussion:

On one hand, if the man is a rapist [i.e. if there really was a "Mr. Hyde" that suddenly emerged], then be afraid, and if afraid, do not engage in x, y, and z activities [such as staying afterwards, seeing him again, or continuing to correspond with him]; on the other hand, if the man is not a rapist [i.e. if there really was no "Mr. Hyde"], then be unafraid, and if unafraid, you may engage in x, y, and z activities. (99)

Although the complainants' description of the sudden and unexpected nature of the assault could have helped to explain their *pre*-incident actions in a way that satisfied doxic expectations of risk-management, their *post*-incident behaviour did not accord with assumptions about how women respond to sudden attacks. That is, they may have been confused by what happened, but the fear evoked by the revelation of "Mr. Hyde" should have left them with no confusion about how to respond. In this way, the symbolic efficacy of a "Jekyll and Hyde" narrative twist depends on the assaulted woman responding with a good show of fear and clear risk-avoidance

as soon as “Mr. Hyde” emerges. If stereotypical demonstrations of fear are not present and the woman instead “engage[s] in x, y, and z activities”, the cultural stock stories about untrustworthy claims of sexual assault embedded in the practical sense of the socio-political and cultural habitus may cause the audience to feel suspicious about whether there really was a “Mr. Hyde” to fear after all.

The second factor that may have limited the success of the complainants’ narrative twists, even if the organization of relations had afforded them configurational power, is the retrospective nature of legal narratives and the foreknowledge of legal audiences. Although a judge or jury provides the official ending, which can only be guessed at until the verdict is rendered (see Chapter Three), legal narrative construction and interpretation is based on an ever-present awareness of certain outcomes, namely, that specific allegations have been made and charges laid. As Brooks (2017: 15) argues, legal narratives are constructed retrospectively by “reading back from the end” such that preceding events are evaluated in terms of the outcomes before the court (e.g. alleged sexual assault; stolen property; a deceased individual). While they remain unresolved until an official decision is rendered, legal narratives are organized and understood in terms of the outcomes that precipitated the law’s official involvement. Thus, the audience’s knowledge that four counts of sexual assault and one count of overcoming resistance by choking resulted from the events being narrated throughout the *Ghomeshi* trial shaped how the events could be legitimately presented. Even if they had configurational power in the courtroom, the complainants would have been unable to narrate their experiences so that the “characters [e.g. their former selves] are moving forward in a state of partial or imperfect knowledge [...] that runs parallel to that of the reader [or audience]” (Dowling 2011: 48-9). When interacting with Ghomeshi a decade ago, the complainants would have been unaware of what was going to

happen next. When hearing an account of the events during in-chief examination, however, the audience of the *Ghomeshi* trial was already aware of certain outcomes. Instead of going alongside the narrative's characters in a state of uncertainty about the events to come, which could have rendered the alleged assault more of an unexpected upheaval and perhaps facilitate greater understanding of the complainants' confusion, the audience's foreknowledge allowed them to judge all preceding action in light of the later allegations of assault.

Foreknowledge of the alleged sexual assaults imposes a sense of foreboding on the preceding actions and allows them to be interpreted with an ever-present awareness that there is trouble coming. When flirting with Ghomeshi, visiting his house, and spending time alone with him, however, the complainants would likely not have experienced this same sense of foreboding. At the time when we experience events, they can be "confused, multiform, and unintelligible" (Ricoeur 1984: 99), as well as "out of sequence, random, [and] purely accidental" (Dershowitz 1996: 100); many actions we take or events we experience may be "irrelevant to what comes next" (Dershowitz 1996: 100) in the episodes comprising our lives. While the complainants' lack of foreknowledge would have rendered the assaults shocking and confusing, they were unable to replicate this sudden upheaval in their courtroom accounts because the audience was already aware of the events constituting the key moments of peripeteia. This foreknowledge and its accompanying sense of foreboding may have caused the complainants' actions to appear riskier or more dangerous. In the following excerpt, the first complainant explains why she went out with Ghomeshi again after the first alleged assault:

Excerpt 5.8

Q. So you had that incident that you've described to His Honour [i.e. the hair-pull in Ghomeshi's car]. Why would you go out with Mr. Ghomeshi again?

A. Because he was so nice and then switched and then switched back. It wasn't clear – it was not clear that he was going to violently punch me in the head. (February 1, 2016: 47)

By emphasizing that she was unaware of the impending danger and confused by Ghomeshi's sudden switch, the complainant suggests that her actions did not seem risky to her at the time. In so doing, she enacts her practical sense of what actions might be associated with an untrustworthy account and attempts to address the possibility of negative inferences being drawn about her decision to see Ghomeshi again. However, the confusion and lack of foreknowledge highlighted in her account are undermined by the retrospective clarity afforded the audience, who already knows another count of sexual assault will result from her later interactions with Ghomeshi. Her decision to see Ghomeshi again is thus imbued with a sense of foreboding that makes her actions appear especially risky.

Furthermore, the audience's foreknowledge that the complainants came forward to report the sexual assaults ten years later shaped how their post-incident actions could be narrated and interpreted. Actions that might be understood as outcomes of the complainants' confusion may appear strange or irrational when viewed in light of their later decision to report the assaults. For instance, when the second complainant is asked why she sent Ghomeshi flowers after the weekend when he allegedly assaulted her, she states: "as I tell you this now, it does sound like a ludicrous choice, but when I spend time with men I send them flowers. It's just what I do" (February 4a, 2016: 44). The retrospective viewpoint of the complainants' testimony further undermined their ability to explain their reasoning at the time when the events were unfolding, making decade-old actions seem particularly "ludicrous" in light of the accusations being made in the present. Not only did the complainants lack the legal capital and configurational power necessary to successfully create narrative twists, but they could not capture the sudden upheaval

of their experience because the events were already known to the audience⁶⁸. The complainants' inability to configure moments of peripeteia made it difficult for them to explain their confusion and shock in a way that resonated with the audience and helped them to contextualize their actions both before and after the alleged assaults. In this sense, the complainants' attempts to create narrative twists were undermined by the narrative domination of courtroom practices, the stock stories of sexual assault embedded in the practical sense of habitus, and the retrospective nature of legal narrative construction. The conditions that made it difficult for the complainants to capture their experiences are misrecognized, however, causing certain actions to appear merely nonsensical. In the following subsection, I further explore how the complainants attempted to explain their post-incident behaviour.

1.3. Coming Forward Over a Decade Later: From Brushing It off to Fulfilling a Moral Obligation

During in-chief examination, the complainants were asked why they did not report the alleged assault(s) ten years earlier, at the time that they occurred. Their responses suggest that stock stories about what constitutes sexual assault and doxic conceptions of passive femininity embedded in the socio-political and cultural habitus caused them to experience certain reactions to the violence as appropriate and contributed to their initial decisions to remain silent. Each of the complainants indicated that they thought their experiences would not be taken seriously as a 'real' sexual assault. For example, in the following excerpt the second complainant states that she did not think her experience "qualified" as a sexual assault or even as an illegal act:

Excerpt 5.9

⁶⁸ As discussed later, it is a *lack* of foreknowledge surrounding the evidence disclosed during cross-examination, in conjunction with the cultural stock stories embedded in the socio-political and cultural habitus, that allowed the defence to create powerful narrative twists that implied the complainants had been acting manipulatively.

Q. Why did you not call the police in July 2003?

A. A bunch of reasons. I always thought that assault meant that you were beaten to pieces, and so I didn't think this qualified. Also, I didn't know that what had happened was illegal, and I had no understanding of what the reporting process was. It didn't seem – I didn't think it qualified really. I thought that, in order to go to the police, in order for you to be assaulted, you had to be broken and raped. (February 4a, 2016: 52)

Explaining why she did not go to the police, the second complainant says that she thought sexual assault involved being “beaten to pieces” and “broken and raped”. This echoes stock stories that presume sexual assault results in physical injury and signs of physical resistance (Anderson 2010: 650-1; Ellison & Munro 2010b: 286-289; Randall 2010: 417-420). The above excerpt illustrates how stock stories and stereotypes about sexual assault may be inculcated and internalized within habitus, instilling for those who have been assaulted a tacit sense of what their experiences of sexual violence mean and whether they qualify as sexual assault. Cultural stereotypes influence not only whether women are believed when they report sexual assault, but also the ways that women define and make sense of their experiences (Bohner et al. 2009: 24; Temkin & Krahé 2008: 32; Weiss 2009: 814-815, 829-830). When they are embedded in habitus, stock stories do not need to be expressly stated, but rather they function by forming part of the “cognitive and motivating structures” (Bourdieu 1977: 76) that condition how agents *perceive*, *experience*, and *feel*.

Furthermore, negative stereotypes about women who report sexual assault appear to have increased the complainants' reticence to come forward contemporaneously to the assaults. When asked why she did not think to call the police in 2002, the first complainant states that she “didn't think anyone would listen” and refers to “the stigma about reporting sexual assault” (February 1, 2016: 66). As discussed in Chapter Four, Henein interrupts the complainant's response, pointing to the legal irrelevance of the topic, and the Crown clarifies that he will not

“get into a social commentary” (Excerpt 4.8). Explaining why she did not initially go to the police, the third complainant similarly suggests that negative stereotypes influenced her decision:

I wasn't sure that there was anything to go on. I don't know – I don't know the law. I know that it's not always in favour. And I have a [family member] who is in the industry and I was very cautious about his – his career [...] it doesn't take very long for a girl or a woman to get a reputation as anything, hysterical or whatever, and I just thought if I keep myself out of any line of fire that way, that it's probably best for everybody. (February 8, 2016: 36-37)

In the complainants' explanations for why they did not initially report the assaults, concerns about being disbelieved are mingled with concerns about being seen as “troubled and delusional” (Gotell 2002: 282) or cast as “the vindictive, malicious, or hysterical woman” (Larcombe 2005: 110). The complainants explained that they thought coming forward to report the sexual assaults may have had consequences beyond that of having their experiences denied; it could have affixed them with “stigma” or given them a “reputation as [...] hysterical”.

The stock stories embedded in the shared socio-political and cultural habitus gave the complainants a tacit sense of how their accounts were likely to be framed and received. They did not need to be told that their accounts were implausible or that they might be cast as untrustworthy; through the dispositions of habitus, they experienced the prospect of reporting the assault as intimidating and potentially dangerous and discrediting. In light of their tacit concerns about being disbelieved or judged through negative stereotypes, the complainants explained during in-chief examination that remaining silent and trying to move on felt like the best option at the time. For instance, the third complainant indicates that she did not want to negatively impact her family member's music career by reporting the assault and that she thought remaining silent was “probably best for everyone” (February 8, 2016: 37). She states that she “just wanted it to go away. [She] wanted to pretend that it – not pretend, [she] just wanted it gone” (February

8, 2016: 36). Similarly, the first complainant explained how moving on felt like a better option than trying to report the assault:

...it's not easy to report something like this. It just didn't seem like anyone would do anything about it, or listen or care. I just didn't think it was an option. It was just easier, I thought, to carry on and try to put it behind me as a bad experience. (February 1, 2016: 68-69)

The complainants' comments demonstrate how stock stories about sexual assault and negative stereotypes about women who report sexual assault embedded in habitus led them to *experience* silence as their best or only option. The second complainant also indicated that she "wanted to get over what had happened" (February 4a, 2016: 42) and "brush it off" (35). Moreover, she explained that she was "brought up as a person to make people around [her] happy and comfortable" (35) and therefore she "made a point of never making an issue of this" (39). While explaining why she stayed at Ghomeshi's place for a short period of time after the alleged assault, she states the following:

I didn't want to leave and seem like I couldn't handle that. I also didn't want to anger him. I also didn't want to seem rude to just leave because he had just assaulted me. That seemed like a strange reaction maybe, but I just didn't feel like leaving was the right choice, so I stayed because I wanted to placate the situation. When I'm put into a situation which is negative, I will go out of my way to make it, at the very least, neutral and ideally positive. (February 4a, 2016: 35)

Throughout in-chief examination, the second complainant indicated that her "placating personality" (February 4a, 2016: 50) led her to stay silent about the sexual violence. By repeatedly describing herself as placating, the second complainant enacts the gendered dispositions of her habitus as well as her practical sense of the personality traits that cause women to behave irrationally. In so doing, she reproduces doxic tropes of womanhood through

which passivity, emotional sensitivity and a desire to appease unpleasantness and avoid appearing rude are misrecognized as naturally feminine traits.

These doxic tropes were also reproduced in several news articles. For instance, Bielski (*TorStar*, March 21, 2016) refers to a “peacemaker programming” or “pacifist conditioning” that encourages women to locate their value in “being a fixer of problems, in being “nice,” even at a cost to themselves”. Similarly, Mallick (*G&M*, February 6, 2016) argues that the second complainant “was, like all women, raised to be nice”. Commenting on the complainant’s characterization of herself as a “people-pleaser”, Mallick states “we get that. Most women are”. While these discussions do problematize the cultural context that encourages women to embrace a “peacemaking”, “fearful”, and “people-pleasing” persona, they nonetheless take for granted that women who have been assaulted typically display a particular image of vulnerability and passivity. That is, they perceive appeasing and passive behaviour as a self-evident indicator that victimization has actually occurred, misrecognizing the internalized gendered binaries and relations of power that condition both the behaviour and how it is perceived. According to Bonnycastle (2000: 76), efforts to emphasize women’s vulnerability and victimization can end up “inscribing women ever deeper into narratives of how they are overwhelmed, in myriad ways, in the presence of power”. While the essentializing language of fearful, passive, and vulnerable womanhood used in the context of sexual assault is “a language that wins moral support and empowers the speaker” (Smart 1995: 84), it is also disempowering in that it is based on and reproduces an unspoken assumption that women are “eternal victim[s] because of [their] sex” (86). Importantly, this essentializing language can be embedded in the dispositions of habitus, making certain ways of speaking about sexual violence against women *feel* natural.

The complainants' initial decision *not* to report breaks with aspects of stock stories in which the assaulted woman immediately runs to the nearest police station (Anderson 2010: 645; Johnson 2012: 625; Temkin & Krahé 2008: 32). In their accounts and in some media coverage, however, this failure to report is explained through doxic notions of passive femininity. This demonstrates how stock stories are not necessarily or automatically reproduced in their entirety, but rather provide a *sense* of what should be included and how events should be narrated and interpreted. Even as the accounts in the *Ghomeshi* trial differed from stock stories involving immediate reporting, the legal agents seemed to perceive immediate reporting as the appropriate response and certain feminine characteristics as legitimate explanations for a departure from expectations. In particular, the Crown lawyers enacted their tacit sense that the failure to immediately report requires an explanation by directly asking the complainants why they did not initially go to the police and the complainants explain their "strange reaction[s]" through reference to passivity, people-pleasing, and vulnerability. As we shall see later, the misrecognition of feminine passivity as both natural and indicative of genuine victimhood contributes to the defence's framing of the complainants as manipulative by further accentuating and dramatizing the evidence the defence raises to suggest the complainants were active pursuers, hostile, and attention-seeking.

Having emphasized their desire to put the events behind them and placate the situation, the complainants must then explain why they decided to come forward a decade later. This creates a double bind because the very act of coming forward to the police a decade later has the potential to undermine their explanations for *not* doing so previously. By reporting the assault(s), the complainants contradicted their claims to have "wanted it gone" (February 8, 2016: 36), "put it behind [them] as a bad experience" (February 1, 2016: 69), and "made a point of never making

an issue of this” (February 4a, 2016: 39). To explain why they did not report the assaults contemporaneously, the complainants enacted the gendered dispositions of their habitus, emphasizing their vulnerability, passivity, and fear of being stigmatized or cast as “hysterical”. Ironically, their explanations would have been best proven by the complainants’ *continued silence*. In coming forward after ten years, the complainants appeared active and assertive, rather than vulnerable, passive, and placating. In this sense, there emerges a paradoxical double bind: the very act of reporting jeopardizes the complainants’ ability to legitimately explain their ten years of silence or meet unspoken expectations of feminine vulnerability.

Navigating this double bind, the complainants and the Crown lawyers framed the act of eventually coming forward as motivated by a sense of moral obligation. In the following excerpts, the first, second, and third complainants (respectively) explain why they eventually decided to go to the police:

Excerpt 5.10

A. Well, when I heard that he had been fired and had written a post on Facebook, one of my friends showed me the article, and at that point I had thought it was just me that he had hit and I felt like I had to say something. I had no intention at that point of going to the police because I had no clue I could. So when I went to the police, it was because Bill Blair gave a press conference and he was encouraging people to speak up and said that we will listen to anybody, that there was no statute of limitations, and prior to that I thought I had no recourse, no one would listen. (February 1, 2016: 66)

Excerpt 5.11

A. I decided to go to the police because, quite simply, they asked if anyone had any information regarding this circumstance to go talk with them. I was not actually interested in engaging in any legal action with Mr. Ghomeshi, but I felt like, if I had information which could be helpful for the police, I would go, understanding nothing about the legal process, understanding nothing about, I’d never given a statement before, I’d never talked to the police unless it was for something like a traffic violation. I didn’t know anything about the process. So I just went. I came to Toronto and I gave my statement here. (February 4a, 2016: 56)

Excerpt 5.12

A. Well, I think the biggest thing was the fact that I recognized a pattern, that I had – there was just – there was familiarity in some of the things that I was hearing, that were familiar to me because of what I had gone through, and I realized that I wasn't an isolated incident as I knew, but that it was – it was – it was time. There was – it was time to talk. (February 8, 2016: 35)

As discussed in Chapter Four, Larcombe (2005:109-112) argues that there is an apprehension within the legal system that women claiming to have been sexually assaulted will use the legal process and law's punitive powers to serve their personal purposes and interests. Within this context, complainants must be especially careful about how they present their motivations for reporting so as to avoid insinuations that they were misusing the legal process. Larcombe (2005: 111) argues that "through the maligning of all personal motives, the only valid and legitimate motive for sexual complaint becomes the impersonal, legal motive: justice". While this could include notions of bringing the truth to light and the perpetrator to account, a complainant's allegations could be delegitimised if she appears to be seeking punishment or material gain (Larcombe 2005: 111). Furthermore, a complainant seeking justice is expected "to put herself at the disposal of the (state's) prosecution in order to prove that her motives are legitimate and to guard against the possibility that she might treat law as though its punitive powers were at her disposal" (Larcombe 2005: 112; see also Bumiller 2008: 96-7, 131). In this sense, a sexual assault complainant's credibility hinges on her ability and willingness to demonstrate the legitimacy of her motivations by complying with the legal process and the symbolic violence of its narrative practices. Within the specific context of the *Ghomeshi* trial, it may have been particularly important for the complainants to demonstrate that they had legitimate motivations in order to offset insinuations that they were motivated by the case's publicity.

The notion that a sexual assault complainant is expected to avoid personal motivations for reporting may contradict the success that some victim's movements have had in advocating for legal changes in part through public expressions of anger, anguish, and indignation (Stanbridge & Kenney 2009: 483, 489); though notably Stanbridge and Kenney (2009: 489-490) argue that these emotional expressions had to be balanced with emotional composure and they found that, like the complainants in *Ghomeshi*, several spokespersons were careful to indicate they were acting out of a desire to assuage the risk posed by criminals, rather than out of a personal desire for revenge. Exemplifying how victims may shape justice responses through expressions of anger and personal grief, Rodney Stafford organized a protest on Parliament Hill against the transfer of the woman who killed his daughter to the Okimaw Ohci Healing Lodge for Aboriginal Women. His protest caused the Correctional Service of Canada to review the case and send the woman to the Edmonton Institution for Women (*CBC News*, November 22, 2018).

To legitimately express anger, grief, or a desire for punishment, however, one's status as a victim must first be recognized. In many criminal cases (e.g. murder, manslaughter, robberies, physical assaults), there is often very little question as to whether or not there is a victim or who that victim is (though there can obviously be questions raised about the guilt of the accused); the father of a murdered child typically does not have to prove that victimization occurred⁶⁹. If someone charged with murder is acquitted, this does not necessarily deny the existence of a victim. Conversely, sexual assault trials are based upon the question of whether or not victimization even happened. Within a context of heightened suspicion towards women who claim to have been sexually assaulted and gendered assumptions about the uncontrollability of

⁶⁹ It is important to note, however, that gendered, racialized, and classed assumptions about who legitimately constitutes a victim also impact whether one's victimization is acknowledged. This is tragically illustrated by the systemic disregard throughout the Canadian criminal justice system for the thousands of Indigenous women and girls who have been murdered and disappeared.

women's emotions (Stanbridge & Kenney 2009: 491-2), expressions of anger or a desire for revenge by female complainants in sexual assault trials may be perceived as stemming from something other than victimization, such as rejection. The question is thus one of whether the allegations were made up by an overly emotional and scorned woman out for revenge; in cases where there is very little question as to whether someone was victimized (e.g. the murder of a child), anger and a desire for punishment may be perceived as more legitimate.

In Excerpts 5.10, 5.11, and 5.12, the complainants present their motivations for going to the police as impersonal and thus legitimate, thereby enacting their practical sense of the acceptable reasons a woman may report sexual assault. The first and third complainants suggest that they were motivated by a concern for other women who had been or might be hurt by Ghomeshi. Until she saw an article about Ghomeshi, the first complainant “thought it was just [her] that he had hit”; once she realized this was not the case, she “felt like [she] had to say something”. Similarly, the third complainant explains that she “recognized a pattern” and realized that what she had experienced “wasn’t an isolated incident”. By pointing to how they were concerned about the potential of other women being hurt, the complainants distance themselves from notions of personal motivation. Moreover, the first and second complainants suggest that they reported the assaults in response to the police’s request for people to provide information. The first complainant states that she went to the police because the Chief of the Toronto Police Service, Bill Blair, “was encouraging people to speak up”. Emphasizing that she knew “nothing about the legal process” and “was not actually interested in engaging in any legal action with Mr. Ghomeshi”, the second complainant explains that she went to the police “because, quite simply, they asked if anyone had any information regarding this circumstance to go talk with them”. In this way, the complainants presented themselves as good legal subjects

who came forward out of compliance with legal processes and the requests made by criminal justice authorities, rather than any personal desire to pursue legal action. This contributes to the misrecognition of law's processes and its underlying relations of power as components of a legitimate and just response to sexual violence.

Throughout in-chief examination, passive behaviour and compliance with the symbolic violence of legal processes were misrecognized as natural traits of femininity in general and women's victimhood more specifically. This misrecognition not only made certain narratives of victimization possible, but caused them to be experienced as natural, plausible, and credible. Explaining why they did not initially report the assaults, the complainants indicated that they were afraid of being disbelieved and thought it would be better to move past the events and placate the situation. Navigating the potential contradiction between these explanations and their decision to come forward ten years later, the complainants explained that they felt morally obligated to say something once they realized other women were being harmed and that they wanted to obey the police's request for information. In this way, they enacted their sense of what constitutes an appropriate motivation for reporting sexual assault, namely, a sensitive and empathetic concern for the welfare of others and compliance with legal processes and authority. Unsurprisingly, the question of the complainants' motivation also became a focal point in cross-examination. In particular, the courtroom relations of configurational power allowed Henein to create narrative twists that redefined the complainants as infatuated, scorned women acting out of personal interests that pose a threat to law's integrity. In the next section, I examine how apprehensions about women misusing the legal system helped Ghomeshi's defence team to configure a narrative about the complainants' manipulation and deception.

2. “This courtroom should not be a game of chicken”: Configuring the Complainants as Manipulative Threats to the Law’s Search for Truth

Exercising configurational power and externalizing stock stories about women who make up false allegations of sexual assault, Ghomeshi’s defence team discredited the narratives of victimization constructed during in-chief examination and presented the complainants as deceptive, manipulative, and a threat to the integrity of the legal process. Discussing the judicial warnings formerly given to juries about the dangers of false complainants, Larcombe (2005: 103-104) states the following:

The warning that “rape is an easy allegation to make and a difficult one to defend” can be approached, then, as a cautionary story, a tale about wolves in the forest – in this instance told by concerned parents long after the trees have been logged and the wildlife skinned. Like other cautionary tales, we can presume that it is told to put listeners on their guard, to alert them to danger, and remind them that their comfort and security are only guaranteed by community observance of certain rules.

These “cautionary tales” about unfounded and convincing rape allegations can be understood to form part of the cognitive structures of juridical habitus. As they develop a practical mastery of legal standards of impartiality, autonomy, and objectivity (see Chapter Four), legal professionals are also trained to be “on their guard” against the presumed emotionality of women’s testimonies of sexual assault. This embodied suspicion is conditioned by internalized patriarchal relations in which women are in positions of emotional dependence and irrationality in relation to men.

To discredit the complainants and their allegations, Ghomeshi’s defence team configured the events and any inconsistencies or undisclosed information within narratives of manipulation, suggesting that the audience should be on its guard against the proverbial “wolves in the forest”. The defence’s narrative configurations were possible and particularly effective because they resonated with the suspicion towards sexual assault allegations embedded in juridical habitus, as

well as with wider gendered binaries and cultural tropes of women's emotionality and consequent untrustworthiness. The publicity of the *Ghomeshi* trial and calls to believe survivors also created a conjuncture within which guardedness towards the complainants' accounts was experienced as especially necessary.

Through the symbolic violence of the misrecognized configurational domination in the courtroom, the complainants' presentation of themselves as passive and vulnerable was upended at key moments during cross-examination and used to imply deliberate misrepresentation. According to Bruner, peripeteia or narrative twists tend to upend initial assumptions about what ordinarily occurs or ought to occur in a given situation; for example, "the wolf dressed in Grandma's clothes" functions as peripeteia by upending initial expectations about "what *ought* to prevail when Red Riding Hood visits her grandmother" (Bruner 2002: 6). During cross-examination, the relations of configurational power enabled Henein to create narrative twists that implied things were not how they appeared or how they ought to be: the complainant was not the traumatized victim she portrayed herself as, but rather a deceptive and manipulative woman – a wolf in Grandma's clothes. These narrative twists were successful in upending the narrative of victimization and discrediting the complainants' claims only because of the cultural stock stories about deceptive women embedded in the socio-political and cultural habitus of the legal audience. In particular, Henein's sudden revelations are especially shocking and discrediting when the practical knowledge of habitus produces a tacit sense of wariness towards the presumed dangers of "predatory women" who deviate from cultural expectations of heterosexual relations and seek to seduce famous, affluent, or wealthy men (Mewett & Toffoletti 2008: 168-170; Tipler & Ruscher 2019: 109; Toffoletti 2007: 432).

The narrative domination through which the defence framed inconsistencies as deliberate deception, configured moments of peripeteia, and, in so doing, re-characterized the complainants as manipulative threats to the legal system constituted symbolic violence. For the defence's narrative to be effective, the relational structure of the courtroom had to bestow configurational power on the defence lawyers, enabling them to legitimately reveal inconsistencies and make accompanying insinuations about their meanings. Moreover, this configurational power had to be misrecognized as a legitimate component of law's impartial search for the truth. In this way, the success of the narrative configurations discussed in this section depended on the relations of narrative domination being misrecognized through the doxic standards of legal impartiality, autonomy, and objectivism discussed in Chapter Four. To demonstrate how Ghomeshi's defence narratively transformed the complainants from victims of sexual assault into manipulators playing "a game of chicken" (February 11, 2016: 75) with the legal system, I begin by discussing how the complainants' presentations of themselves as vulnerable, confused, and passive were undermined during cross-examination. Configuring dramatic narrative twists, Henein cast the complainants as infatuated by and actively pursuing Ghomeshi both before and after the alleged assaults. Next, I examine how the complainants were framed as scorned and hostile women who had personal motives for coming forward with their allegations. Finally, I discuss how the inconsistencies raised in cross-examination and the image of the complainants as infatuated, scorned, and attention-seeking were framed within narratives of manipulation.

2.1. From Confused and Vulnerable Women to Infatuated Pursuers

Unsurprisingly, creating a disjuncture between complainants and stereotypes of ideal victimhood is a key part of defence strategy in sexual assault trials, as this helps to discredit their allegations (Larcombe 2005: 67; Matoesian 1993: 30). Throughout the *Ghomeshi* trial, the

defence lawyers worked to undermine the complainants' accounts of victimization by showing that they were *not* passive, confused, vulnerable, or risk-managing. In this sense, the discrediting force of their narrative configurations depended on the continued misrecognition of gendered binaries in which passivity and hesitant interest are perceived as natural traits of femininity and, more specifically, as self-evident attributes of genuine victimhood. By discrediting the complainants' claims through reference to actions that suggest a *lack* of vulnerability and passivity, the defence lawyers create a sense of disjuncture between the complainants and the patriarchal relations of male pursuit and cultural stock stories of sexual assault embedded in the socio-political and cultural habitus. For example, at the beginning of the first cross-examination, Henein emphasizes how the first complainant was "a person with life experiences" and six years older than Ghomeshi when she met him:

Excerpt 5.13

Q. Am I right that when you met Mr. Ghomeshi in 2002, you were about 41 years old.

A. I was.

Q. And Mr. Ghomeshi was about six years younger than you.

A. I think – I think so. He never told me at that point how old he was.

Q. And I take it you would agree with me [...] that you were a mature person, right?

A. Are you talking about my age?

Q. You were a person with life experiences. You had been married, right?

A. Yes.

Q. And you had - you told the Crown you had two children, right?

A. Yes.

[...]

Q. So let's go back to 2002 and 2003 so we can understand. You're living in the same house [as your husband] but you're obviously in the throws of [...] a marriage separation, breaking down, right?

A. Yes.

Q. And you have two children [...] at the time, the teenager and an 11 year old, is that right?

A. Yes.

Q. And you said that you were working in the business at the time. I take it you would agree with me that you weren't doing particularly well, right? You weren't making a lot of money.

A. But my main focus was my children –

Q. I understand that.

A. – it wasn't to make a lot of money.

Q. Right. And so when you say you were in the industry in response to [...] Mr. Callaghan's questions, you weren't really actively in the industry, right? You had other priorities. You were a mom.

A. Uhm-hmm.

Q. And so you were doing this sort of on a part-time basis, right?

A. Everything was, yeah.

Q. I'm sorry?

A. Everything was part-time.

Q. Right. So you weren't a full time actress, you weren't a full time model, you weren't a full time anything.

A. I just said I wasn't.

Q. Right. And when you met with Mr. Ghomeshi for the very first time, you met him when you were waitressing at the CBC party, am I right?

A. Yes.

[...]

Q. So you're not a guest at the party.

A. No. (February 1, 2016: 84-86)

In this exchange, Henein works to discredit the complainant by both describing her as a “mature person” and emphasizing her lack of success in the entertainment industry. This characterization of the complainant is echoed in a couple of *Toronto Star* news articles where she is referred to as “[a]n older separated mom from the suburbs” (DiManno, March 26, 2016) and “a struggling actor and part-time cocktail hostess seven years older than Ghomeshi” (Donovan & Hasham, February 2, 2016). By highlighting her “life experiences”, specifically her age, marriage separation, and status as a mother, Henein creates a disjuncture between the complainant and doxic images of female vulnerability that hinge on youth, naivety, and a position of powerlessness in relation to men (Anderson 2010: 645; Bonnycastle 2000: 76; Larcombe 2005: 3). Implied by Henein's line of questioning is the idea that an older, “mature”, and separated

mother of two children is not as vulnerable to sexual violence and should have known how to protect herself.

As she presents the complainant as experienced and thus less likely to be victimized, Henein also emphasizes that the complainant “w[as]n’t doing particularly well” in the entertainment business, “w[as]n’t making a lot of money”, “w[as]n’t a full time anything”, and was “not a guest at the party” where she met Ghomeshi. The differences between Ghomeshi and the complainant in terms of their financial status, affluence, and success in the entertainment industry could be used to point to an unequal power relation between them that may have, for example, contributed to the complainant’s fear of coming forward. Within Henein’s narrative about a “mature person [...] with life experiences”, however, the inequality between Ghomeshi’s position as a guest at the party and the complainant’s position as a waitress is framed as a motive for the complainant’s infatuation with and pursuit of Ghomeshi. According to Bourdieu (2013: 297) and Lawler (2004: 113), material differences are made socially meaningful by those who have the symbolic power to define them. By transforming age difference into an indicator of the complainant’s lack of vulnerability and differences in success, affluence, and financial status into motives for pursuing Ghomeshi, Henein exercises configurational and symbolic power and pre-emptes her later framing of the complainant as both smitten and manipulative.

Enacting her practical sense of what might contradict doxic expectations of passive, feminine victimhood and thus discredit the complainants’ accounts, Henein emphasized some of the following details: that the complainants all had lawyers and therefore could not claim they “didn’t know the process” (February 5, 2016: 29); that the second complainant did not want to be “protected by the publication ban” (February 4a, 2016: 83); that the third complainant went against the police’s advice by choosing a lawyer recommended by the second complainant

(February 8, 2016: 65); and that the complainants all decided to report their experiences to the media before going to the police. As aforementioned, sexual assault complainants are expected to comply with the legal process and the authority of legal professionals in order to prove the legitimacy of their claims and motives for reporting (Bumiller 2008: 131; Larcombe 2005: 112).

This points to the symbolic violence of the sexual assault trial: in order to have their day in court, complainants must participate in their own subordination by acquiescing to the demands and expectations of legal processes, providing their episodic stories, and complying with the configurational control of the legal professionals. Attempting to take a more active role in the legal process or to control the narrative being configured in court could be framed as a lack of legal compliance and vulnerability, potentially undermining a complainant's ability to legitimately claim victimhood and disqualifying their legal participation. The correlation between complainant truthfulness and the degree to which that complainant passively complied with the expectations of legal processes and professionals functions as a doxic element in the juridical field and is embedded in the juridical habitus enacted during the *Ghomeshi* trial. Configuring based on her embodied know-how of what constitutes discredit in the juridical field, Henein suggested that the complainants played an active role throughout the process and did not fully comply with the legal system. Not only did this help her cast their actions as strange and suspicious because they contradicted gendered stereotypes of vulnerable victimhood, but it also contributed to her framing of the complainants as manipulative threats to the legal process, as I discuss later. Moreover, by emphasizing procedural justice and the complainants' claims to have felt safe during the police interviews (see Chapter Four), Henein implied that the complainants were not vulnerable during the legal process and therefore had no valid reason not to comply with it.

During cross-examination, Henein also undermines the complainants' attempts to explain their post-incident actions through reference to confusion or their passive, placating personality. Consider, for example, the following excerpts from the cross-examinations of the first and second complainants respectively:

Excerpt 5.14

Q. And so you can agree with me that, whatever happened in that car, it wasn't enough to keep you from driving [...] to Toronto to come to a second episode of the Play, right?

A. As I explained yesterday, he was very nice, and when I left, he was nice. There was confusion.

Q. But not enough confusion to keep you away, right?

A. Because the nice outweighed.

Q. The hair pull?

A. All the way up to that point, there was a different, a different type of person, and then it switched, and I told you yesterday that I wasn't sure if he just doesn't know his own strength. I wasn't sure. If I had been sure, I assure you I would never have seen him again.

Q. So you agree with me that whatever occurred in that car did not cause you to be dissuaded that he was nice? That sensuous kiss and hair pull for two to three seconds didn't cause you to say I'm not going back?

A. I didn't know.

Q. It wasn't that bad, right? Not hard enough to keep you away?

A. I didn't know. If I had known, I would not have gone out with him again. There was confusion.

Q. You did know because you were the one in the car, right? You did know [...] You were the one that had had that experience, right? (February 2, 2016: 12-13)

Excerpt 5.15

Q. And he goes in for a kiss [during a walk], right?

A. Right.

Q. And this is before – this is before he has, as you say, choked you and slapped you, before he's done any of that [...] and you say "No"?

A. Yes.

Q. Not interested right now?

A. Right.

Q. Because it's awkward?

A. Right.

Q. And as I understand your explanation for kissing him after you say he chokes you and slaps you on the couch and then before you leave, it's because you don't want to make him feel like a bad host?

A. Yes. And also, and at the time, it seemed appropriate.

Q. So just so I understand, it was not appropriate for him to kiss you while you're walking out on the street [...] and it was in your mind appropriate for him to kiss you after you say he choked and slapped you not once but twice?

A. Yeah. That's for reasons I explained earlier.

Q. You just wanted him to not feel bad about himself?

A. And because I was trying to normalize a weird situation.

Q. Well, surely you weren't concerned about it before when he tried to kiss you, right?
(February 4a, 2016: 61)

Echoing her claims from in-chief examination, the first complainant attempts to explain why she saw Ghomeshi again after the first alleged assault by pointing to her confusion and lack of foreknowledge: "If I had known, I would not have gone out with him again. There was confusion." Henein undermines this explanation, suggesting that if the complainant had been assaulted in the way she claimed, she would have had the knowledge necessary to make a responsible, risk-managing decision about whether to see Ghomeshi again. Emphasizing the apparent lack of confusion demonstrated by the complainant's actions (i.e. driving to Toronto), Henein also implies that an assaulted woman who was genuinely confused about the suddenness of her assailant's aggression would have had "enough confusion to keep [her] away" and been "dissuaded that he was nice". The discrediting insinuations of the connection that Henein configures between the first alleged incident and the complainant's decision to see Ghomeshi again rests on doxic elements of neoliberalism, specifically the image of the perpetually risk-managing female subject (see Chapter One). With "keep[ing] away" misrecognized as the rational and appropriate response to sexual violence, Henein frames the complainant's actions as illogical while simultaneously discrediting the complainant's attempts to explain her actions as the outcome of confusion.

In Excerpt 5.15, Henein exercises the configurational power of her relational position by using the technique of formulation (see Chapter Three) to make the complainant's actions and explanations for them appear implausible. During in-chief examination, the complainant explained that after the assault she did not want to seem "rude" or "frosty" (February 4a, 2016: 38) and so she tried to act as if everything was normal. Furthermore, she expressed that the experience was unfamiliar to her and so she "didn't know how to process it" (39). In Henein's cross-examination, however, the confusion, uncertainty, and complexity of the complainant's experience is expunged. In his discussion of contrastive lists, Matoesian (2001: 63) argues that pairing contrasting events or elements "amplifies the inconsistency [...] and unifies the ironic particulars" being implied. In Excerpt 5.15, the two events (i.e. the unsuccessful kiss during the walk and the kiss after the alleged assault) are simplified and contrasted in a way that makes the complainant's explanations appear nonsensical and incredulous.

The symbolic violence of Henein's formulation is accentuated by her use of the phrase "just so I understand", which misrecognizes the relations of configurational power underpinning her practice of discrediting. This phrase implies a mere clarification of events while simultaneously suggesting that the events and the complainant's explanation for them are so implausible that Henein has to strain her considerable intellectual abilities to comprehend them. Even as she presents her re-wording of the complainant's testimony as an attempt at clarification (i.e. "just so I understand..."), Henein takes the events out of their confused context and juxtaposes them in a way that configures a suspicious inconsistency in the complainant's account: if the complainant could refuse Ghomeshi *before* the alleged assault, it makes no sense for her to have felt it was appropriate to kiss him *afterwards* when she, if this incident actually occurred, should have been fleeing from him and ideally towards the nearest police station. At

the end of the excerpt, Henein also discredits the complainant's previous explanations during in-chief examination. Highlighting that the complainant was not "concerned about [normalizing things] before when he tried to kiss [her]", Henein suggests that the complainant's references to her "placating personality" and desire to "normalize" the situation were deceptive attempts to explain away behaviour that undermined her allegations.

In both Excerpts 5.14 and 5.15, the complainants' self-presentations as confused, passive, and vulnerable were not only contradicted, but framed as part of their deception. The discrediting force of Henein's configurations only functions because of the stock stories of sexual assault embedded in the shared socio-political and cultural habitus that provide the legal audience with a practical sense of how to interpret the juxtaposed events. When avoidance and fleeing from a sexual assailant are perceived as natural, the misalignment between the events and stereotypical expectations does not need to be expressly pointed out or stated; instead, the dispositions and perceptual schemes of habitus allow the juxtaposition of events to be *experienced* as suspicious. This becomes even more apparent in the narrative twists configured by the defence during cross-examination.

The ways in which Henein exercised configurational power to create moments of peripeteia surrounding questions of romantic interest and pursuit constituted a key form of symbolic violence in the courtroom. The relations of misrecognized narrative domination during cross-examination and Henein's practical mastery of the legal game provided by juridical habitus allowed her to create narrative twists that framed her configurations and interpretations as revelations of what was *really* going on over a decade ago. In dramatic moments of reversal during the trial, she reveals that instead of being the passive and hesitant objects of Ghomeshi's pursuit, the complainants were infatuated by and actively *pursued him*. For example, in the

following excerpt the first complainant's claim that Ghomeshi was "smitten" by her is suddenly upended:

Excerpt 5.16

Q. And so do you agree with me that the story that you were telling both the police and the public was that Mr. Ghomeshi was very dazzled by you, right?

A. Yes.

Q. And he was "smitten," to use your words, right?

A. I'd say smitten. I don't know about dazzled. I don't – I wouldn't say dazzled. Smitten as in he was interested.

Q. And so much so that you noticed that the minute you walked into the [restaurant], his face lit up, right?

A. Yes.

Q. And so if I were to suggest to you that your friend [...] says that you were in fact the one who was smitten by him because he was a famous person and that you were taken aback by him, is that not consistent with what you recall telling her?

A. Ms. Henein, I cannot speak for [my friend]. I can tell you what I saw and my story. You'd have to ask [my friend] what she's saying. (February 1, 2016: 88)

The sudden reversal happens here when Henein suggests that things are not as the complainant has led the court to believe: it was actually *the complainant* who was smitten by Ghomeshi. Occurring a few moments after Excerpt 5.13 in which Henein emphasized the complainant's "life experiences" and her lack of success relative to Ghomeshi, this exchange casts the complainant as a character trope within stock stories about infatuated, predatory women who transgress ideals of feminine sexual passivity and pursue men for their fame or affluence (Tipler & Ruscher 2019: 110; Toffoletti 2007: 435; Waterhouse-Watson 2016: 953). Not only is the complainant presented as an infatuated pursuer, she is framed as having pursued him and been "smitten by him *because he was a famous person*". The discredit of this narrative twist rests on a doxic assumption of mutual exclusivity regarding interest: either the complainant was a passive victim pursued by Ghomeshi as she claimed *or* she was infatuated by and after him. This leaves little space for considering how the complainant may have been both *pursuing* and *pursued*.

Moreover, it misrecognizes patriarchal relations of male-initiated sexual interest as natural and appropriate.

By configuring moments of peripeteia, Henein reverses the narratives of victimization recounted during in-chief examination. This is particularly evident in how she builds towards the revelation of post-incident correspondence in her cross-examinations of the first and second complainants⁷⁰. After emphasizing how the first complainant said multiple times that she dealt with the assaults by having “no further communication with [Ghomeshi]” (February 2, 2016: 31), Henein dramatically reveals two emails that the complainant sent to Ghomeshi – the first email a year after and the second a year and a half after the alleged assault. The following two excerpts show how Henein configures these emails in relation to the complainant’s previous comments:

Excerpt 5.17

Q. All right. Now, let’s go to the text [of the email]. “Hello, Playboy,” right?

A. Right.

Q. This is the one –

A. Can –

Q. This is the gentleman that’s been – his voice and his image on TV has re-traumatized you. It is so bad, that you cannot even hear the new host of Q right? That’s what you’ve told us under oath?

A. Right. (February 2, 2016: 38)

Excerpt 5.18

Q. I turn it off, and I turn it off, and I turn it off?

A. I do.

Q. Every time I see his face, I’m traumatized?

A. That is correct.

⁷⁰ Although Henein does discuss some post-incident emails between Ghomeshi and the third complainant, these are less suggestive of sexual interest and are therefore emphasized significantly less. Since the third complainant disclosed post-incident sexual activity with Ghomeshi in a second police statement given two days before testifying in court, Henein does not configure narrative twists to suddenly reveal post-incident sexual interest in this cross-examination. Instead, she focuses on how the complainant’s late disclosure made things feel like “the Twilight Zone” (February 8, 2016: 5) and threatened the integrity of the legal process, as I discuss further in a later section.

Q. But you see there, you say, “I’ve been watching you on Screw the Vote? (February 2, 2016: 47)

By pre-emptively emphasizing the complainant’s claims to have avoided further contact with Ghomeshi and been re-traumatized by the sound of his voice, Henein builds a plot twist or moment of peripeteia into her narrative configuration. The emails are presented as a sudden reversal that disrupts the complainant’s initial statements about avoiding further communication with Ghomeshi, thus implying that things are not what they seem. The courtroom relations of configurational power enable Henein to manipulate both her evidence and the complainant’s episodic stories in order to create and dramatize moments of peripeteia that seem to suddenly reveal what is *really* going on and what the complainant, as narrative character and audience member, cannot fully anticipate (see Chapter Three). Although we cannot know whether the complainant remembered the two emails before this exchange, she would not have pre-emptively known how repetition of her previous statements about how she “couldn’t even bear to see [Ghomeshi] on television or hear his voice” (February 2, 2016: 32) would be used to configure Henein’s narrative twist.

Perceiving the unfolding cross-examination through the stock stories embedded in the socio-political and cultural habitus, the complainant senses the negative insinuations of Henein’s configuration, in particular, the ways that this configuration encourages listeners to tacitly perceive her through unspoken tropes of lovesick and scorned women who make up sexual assault allegations. Given her practical sense of the discrediting insinuations associated with being “smitten”, the complainant repeatedly asks for the opportunity to explain:

Excerpt 5.19

Q. And that is an e-mail that you sent to Mr. Ghomeshi on January 16th, 2004, right?

A. Yes.

Q. All right. [...] Let’s bring –

A. Can I explain?

Q. We're going to go through it line-by-line. You'll have every opportunity to explain.

A. I would like to explain it before we go through it line-by-line.

Q. I would like to ask my questions, and you'll have every opportunity, and the Crown attorney will ask you any questions he wishes. Let's go through this line-by-line.

(February 2, 2016: 36-7)

In this excerpt, the complainant attempts to open up a space to pre-emptively explain how the emails fit with her experience and what they mean. The relations of configurational domination in the courtroom, however, allow Henein to expressly reject the complainant's attempt to explain. Furthermore, this domination is misrecognized as a self-evidently legitimate component of a witness examination process in which the complainant has "every opportunity to explain".

As the cross-examination continues, the complainant makes several more requests to explain. After Henein discusses each line of the email, which ends with the complainant providing Ghomeshi with her email and phone number so he can "keep in touch", the complainant again asks to explain, this time directing her request to the judge:

Excerpt 5.20

Q. You wanted him to e-mail you or to call you?

A. I did want him to e-mail me. I did want him to call me.

Q. And so that you could hear the voice live and in person that you say you couldn't bear to hear?

A. Yes.

Q. And –

The Witness: May I explain, Your Honour?

Q [Henein]: Please. You want to give your explanation? Go ahead.

A. I wanted Jian to call me so that I could ask him why did he violently punch me in the head and if I were to call him and just say – call him, I didn't have his number. If were to e-mail and just say to him, hi, it's me, give me a call, I didn't think he would.

Q. Is that the explanation you're giving under oath?

A. I'm giving you under oath that I did not want to see him, that I wanted to talk to him to ask him why.

Q. That's not what you say in the e-mail.

A. The e-mail was bait.

Q. It was bait?

A. It was bait to call me so that I could get an explanation as to why he had violently punched me in the head. I had no interest in him. I was with another person. I was in a committed relationship. (February 2, 2016: 42-43)

Momentarily disrupting the question/answer format of legal procedure, the complainant directly asks the judge for an opportunity to explain and contextualize the email. Although she is finally permitted to provide her explanation, it is Henein, not the judge, who grants this permission. Furthermore, the explanation comes *after* Henein has already gone through the email “line-by-line” and configured it within her overall narrative as a plot twist that discounts the complainant’s claim to have wanted nothing to do with Ghomeshi after the alleged incident. This postponement of the complainant’s explanation undermines its forcefulness; rather than preemptively providing a context for interpreting the emails, the complainant attempts to *reframe* their meaning. By permitting her to “go ahead” with her explanation only after scrutinizing each line of the email, Henein undercuts the complainant’s ability to provide a plausible alternate meaning, making it appear as an after-the-fact explanation by someone who has just been shown to have withheld the truth. Her ability to do so successfully is conditioned by the misrecognized relations of configurational power structuring the courtroom narrative practices. Through the symbolic violence of courtroom narrative practices and stock stories about predatory women embedded in the practical sense of habitus, an act that could be interpreted as a strategic attempt to get an explanation from one’s assailant is configured as the manipulative act of an infatuated woman. Driving this narrative home, Henein ends her cross-examination by emphasizing that despite the complainant’s “bait” Ghomeshi did not call her.

Early on in her two-day cross-examination of the second complainant, Henein highlights how the complainant told the media that during dinner before the alleged assault Ghomeshi

commented that he wanted to “go back to his place and put on some music and [...] hold [her]” (February 4b, 2016: 16) – a comment the complainant alternately described as “creepy”, “weird”, and “awkward”. After briefly challenging the complainant on her shifting word choices, Henein emphasizes that regardless of changing words, the complainant should be relied upon to be accurate in her recollection of how she *felt*:

Excerpt 5.21

Q. And so what I’m interested in though is relying on your word under oath. Your recollection, forget how we describe it, whether it’s creepy or it’s weird or it’s awkward [...] all those things that you’re telling the media over and over again, can we rely on your recollection of your feeling, of how you felt during that conversation?

A. Absolutely. (February 4b, 2016: 19)

Building toward her narrative twist, Henein also emphasizes the complainant’s claim that after the alleged incident she did not have any romantic feelings towards Ghomeshi:

Excerpt 5.22

Q. You told the police you didn’t really have any dealings with him afterwards, except professionally. That you didn’t engage with him. And that you weren’t friends with him. That there were no romantic feelings afterwards. Those were your words.

A. Oh there are no romantic feelings afterwards, I guarantee you that.

Q. Do you? Under oath you’re going to guarantee me that?

A. Oh, God yes. (February 5, 2016: 39)

In both of these excerpts, an emphasis is placed on the complainant’s *feelings*, which, it is presumed, she should have no difficulty remembering. Halfway through the second day of cross-examination, Henein begins to reveal a series of correspondence that suddenly reverse or appear to upend the complainant’s prior claims about her feelings towards Ghomeshi. Importantly, these emails are *not* provided in chronological order, but rather are configured to gradually increase in significance. The first set of emails show the complainant corresponding in a friendly manner with Ghomeshi and arranging to meet; these are sent between 2003 and 2005. Henein then reveals a series of correspondence that are more suggestive of an intimate relationship, including

one where the complainant refers to a dream she had that Ghomeshi was in (February 16, 2004) and one asking if he had “an itch that needs scratching” (April 16, 2004). Next, Henein reads an email the complainant sent to Ghomeshi thirteen days after the alleged assault in which she refers to Ghomeshi as “magic” and asks to hang out with him again (July 17, 2003). Finally, Henein goes right back to an email the complainant sent the day after the alleged assault and a “love letter” sent four days later; in the email the complainant tells Ghomeshi “You kicked my ass last night and that makes me want to fuck your brains out” (July 5, 2003) and the letter ends with the line “I love your hands” (July 9, 2003). It is worth noting that Henein asks the complainant to read the July 5th email and the last line of the “love letter” out-loud to the court, further highlighting her position as a narrative character who speaks and acts within someone else’s narrative (see Chapter Three).

Throughout the entire cross-examination, Henein builds towards these pieces of correspondence as the key moments of peripeteia in her narrative. In fact, she ends the first day of cross-examination with a dramatic cliff-hanger that hints an important narrative twist is forthcoming: she asks the complainant if she “want[s] to take a moment and tell the truth of the real conversation that was going on” (February 4a, 2016: 101) and when the complainant says “I’m not sure what you mean” Henein requests that they end for the day. As Henein reveals the correspondences, she configures them in juxtaposition to events and statements emphasized at previous points in the cross-examination (e.g. the complainant’s claim to have found Ghomeshi’s comment “creepy” and to have had no lingering romantic feelings). Through this configuration, Henein’s presentation of the correspondence appears as a revelation of what was *really* going on:

Excerpt 5.23

Q. [reading from the ‘love letter’] “really what on Earth could be better than lying with you, listening to music and having peace. Nothing. But put to me like that? I really could

not deal.” Let me just stop here. How many times did you tell the public, tell the police, tell His Honour that you remember one conversation where he said you know what I’d like to do with you? I’d like to go home and lie down and listen to music, and hold you and you thought, geez, that is creepy?

A. Yes.

Q. That is awkward. That is corny. And when I asked you, you remember, you’re being honest about how you felt, you said oh, yeah, I remember that, that’s something I wouldn’t forget. That’s not a detail, right. Do you agree that you have been lying?

A. No, I don’t agree that I’ve been lying. (February 5, 2016: 86)

From the beginning of the cross-examination, Henein is obviously aware of the emails she will eventually reveal and how the complainants’ earlier comments will be configured in relation to them; her legal capital and the relations of configurational power allow her to occupy the position of a narrator who has already grasped the series of events as a whole. Exercising configurational power to emphasize certain comments and events during the earlier stages of cross-examination, she contributes to the shock of the later narrative twist and thus to the sense that things are not as they seem and, crucially, things are not as the complainant has claimed.

Henein’s narrative configurations and moments of peripeteia not only dramatize inconsistencies in the complainants’ accounts, but also contribute to the *re-characterization* of the complainants, transforming them from confused victims into infatuated pursuers. This is reflected in both the judge’s ruling and in the media coverage. For instance, the judge describes the first complainant as “obviously very much taken with Mr. Ghomeshi” (4), states that the second complainant’s post-incident correspondence “reads as if [she] was [...] clearly pursuing Mr. Ghomeshi with an interest in spending more time together” (13), and says that an email sent by the third complainant in which she asks Ghomeshi if he still wants to have a drink “are not the words of someone endeavouring to keep her distance” (19). Summarizing the similarities between the complainants, the judge states that “[e]ach complainant was aware of Mr. Ghomeshi and his celebrity status prior to meeting him. Each was a fan to some greater or lesser extent”

(22). Similarly, some of the newspaper coverage depicts the complainants as “star-struck” (DiManno, *TorStar*, March 26, 2016), “lovesick fan[s]” (Wente, *G&M*, February 9 2016) and describes how they were “love-bombing [...] Ghomeshi” (Blatchford, *NatPost*, February 6, 2016).

The moments of peripeteia through which Henein undermined the complainants’ accounts and re-characterized them as infatuated pursuers were key moments of symbolic violence in the courtroom. In particular, Henein’s ability to successfully create narrative twists that appeared to reveal the previously hidden truth required the relations of configurational power and narrative domination that underpinned these practices to be misrecognized as an inherently legitimate part of attaining a fair, impartial, and objective trial. Furthermore, the sense of dramatic reversal and discredit created through Henein’s narrative twists relied on stock stories of sexual assault embedded in the narrative sensibilities of the socio-political and cultural habitus. For instance, the sudden revelation of the emails that the first and second complainants sent to Ghomeshi functioned as a dramatic reversal or moment of peripeteia only through narrative dispositions that allowed the audience to experience certain post-incident conduct as discordant with claims of traumatization or characterizations of Ghomeshi as the interested pursuer. Moreover, when stock stories about infatuated women who make false allegations of sexual assault are embedded within habitus, they function as embodied “schemes of perception” (Bourdieu 2001: 8) through which agents tacitly *make sense* of the discordance created through peripeteia. Perceived through cultural stock stories embedded in habitus, the discordance configured during cross-examination can be experienced as particularly suspicious.

As I discuss later, the transformation of the complainants into infatuated pursuers underpinned the defence’s presentation of them as manipulative threats to the legal process. In

particular, the complainants' initial appearance as passive, confused, and pursued was not only undermined, but configured as a deceptive hoax – as Grandma's clothes on the predatory wolf. Instead of being part of their "mixed feelings" (second complainant, February 5, 2016: 36) or efforts to "get an explanation [for the assault]" (first complainant, February 2, 2016: 43), the complainants' post-incident correspondence was used to upend their narratives of victimization and characterize them as predatory women who tried and failed to seduce Ghomeshi. In the next section, I examine how stock stories of scorned, hostile, and attention-seeking women further contributed to the defence's ability to discredit the complainants.

2.2. Scorned Women, Hostile Collusion, and "Theater at its best": Configuring Ulterior Motives

As she undermined the complainants' appearance of vulnerability and passivity, presenting them instead as infatuated pursuers, Henein also worked to discredit their reasons for coming forward to make allegations against Ghomeshi. As aforementioned, during in-chief examination the complainants enacted their practical sense of the acceptable motivations for reporting sexual assault, which was shaped by doxic assumptions that complainants are more trustworthy when they report for impersonal reasons and comply with the symbolic violence of legal processes. In particular, the complainants suggested that they were concerned about the harm being done to other women and indicated that they wanted to comply with the police's public request for information. During cross-examination, Ghomeshi's defence team upended these explanations and implied that the complainants were actually motivated by vengeance, hostility, and publicity. In this sense, the defence's narrative configurations relied on the suspicions embedded in the juridical sense or habitus, specifically concerns about the ever-present risk posed by women who take advantage of the emotional force of sexual assault allegations in order to "use the legal process for *personal* reasons such as exacting revenge,

thereby abusing the function and purpose of the criminal law” (Larcombe 2005: 110, original emphasis). The reframing of the complainants’ motivations contributed to the defence’s ability to configure a narrative about cunning women who manipulated and misused the legal process to serve their own ends, as I discuss in the final section.

Stock stories about scorned women who get revenge for their rejection by falsely claiming sexual assault are possible because of broader binaries and relations of masculinity and femininity that are repeatedly misrecognized as natural. Within doxic categories of perception women are typically associated with the derogated side (i.e. second part) of the following binaries: rationality/emotionality; independence/dependence; thought/feeling. As discussed in Chapter One, law’s gendering practices are premised upon and (re)produce these binaries. It is within this context that stock stories of sexual assault operate as schemes of perception embedded in habitus that allow agents to *experience* certain accounts of sexual assault as plausible and credible and other accounts as untrustworthy. Underpinned by the wider misrecognition of emotionality and dependency as problematic albeit natural traits of womanhood, stock stories of scorned and vengeful women rely on the framing of women as cunning and men as uncomplicated, as well as on assumptions that women desire romantic commitment and men desire freedom (Ellison & Munro 2010a: 797-8; Matoesian 2001: 41-42). Discussing what he refers to as “the patriarchal logic of sexual rationality” (41), Matoesian (2001) points to two intertwined cultural assumptions prevalent in sexual assault trials: that women frequently experience irrational emotions after a sexual encounter and that claims of sexual assault might be fabricated because “strong expectations for a more enduring, romantic relationship were not fulfilled” (42). These assumptions and their ability to discredit women’s allegations of sexual assault rest upon the ongoing misrecognition of patriarchal relations of

masculine rational independence and feminine emotional dependency as natural. When references to a woman's romantic interest are perceived through stock stories of scorned women, this misrecognition is reproduced.

In her cross-examination of the first and second complainants, Henein cast them as scorned and rejected women, a defence strategy that Ellison and Munro (2010a: 795) describe as “far from uncommon in acquaintance rape scenarios”. Building on the previous narrative twist (Excerpt 5.16) in which she revealed that it was the first complainant, not Ghomeshi, who was smitten, Henein suggests that the first complainant was also disappointed by Ghomeshi's lack of interest when she attended a second taping of his show:

Excerpt 5.24

Q. All right. And I'm going to suggest to you that what you told your friend after attending that second Play episode, is that you were very disappointed because he really didn't look interested in you at all like the first time. Do you recall telling [...] [your friend] that you were disappointed?

A. No, I don't.

Q. And do you recall telling her that he didn't seem interested in you at all?

A. No, I don't.

[...]

Q. And so she then would never have said to you “Just leave it alone, just – he's probably changed his mind, don't bother.”

A. She didn't say that to me that I remember.

Q. She did not say that to you. All right. So [your friend's] recollection of your feelings after that second Play episode, which is that it wasn't any chemistry, there was no flirtation, that does not accord with your recollection of that [...] second interaction you have with him at Play, am I right?

A. That's correct.

Q. But you agree that you don't go out with him that night, the second episode –

A. I needed to go home.

Q. So agree with me that you do not go out with him.

A. I do not go out with him. (February 1, 2016: 95-97)

In this excerpt, Henein uses the words of the complainant's friend to portray the complainant as an infatuated fan girl who would not "leave it alone" when Ghomeshi did not initiate any flirtation. Resisting the implication that she was rejected and disappointed, the complainant denies her friend's statements and indicates that she did not go out with Ghomeshi that night because she "needed to go home". Exercising configurational power, Henein responds by reasserting that, regardless of the reason, the complainant "do[es] not go out with him". Henein's emphasis on the fact that they did not go out functions as a discrediting statement because it is rooted in stock stories about infatuated women seeking romantic relationships with uninterested men. Henein's earlier framing of the complainant as smitten and disappointed combines with these stock stories to imply that if they did not go out together it must have been because *Ghomeshi* did not want to, that is, it must have been because he rejected her, rather than because she "needed to go home".

This narrative of rejection runs throughout the first complainant's cross-examination. For instance, Henein raises what the complainant described to the police as the "kooky yoga moves" she was doing while at Ghomeshi's place and which she told the police appeared to be "annoying" or "bothering" him (February 2, 2016: 28). To make the complainant's actions appear absurd, Henein sarcastically clarifies that it "was not a yoga class, was it?" (26) and asks the complainant to describe the yoga move she was doing (27). Reconfiguring the narrative from one about sexual assault to one about a smitten woman's unsuccessful attempt to seduce a celebrity, Henein ends her discussion about the yoga moves with the following question: "And what you tell the police is that, at the end of this, he tells you to leave?" (February 2, 2016: 28). Skipping over the complainant's account of how Ghomeshi violently punched her, Henein suggests that Ghomeshi asked the complainant to leave because she was "annoying" him, rather

than because she was crying after he assaulted her. Furthermore, Henein goes over the “flirtatious” emails (February 2, 2016: 39) and the “attractive photo” (50) that the complainant sent to Ghomeshi after the alleged assaults and then ends her cross-examination by asking the complainant “[h]e didn’t [call you], did he?”. Exercising the significant configurational power afforded by her position in the courtroom, Henein cast the complainant as an infatuated woman whose experience of rejection may have given her incentive to fabricate allegations of sexual assault.

During Henein’s cross-examination, the second complainant was also narrated as a rejected woman, particularly as her post-incident correspondence with Ghomeshi was revealed. For instance, after stating that the complainant’s emails suggest she was “doing [her] best to make sure [they] hang out together” (February 5, 2016: 45), Henein shows that Ghomeshi responds by indicating he would be “pretty busy” (46) and “doesn’t think he’ll have time” (47). Further casting her as a scorned woman, Henein highlights the hostile comments the complainant made about Ghomeshi in online correspondence with friends. In the following excerpt, a short portion of which was discussed in Chapter Two, Henein configures a narrative twist that presents hostility as one of the complainant’s hidden motives:

Excerpt 5.25

Q. And as I understand it, what you told us today is that you wanted to protect Mr. Ghomeshi, right? You have compassion for him, right?

A. I did say that, yes.

Q. But you don’t have compassion for him, right?

A. That’s not true, I do have compassion for him.

Q. You do have compassion for him?

A. Yeah, I do.

Q. You feel sympathetic towards him?

A. Absolutely.

Q. All right. And that is why you told your friend [...] on October 26th, “I want him fucking decimated. [...] He’s walked the line so long, he’s had so many women afraid of

him or at least crept out for a very long time, all the while becoming more famous and successful.” So you wanted him fucking decimated, to use your words, is that right?

Yeah?

A. So I often will speak a hyperbole and I did say that. I would say that that was said with a degree of hyperbole.

Q. How about this one, “The guy’s a shit show, time to flush”? That’s said to your friend on November 13th, 2014.

A. Someone can be unkind and hurt people very much and still have a soul that requires nurturing. I have compassion for Mr. Ghomeshi because his life has changed drastically.

Q. So this is you being compassionate?

A. To be fair, I was fielding a lot of correspondence with a lot of violence in it.

Q. Okay. What about this one, February 24th, 2015, charges have been laid, and you say, “I hope he’s panic-eating so much feelings in a high-calorie way. Hope [...] he gets chubby. I want him to get really chubby.” That’s hyperbole?

A. That’s a self-referential. I was [...] eating a lot and getting chubby.

Q. What about this one, “Fuck Ghomeshi”? That’s February 24th. He’s Iranian. You’re talking about Detective Ansari. You seem to be delighted that Detective Ansari is Iranian and he’s arresting another Iranian, “Fuck Ghomeshi”. [...] What’s the hyperbole there?

A. Oh, that’s fairly aggressive. (February 4a, 2016: 79-81)

After emphasizing the complainant’s claims to have felt compassion and sympathy towards Ghomeshi, Henein suddenly upends this portrayal by revealing a series of correspondence in which the complainant says she wants Ghomeshi “fucking decimated”, “hope[s] [...] he gets chubby”, refers to him as a “shit show”, and states “fuck Ghomeshi”. Through this exchange, the complainant’s portrayal of herself as compassionate and “nurturing” is presented as a hoax intended to disguise her hostility towards Ghomeshi, who is cast here as the victim of female aggression. No consideration is given to the possible complexity of the complainant’s feelings or to how the aggression expressed in these messages may have been the venting of pent-up anger about her experience of sexual violence, perhaps even bolstering the credibility of her allegations. Instead, the hostile messages are configured in the defence’s narrative in a way that undermines the complainant’s narrative of victimization, presents Ghomeshi as the true victim,

and suggests that the complainant's motives for coming forward were personal and thus illegitimate.

The courtroom relations of configurational power allow Henein to legitimately draw connections and implications *across* the three witness examinations, extending discrediting insinuations made about one complainant to her characterization of another complainant. In the cross-examination of the third complainant, Henein builds on her depiction of the second complainant by highlighting the complainants' aggressive correspondence about Ghomeshi. Henein read aloud a series of online messages the complainants sent to each other: "It's time to sink the prick" (February 8, 2016: 77); "I'll do whatever I can to put this predator where he belongs" (77); "I want so fucking badly for that piece of shit to pay for all he's done" (77). Importantly, Henein frames these hostile comments through reference to how the complainants discussed lawyers, publicists, media interviews, their meetings with different Crown lawyers, and the legal process. For instance, before reading out the messages mentioned above, Henein asks the third complainant about her "reporting in" to the second complainant:

Excerpt 5.26

Q. All right. Just so we have the sequence there [...] it's [the second complainant] that *says to you call* the publicist, right?

A. Yes, she *suggests* it, yes.

Q. And then you tell her you're going to think about it.

A. Mm-hmm.

Q. And then when you call the publicist you *report in* to [second complainant], right?

A. I report? I *talk to* her, yes.

Q. Yes. [...] And [the second complainant] is also the one who *sends you* to the civil litigation lawyer, right, Ms. Hnatiw?

A. She *gave me her contact information* yes.

[...]

Q. Yes. And do you recall that on November 13th you say to her: "Yep, I'd love to speak to your lawyer and I will get in touch with the publicist tomorrow." Right?

A. Yes.

Q. So you take her advice, right?

A. I do.

Q. And then again, the same way as it goes with the publicist, you *report in* to [the second complainant] on November 27th and you tell her: “Look, I met with the lawyer and we had a good talk.” Do you remember that?

A. I do.

Q. All right. And she tells you: “That’s great. Your statements will be part of a Jenga tower.” Do you remember [her] telling you that? (February 8, 2016: 62-63, emphasis added)

In her discussion of the complainants’ correspondence, Henein frequently refers to how the third complainant “reported in”, implying a planned approach and presenting the second complainant as the strategist. In the excerpt, the third complainant is attentive to Henein’s word choices and resists their implications; she changes “says to you call” to “suggests”, “report in” to “talk to”, and “sends you” to “gave me her contact information”. Given the relations of narrative domination in the courtroom, however, the complainant’s attempts to redefine the correspondence as supportive rather than conniving are unsuccessful and Henein concludes this exchange by emphasizing that the complainant “report[ed] in to [the second complainant] on November 27th” and was told her statements would “be part of a Jenga tower”. In closing arguments, the defence expressly frames the complainants’ hostile messages through the image of intentional collusion: “[the second complainant] told [the third complainant] [...] that [her] statement would be part of the Jenga tower against Mr. Ghomeshi. And it is in that context, Your Honour, that I ask you to consider the animus expressed [...] against Mr. Ghomeshi” (February 11, 2016: 47). In this sense, the complainants are not only presented as angry and hateful, but crucially as conspirators in their efforts to harm Ghomeshi.

According to Randall (2010: 421), when a woman responds with anger to her experiences of sexual violence, her anger is “treated with suspicion” and often results in “adverse inference[s] being drawn with regard to credibility”. To express anger as a woman is to trouble

cultural expectations of passivity and potentially be cast as overly emotional or unreasonable (Holmes 2004: 215; Lakoff 2003: 163; Trimble 2017: 185). While there seemed to be some recognition in the *Ghomeshi* trial that women who have been assaulted may legitimately experience anger, the notion that this anger may lead to *intentional actions* was treated as particularly problematic. In closing arguments, the Crown (Callaghan) attempts to reframe the complainants' angry correspondence as "an informal support network" (February 11, 2016: 27) in which the women "were reaching out [...] to vent and support each other" (28).

This reframing, however, relies on notions of passive and vulnerable femininity that had been undermined through the defence's emphasis on intentional and strategic actions. In his ruling, the judge states that:

While this anger and this animus may simply reflect the legitimate feelings of victims of abuse, it also raises the need for the Court to proceed with caution. [The complainants] considered themselves to be a "team" and the goal was to bring down Mr. Ghomeshi. (March 24, 2016: 18)

According to Lakoff (2003: 163), anger is a powerful form of speech that expresses potency, but women's expressions of anger are often denied power, as exemplified by the phrase "[y]ou're cute when you're mad". In the context of aforementioned doxic binaries between masculine rationality and feminine emotionality, women's expressions of anger are often cast as the outcome of emotional instability, justifying the dismissal of the claims upon which their anger is based (Marriner 2012: 417; Salerno & Peter-Hagene 2015: 582; Stanbridge & Kenney 2009: 491-2). The defence's efforts to frame the complainants' anger as a reflection of their strategic conspiracy, the Crown's attempt to reframe their anger as a legitimate emotion within the context of giving other victimized women emotional support, and the judge's concerns about the complainants' anger in the context of their "goal [...] to bring down Mr. Ghomeshi" suggest that

it was their anger's association with *potency and intentional action* that rendered it not only untrustworthy, but potentially dangerous. The complainants did not fit the image of passive, vulnerable women expressing to one another their emotions, which might include anger, but rather appeared within the defence's narrative configurations as a hostile and strategic "team" targeting Ghomeshi. This brings together aspects of the rational/irrational binary to create an image that was particularly damaging to their credibility: the complainants were presented as irrational and overly emotional in their motives for making allegations (i.e. anger at being scorned), but strategic and calculating in their actions and the steps they took to get back at Ghomeshi. When perceived through the doxic standards of impartiality and autonomy and the suspicions towards the extra-legal embedded in juridical habitus, the insinuation that the complainants may have acted strategically based on emotional motives appears particularly threatening to the legitimacy of the trial. Instead of being impotent, "cute", or the expression of collective emotion and support amongst victims, the complainants' anger was framed as the basis of collective action, thus causing "the Court to proceed with caution".

In addition to creating narratives about scorned and hostile women, Henein spends a good portion of her cross-examinations emphasizing the complainants' media interviews. Not only does the narrative capital that the complainants had when recounting their experiences to various media outlets fail to translate into narrative capital in the courtroom, but when configured within the defence's narrative it becomes another illegitimate and suspicious motivation for reporting sexual assault. During cross-examination of the *Ghomeshi* trial, stock stories about women falsely alleging sexual assault in desperate bids for attention (see e.g. Busby 2014: 293; Ellison & Munro 2010a: 797; Tanovich 2012: 558) take on a particular tenor given Ghomeshi's celebrity status and the significant publicity of the case. Framing them not only as attention-seeking false

accusers, but also as *fame*-seekers, Henein points out early in each cross-examination that the complainants did media interviews before speaking with the police. For instance, in the following exchange the first complainant's assertiveness in setting up media interviews is juxtaposed against her hesitation in reporting to the police:

Excerpt 5.27

Q. And in terms of arranging the [media] interviews, how did you do that?

A. By phone.

Q. Just explain it to me. You, what, picked up the phone, looked up the number and did what?

A. I went on Google and I looked up how to contact them.

Q. How to contact the media.

A. Yes.

Q. And so you did that all on your own, right?

A. I did.

Q. And I take it you didn't do that for the police though, you didn't Google how to contact the police and pick up the phone and speak to them.

A. I don't understand. I saw the interview, the press conference with Chief Blair, and then I did some research, talking to people at police stations and called a few people and then I went in. (February 1, 2016: 79-80)

As aforementioned, women alleging sexual assault are considered more credible when they comply with the legal process and appear to report for the impersonal motive of justice (Bumiller 2008: 131; Larcombe 2005: 112). In Excerpt 5.27, the complainant's decision to contact the media before going to the police station is framed as a fame-seeking circumvention of legal process.

The emphasis on media attention is particularly prevalent in the cross-examination of the second complainant⁷¹, who did "nine interviews [...] before [she] walk[ed] into the police

⁷¹ Although the third complainant did not do many media interviews and never publicly attaches her name to the case, the emphasis on the second complainant's media involvement implicates the third complainant because of the ongoing correspondence discussed above. In closing arguments, the defence indicated that there is a "stark contrast" (February 11, 2016: 50) between the third complainant's friendly correspondence with Ghomeshi seven months after the alleged assault and the hostility expressed twelve years later in her correspondence with the second complainant.

station” (February 4b, 2016: 4) and “nine more interviews after that” (6). Having already gone over each of the second complainant’s media interviews and clarifying that the complainant declined “the anonymous route” (February 4a, 2016: 82) offered by a publication ban, Henein read the following quote from the second complainant’s messages to the third complainant: “Dude, with my background I literally feel like I was prepped to take this on, no shit. This trial does not freak me out. I invite the media shit. I’m not worried at all” (82). Instead of being seen as a resourceful and even courageous attempt to take a negative experience and turn it into something personally or socially beneficial (e.g. an increase in one’s narrative capital and greater attention to the issue of sexual violence), the complainant’s boldness and interest in “the media shit” was framed in the defence’s narrative as indicative of deception.

This framing was further emphasized through references to theater and acting that drew on the complainant’s career as a television actor. Henein ends her questioning about the media interviews by asking the complainant whether she remembered telling another complainant “how excited [she] was for court because it’s theater at its best” (February 4a, 2016: 90). Summarizing this comment in his ruling, the judge states that “she, [the second complainant], *the professional actor*, was excited for the trial” (Ruling, March 24, 2016: 15, emphasis added). By defining the complainant as “the professional actor” at this juncture, the judge implies that her career might have made her particularly good at deception and suggests that she was merely playing the role of victim, perhaps in an attempt to boost her career. In this way, the stock stories about attention-seeking women were slightly transposed in the context of the complainant’s success as an actor and Ghomeshi’s celebrity status. Instead of being cast simply as a desperate attention-seeking

The defence argues that “the intervening factor of [the second complainant] goes a long way to explain the difference” (50). This suggests that the fame-seeking and hostile motivations of the second complainant strongly influenced the allegations of the third complainant, thereby discrediting both complainants simultaneously.

woman, the second complainant was cast as a professional actor attempting to use the case to boost her fame and career through extensive media interviews. Existing through the transposition of stock stories embedded in the shared socio-political and cultural habitus, this narrative does not have to be expressly stated; the narrative dispositions and cognitive structures of habitus allow the legal audience to tacitly perceive the implications of the comments and media interviews that the defence brings forward.

As demonstrated in this section, the range of acceptable reasons for reporting sexual assault is narrow and anything hinting at self-interest or personal motivation brings into question the entirety of the allegations. In cross-examination, the complainants' previous statements about their motivations were undermined and they were presented as rejected, hostile, and fame-seeking women who brought forward allegations in order to serve their personal interests. The discredit of the ulterior motives that Henein configures during cross-examination relies not only on the misrecognized domination of courtroom narrative practices, but also on misrecognized patriarchal relations that position women as emotionally dependent and irrational in relation to men. In this broader relational context, passive vulnerability is perceived as a natural trait of genuine female victimhood. The insinuation that the complainants might have reported the assaults to serve their own ends or in response to feelings of anger is so discrediting because it suggests that instead of demonstrating the passivity and compliance assumed to go along with victimization, they demonstrated the infatuation, hostility, and cunning assumed to accompany false accusations. In the next section, I demonstrate how the defence's narrative of manipulation framed the complainants as threats to the legal process and imbued both consistencies and inconsistencies with meaning.

2.3. “[She] was clearly “playing chicken” with the justice system”: Configuring (In)Consistencies through Narratives of Manipulation

Inconsistencies do not signify on their own, but rather they must be configured and imbued with particular meanings, as argued in Chapter Three. An inconsistency in someone’s account could be interpreted, for example, as the outcome of misunderstanding, incomplete information, a mistake, a confusing situation, or intentional deception. Furthermore, the weight given to a certain inconsistency shifts depending on context, relations, and the purposes of the speaker’s interlocutor. Exercising configurational power, the defence lawyers in the *Ghomeshi* trial framed inconsistencies in the complainants’ accounts and undisclosed information within narratives of manipulation. This narrative configuration was conditioned by the symbolic violence of courtroom narrative practices and the defence’s narrative twists and re-characterization work discussed previously. Misrecognized relations of configurational power enabled Henein to configure and interpret discordant elements as indicative of the complainants’ intentional deception and manipulation. During cross-examination, the complainants no longer appeared to be the passive, confused, and justice-seeking victims they presented themselves as during in-chief examination; they were re-framed as infatuated, rejected, hostile, and fame-seeking women. Although the misrecognition of passivity as indicative of female victimhood helped Henein undermine the complainants’ allegations, what was particularly important in her narrative configuration was the insinuation that the complainants hid or disguised their true character, thereby deceiving the legal professionals and manipulating the legal system. In other words, the defence suggested that not only were the complainants infatuated, predatory women, but that they *tried to present themselves as otherwise*; they were not just dangerous wolves, but wolves deceptively donning Grandma’s clothes.

As discussed in Chapters Three and Four, the unequal organization of configurational power in the courtroom did not afford the complainants the ability to legitimately configure their episodic stories. Instead, they were expected to comply with the relations of configurational domination in the courtroom by providing the episodic stories that could be manipulated by the legal professionals into legitimate legal narratives. Misrecognized as a legitimate component of law's fair and impartial truth-seeking processes, this relation of domination constituted a form of symbolic violence. Given these relations of configurational power, the complainants were unable to successfully explain the inconsistencies raised in cross-examination in ways that could render them coherent.

For instance, when the first complainant was presented with the two emails she sent to Ghomeshi after the alleged assault and told that they contradicted her earlier statements about wanting nothing to do with him, she asserted that the emails were her attempt to get an explanation for the violence she experienced. Configured within the defence's narrative, however, the discordant elements (i.e. the flirtatious emails and the complainant's statements about staying away from Ghomeshi) were rendered coherent and meaningful by attributing them to the complainant's deception. The complainant's explanation was deemed "not worthy of belief" (February 11, 2016: 72) and presented as merely another attempt to mislead and deceive legal professionals. In his ruling, the judge stated that the complainant's "spontaneous explanation of a plan to bait Mr. Ghomeshi was completely inconsistent with her earlier stance that she wanted nothing to do with him, and that she was traumatized by the mere sight of him". Dismissing the complainant's "spontaneous explanation" (a wording that also implies improvisation) requires making a key inferential leap, that is, it requires assuming that the flirtatious content of her emails negates the possibility of her wanting to stay away from

Ghameshi. This narrative inference is possible because of doxic conceptions of women's emotionality and relational dependency that make it seem natural for women to irrationally expect or pursue romantic commitment after a sexual encounter (Ellison & Munro 2010a: 798; Matoesian 2001: 41-2). When framed through a narrative of manipulation and perceived through stock stories about infatuated women embedded in the narrative dispositions and cognitive structures of our collective socio-political and cultural habitus, the emails are not interpreted as potential attempts to *resist* Ghameshi's violence by "baiting" him into an explanation, but rather as indicators of romantic interest that the complainant attempted to hide when she decided to bring allegations against him.

Throughout cross-examination, the complainants provided many explanations for inconsistencies and undisclosed information: certain details seemed irrelevant (see Chapter Two); words and memories get "jumbled" (February 4a, 2016: 20; February 8, 2016: 83); certain things were "embarrassing [...] to say" (February 8, 2016: 103); they were "nervous" (February 2, 2016: 5); and they did not remember some things (February 2, 2016: 42; February 5, 2016: 78). Within the defence's narrative about hostile, scorned, and manipulative women, however, these explanations are configured as further attempts at deception. For example, consider how Henein questioned the third complainant on a sexual encounter that the complainant had with Ghameshi after the alleged assault and which she disclosed only two days before testifying. Having stated that "the late-breaking changes [made her] feel like [she was] in the Twilight Zone" (February 8, 2016: 5), Henein emphasized that the complainant was "being deliberately misleading" (February 8, 2016: 105) and argued that she only disclosed the additional information because she thought she would be "caught out" (113). The complainant agreed that she had been misleading, but resisted the notion that she only came forward when she thought

she would be “caught”; she explained her late disclosure by stating that she did not think the sexual encounter was relevant to her account of assault, the police did not directly ask her about it, she was confused by the process of disclosure, and it was an embarrassing thing to disclose. Unsurprisingly, Henein framed the late disclosure as evidence that the complainant was intentionally misleading and taking advantage of the legal system. The suspicion towards the assumed emotionality of women’s testimonies of sexual violence embedded in juridical habitus, combined with the defence’s previous deconstruction of the complainant’s claims to vulnerability and emphasis on her hostility towards Ghomeshi contributed to the success of this narrative configuration. Not only did Henein undermine the notion that the complainant did not disclose the sexual encounter due to embarrassment and uncertainty about whether it needed to be discussed, but she presented these explanations as another instance of deception.

By contributing to the misrecognition of unequal relations of configurational power, the “ideology of narrator authorship” (Eades 2012: 477) discussed in Chapter Four helped to reproduce the symbolic violence of the courtroom narrative practices and the success of the defence’s insinuations and overall narrative mosaic. This linguistic ideology understands an account to be “the sole product of the interviewee” (Eades 2012: 478), thereby obscuring the interactive process through which it was produced and interpreted. In their closing arguments, the defence maintained that the complainants’ explanations “evolve[d]” (February 11, 2016: 58) based on the evidence they were confronted with and that the complainants “conceded” (36) to the defence’s evidence and “changed” their accounts (58). While the defence’s evidence was presented as having “triggered” (52, 59, 60) the complainants to disclose more information, the evolving nature of the account was attributed to the complainants’ efforts to withhold the truth. The judge echoed this understanding, arguing that “the twists and turns of *the complainants’*

evidence in this trial, illustrate the need to be vigilant in avoiding the equally dangerous false assumption that sexual assault complainants are always truthful” (Ruling, March 24, 2016: 23-24, emphasis added). By attributing the “twists and turns” of cross-examination to changes in the *complainants’* evidence, the judge misrecognizes the relational context in which the complainants were speaking, as well as the defence’s role in configuring and imposing meaning on each narrative twist. When the courtroom relations of configurational power and the interlocutory role of the legal professionals are misrecognized as natural and legitimate parts of legal truth-seeking, any discrepancies in the emerging account can be experienced as problems in the *complainant’s* testimony.

The relations of configurational domination during cross-examination were also misrecognized in much of the newspaper coverage. While there were some articles that discussed the aggressiveness of cross-examination and the fact that defence lawyers tend to hone in on irrelevant inconsistencies, the narrative domination that enabled the defence to configure inconsistencies and imbue them with particular meanings existed without scrutiny. In several news articles, the inconsistencies were presented as having been *revealed*, which overlooks the importance of the defence’s narrative configuration:

The [complainant’s] answers kept changing (Menon, *TorStar*, February 2, 2016)

...the compelling narrative [the complainant] spun in examination-in-chief [...] was shredded by significant inconsistencies revealed in cross-examination by Ghomeshi’s lead lawyer (Blatchford, *NatPost*, February 2, 2016)

...inconsistencies bubbled to the surface like drops of oil in water (Menon, *TorStar*, March 24, 2016)

Some articles took this even further, attributing the implications of the defence’s configurational control solely to the complainants:

If there was thrashing, blood in the water, it originated with cuts the witness inflicted on herself (DiManno, *TorStar*, February 2, 2016)

[The complainant] might just as well have been wearing a suicide vest, so thoroughly did she blow up (Blatchford, *NatPost*, February 9, 2016)

Obscuring how inconsistencies are configured and made meaningful through an interactive process that is structured through unequal relations of configurational power, the ideology of narrator authorship brings the focus to the *interviewee's* or *complainant's* account and the ways it shifted based on the revelation of conflicting evidence. In this sense, the symbolic violence of witness examination and the defence's configuration of inconsistencies were misrecognized as the revelation of objective facts whose meaning and significance go without saying.

Not only were inconsistencies and undisclosed information configured into a narrative of manipulation during cross-examination, but so were the *consistencies* in the complainants' accounts, particularly the constancy of their allegations. Throughout cross-examination, the complainants repeatedly resisted Henein's insinuations and explicit statements that they lied about the alleged sexual assaults. For instance, when Henein reveals the emails that the first complainant sent to Ghomeshi twelve months and eighteen months after the alleged assault, she asks the complainant to admit to lying under oath:

Excerpt 5.28

Q. Are you prepared to admit that you have lied under oath? Are you now –

A. No.

Q. – prepared to admit –

A. No.

Q. – the obvious? No?

A. No.

Q. You refuse?

A. I refuse. (February 2, 2016: 42)

Confronted with the emails and a photograph of herself in a bikini that she sent to Ghomeshi in 2004, the complainant remains resolute in her claim she was trying to “get him to call [her] so that [she] could get him to tell [her] why he punched [her] in the head” (February 2, 2016: 49). Similarly, the second complainant does not waver in her allegations when Henein presents her with the emails she sent to Ghomeshi after the alleged assault:

Excerpt 5.29

[Henein reads out an email in which the complainant referred to Ghomeshi as “magic” and asks him to “hang out again”]

A. Right, I said that.

Q. So are you prepared to admit that you have been lying about your feelings and you have been lying about the incident? Are you prepared to admit that now?

A. Absolutely not.

Q. You never will, will you?

A. No, because I’m not lying... (February 5, 2016: 75)

As Henein brings forward the post-incident correspondence, the complainant repeatedly insists that it “doesn’t change the fact that he assaulted [her]” (February 5, 2016: 78). As aforementioned, Henein ends her cross-examination of the third complainant by emphasizing the late disclosure of her post-incident sexual activity with Ghomeshi. Although she agrees with Henein’s assertion that she was being “deliberately misleading” when she told police her plan was only to see Ghomeshi “in public” (February 8, 2016: 105), the complainant resists Henein’s characterization of her police statement as a lie:

Excerpt 5.30

Q. The thing that you omitted [...] Is that you had lied to the police under oath, right?

A. No, the thing I admitted [*sic*] was that I gave him a hand job. (February 8, 2016: 113)

In this excerpt, the complainant admits to having *omitted* information, namely, the post-incident sexual activity, but resists the implication that she *lied* to the police when making her allegations. Throughout cross-examination, all three complainants were consistent in their claims to have

been assaulted by Ghomeshi. They resisted Henein's attempts to frame withheld information as indicative that their allegations were false. During closing arguments, the Crown emphasized the complainants' consistency: "[n]otwithstanding vigorous cross-examination, all three of the Crown's witnesses were unshaken in their allegations that they were sexually assaulted by Mr. Ghomeshi" (February 11, 2016: 33).

Although the complainants consistently resisted Henein's assertions and insinuations that they fabricated the allegations, the relations of configurational power in the courtroom allowed Henein to reframe their resistance and undermine its significance. In particular, she argued during her closing arguments that it is very rare for witnesses to recant their statements and that, consequently, the absence of a recantation does *not* indicate credibility or reliability:

And, finally, my friend's submission that they were unshaken in the core allegation *is of no assistance* because, of course, unless a witness gets up and recants on the stand and says "You know, when I said it, that's just simply not true", well, *maybe that happens on TV. But, in 24 years of practising in these courts, that is a rare event.* And so, saying they're unshaken – in other words, that they maintained, as they will, of course, understandably, their position *doesn't assist this court in assessing the credibility and reliability of their – of these witnesses.* (February 11, 2016: 71, emphasis added)

By framing recantation as a "rare event" that only happens "on TV", Henein minimizes the significance of the complainants' consistency in their allegations, arguing that it "is of no assistance [...] in assessing the credibility and reliability of [...] these witnesses". Configured within a narrative of manipulation, the complainants' resistance to certain insinuations, persistent re-assertion of their allegations, and refusals to agree that they lied appear to *negatively* impact their credibility. In fact, the unshaken and unwavering nature of the complainants' allegations, which the Crown upholds as indicative of their consistency in the face of "vigorous cross-examination", was configured in the defence's closing arguments as a further instance of manipulation and deception. For instance, the defence argued that the second complainant "was

not prepared to resile [*sic*] when confronted with her contemporaneous writing [i.e. the emails]” because she had taken on a “very public position [...] given several interviews, and [...] established [herself] as some sort of icon of sexual abuse” (February 9, 2016: 6). Within the defence’s narrative mosaic, the complainants were presented as having been steadfast in their *deception*.

In this way, both the inconsistencies *and* consistencies raised during cross-examination were configured within narratives of manipulation and used to undermine the complainants’ credibility. Although an apparent *lack* of consistency can be used to discredit a complainant, the *presence* of consistency does not necessarily augment credibility. As the judge stated in his ruling on the admittance of a corroborating witness statement, “consistency, in and of itself, [...] is no more a badge of truthfulness than of fabrication” (February 9, 2016: 24-25). The defence’s configuration of inconsistencies, undisclosed information, *and* consistencies as indicative of fabrication was so successful because it resonated with the cautionary tales embedded in juridical habitus about the biasing dangers of emotional rape allegations, as well as with wider stock stories about deceptive female accusers. Furthermore, the discredit of the defence’s configuration depended on the misrecognition of courtroom relations of narrative domination as part of a self-evidently legitimate process of examining the *complainants’* narratives.

According to Larcombe (2005: 110), legal concerns about vindictive and hysterical women falsely alleging sexual assault suggest that “[i]t is not only accused men who are potentially victimised by false complain(an)ts. Legal processes and the law itself are also figured in legal discourses as vulnerable to abuse or at least *misuse*” (original emphasis). The notion that the legal system might be “abuse[d] or at least *misuse*[d]” can be understood as part of the juridical sense, training legal professionals to guard themselves and the legal process against the

perceived threat to doxic legal standards posed by the emotionality of women's testimonies of sexual violence. The cautionary dispositions of the juridical habitus underpinned the defence's narrative of manipulation in the *Ghomeshi* trial. As the defence juxtaposed their evidence against the complainants' accounts, pointing to inconsistencies and missing information, they suggested that the complainants intentionally hid the truth and misused the legal system and the professionals who work within it. As they exercised the misrecognized configurational power afforded by their position in the courtroom and enacted their practical mastery of the standards and unspoken concerns embedded in juridical habitus, the defence configured a narrative mosaic in which they appeared to reveal what really happened and, in so doing, save the legal system from being duped by the complainants' deception. The defence lawyers were thus configured as the ones who knew all along that there was a wolf under Grandma's clothes and whose job it was to reveal this to the legal audience and general public, one question at a time.

The defence's narrative configuration depended on the doxic elements of legal process discussed in Chapter Four. For instance, to frame the complainants as manipulators who misused the system required legal examination processes to be misrecognized as inherently balanced and fair, providing the complainants with every opportunity to freely tell their story. Misrecognizing relations of narrative domination as part of law's legitimate processes, Henein emphasized legal impartiality and procedural fairness to imply that the complainants were narratively powerful and that they misused this power to take advantage of the legal process. The doxic standard of legal objectivity also contributed to the misrecognition of configurational domination, allowing the symbolic violence of peripeteia in cross-examination to appear as the sudden revelation of what was really going on through the exposure of factual evidence.

In her closing arguments, Henein emphasized that information was withheld and then stated that “[t]his courtroom should not be a game of chicken. Our adversary system is structured around a conviction and significant consequences, and it is based on the fact that the truth will emerge” (February 11, 2016: 75). This argument was reasserted by the judge in his ruling:

I accept Ms. Henein’s characterization of this behaviour. [The complainant] was clearly “playing chicken” with the justice system. She was prepared to tell half the truth for as long as she thought she might get away with it. Clearly, [the complainant] was following the proceedings more closely than she cared to admit and she knew that she was about to run head first into the whole truth. (March 24, 2016: 20)

In this way, law’s doxic standards of fairness, impartiality, and objectivity were juxtaposed against the complainants’ apparent efforts to “play chicken” with the law, implying that they intentionally tried to withhold the truth until the last possible moment. As argued in Chapter Three, lawyers work to portray their desired legal outcome as the most fitting and poetically just resolution to their narrative (Chestek 2008: 161; Foley & Robbins 2001: 467, 472; Kaiser 2010: 165-166). The defence’s narrative configuration in the *Ghomeshi* trial sets up for a narrative ending in which the legal standards of objectivity, impartiality, and procedural justice triumph over the manipulative efforts of deceptive women. As Larcombe argues (2005: 113), “the story of the false complainant can tell a better story about law than a rape conviction can”. Through the symbolic violence of courtroom narrative practices and the enactment of their juridical sense, the defence lawyers configured a narrative in which Ghomeshi’s acquittal appeared to constitute the triumph of legal standards and rational truth-seeking processes over the complainants’ deceptive “game of chicken” and its threat of emotional bias.

Conclusion

During the *Ghomeshi* trial, gendered categories of perception, internalized patriarchal relations, and cultural stock stories about sexual assault functioned as part of agents' shared socio-political and cultural habitus, providing them with a practical and unspoken sense of what constitutes 'normal' heterosexual relations, what should be included in an account of sexual assault, what events mean, how they are connected, and whether actions and explanations appear believable. Embedded in the narrative dispositions and "schemes of perception" (Bourdieu 2001: 8) of habitus, stock stories and gendered binaries operate by causing agents to *experience* certain recounted events as strange, plausible, or normal and certain narratives as credible or suspicious. As they strived to explain events, augment their credibility, and/or discredit alternate interpretations, the legal agents enacted their tacit sense of the (dis)crediting insinuations of particular actions, pieces of evidence, and representations.

During examination-in-chief, the complainants described their interactions with Ghomeshi, the assaults, and their action afterwards in ways that highlighted their passivity, confusion, hesitant and cautious interest, as well as their vulnerability in relation to Ghomeshi's pursuit and the sudden emergence of a violent stranger. Moreover, in explaining their decisions to come forward over a decade later, the complainants referenced impersonal motivations and emphasized their compliance with legal authority. Given the doxic misrecognition of passive behaviour and legal compliance as natural traits of genuine female victimhood, the complainants' explanations and descriptions had the potential to bolster the legitimacy of their accounts. However, the relations of configurational power throughout the trial and the symbolic violence of cross-examination undermined the complainants' ability to successfully present themselves in ways that aligned with images of passive, responsible femininity. Nonetheless, as they enacted their practical sense of the disclaimers, explanations, and descriptions that might

render their account more credible, the complainants reproduced certain traits and actions as self-evident indicators of a woman's credibility and the plausibility of her accusations of sexual violence. In so doing, they contributed to the ongoing misrecognition of hierarchal gendered relations that privilege male-initiated sexual and romantic activity and in which women's perceived emotionality, dependence, and irrationality are positioned as naturally subordinate and vulnerable to men's perceived independence and rationality.

Exercising configurational power and creating dramatic moments of peripeteia during cross-examination, Ghomeshi's defence lawyers upended the image of the complainants as passive, hesitant, and confused that was constructed during the in-chief examinations. In the defence's narrative configuration, the complainants' claims to victimhood and descriptions of their vulnerability were presented as part of a calculated hoax that threatened the integrity of the legal process. By presenting inconsistencies *and* consistencies in the complainants' accounts as the result of intentional deception and creating narrative twists that appeared to suddenly reveal the complainants' infatuation, rejection, and hostility, the defence configured narratives of manipulation in which the complainants were shown to have misled and hidden the truth from legal professionals. The discrediting force of the defence's configurations and narrative twists depended upon gendered relations of power and stock stories internalized in the cognitive structures of the socio-political and cultural habitus. In particular, the misrecognition of emotionality and dependency as natural traits of womanhood and stock stories about infatuated and scorned women who falsely accuse allowed the juxtapositions and narrative twists configured during cross-examination to be perceived and experienced by the legal audience as discrediting. Moreover, the guardedness towards emotional accounts of sexual assault testimonies that is embedded in juridical habitus provided the judge with a tacit sense of

suspicion through which to experience and perceive the defence's unfolding narrative of manipulation.

Once they were revealed as the proverbial wolves in Grandma's clothes, it was very difficult for the complainants to resist the insinuations of the defence's narrative configuration. Although they attempted to provide alternate explanations for the evidence brought forward during cross-examination, the complainants did not have the configurational power or legal capital to reconfigure events and their explanations seemed to fall flat and come across as excuses after-the-fact and further instances of manipulation and deception. The symbolic power of the defence's narrative of manipulation is reflected in the following statement by the judge: "[t]he harsh reality is that once a witness has been shown to be deceptive and manipulative in giving their evidence, that witness can no longer expect the Court to consider them to be a trusted source of the truth" (Judicial Ruling, March 24, 2016: 24).

The complainants did resist the defence's narrative configurations and they had brief opportunities to provide alternative explanations. After asking several times, the first complainant was permitted to explain that her post-incident emails to Ghomeshi were an attempt to "bait" him into calling her so she could ask why he assaulted her. During a brief re-examination, the second complainant was given the opportunity to provide her explanation of the "love letter" raised by the defence. In so doing, she stated that: the letter was "weirdly [...] apologetic [and] [...] almost placating" (February 5, 2016: 92); she had internalized his treatment of her; she "wanted to forget about [the letter]" (93); and her post-incident correspondence and encounters "changed nothing" (93). The third complainant was also briefly re-examined; the Crown confirmed that the complainant's account was not impacted by her knowledge of other allegations, suggested that the post-incident correspondence with Ghomeshi was professional,

and asked about her relationship with the second complainant, which she described as part of a “support system” (February 8, 2016: 116).

The complainants, however, had already been revealed as manipulative and deceptive women within the defence’s narrative configurations. Once the inconsistencies and undisclosed information were configured and rendered coherent and comprehensible within a narrative of manipulation, the complainants and the Crown were severely constrained in their ability to re-configure and explain things within a different narrative. In this sense, moments of peripeteia during cross-examination constituted key instances of symbolic violence in which the defence exercised misrecognized configurational power in order to create narrative insinuations and characterizations of the complainants that could not be easily refuted or re-configured.

As aforementioned, the symbolic violence of these narrative twists also rested upon and reproduced cultural tropes of femininity, patriarchal relations of male-initiated heterosexual activity, and stock stories of sexual assault embedded in habitus that allowed agents to tacitly grasp the insinuations and causal implications of juxtaposed events. In this sense, the symbolic violence of peripeteia during the *Ghomeshi* trial can be understood as a gendering practice (Chunn & Lacombe 2000: 16; Smart 1995: 228). As the narrative twists were perceived as the objective revelation of the complainant’s intentional deception and manipulation, the doxic elements upon which these narrative constructions rested continued to exist without scrutiny. In particular, the narrative twists were conditioned by and reproduced doxic assumptions about what constitutes genuine female victimhood (e.g. complying with legal processes) and, conversely, assumptions about what constitutes suspicious and discrediting female behaviour (e.g. media interviews; expressions of anger; the appearance of infatuation). In the process, the

patriarchal relations of male initiation and female passivity underlying these doxic assumptions were misrecognized as natural.

Stock stories and dominant images of femininity do not need to be expressly stated in order to be reproduced; instead, they function through misrecognition and the practical sense of habitus that causes certain narratives to be experienced as plausible, appropriate, and credible. This is what made it possible for the legal professionals in the *Ghomeshi* case to denounce rape myths and declare that they were not at play in the trial while simultaneously configuring narratives whose meanings and insinuations relied upon unspoken stock stories of sexual assault and the perception of passivity as a natural trait of femininity and genuine victimhood. Providing agents with a tacit sense of how configured events should be interpreted, stock stories of sexual assault, cultural images of femininity, and gendered binaries contributed to the misrecognition of the relations of narrative domination during witness examination, as well as to the misrecognition of broader hetero-patriarchal relations that privilege male pursuit and sexual initiation. In the next chapter, I turn to law's doxic notions of memory and the ways in which these were also bound up in the symbolic violence of courtroom narrative practices.

Chapter Six – Narrating Memory: Law’s Doxic View of Memory and the Symbolic Violence of Remembering

Introduction

Memory has been theorized and studied across a vast array of disciplines, including philosophy, psychology, psychoanalysis, history, anthropology, sociology, literary studies, and cultural studies. Within this diverse scholarship, the term “memory” has been used to speak of neural mechanisms occurring in particular regions of the brain (e.g. Moscovitch 2012; St. Jacques 2012), the ways that societies and nations narrate their pasts (e.g. Campbell 2014; Siegel 1999), and how legal institutions and practices function as key sites of remembering and memorializing (e.g. Henry 2011; Sarat & Kearns 1999). According to Radstone and Schwarz (2010: 7), “there is no singular clear-cut phenomenon that we can designate as “memory””. Although in the first section of this chapter I explain how I understand memory to be a socially and culturally situated *practice* in which rememberers enact the dispositions of habitus and exercise varying degrees of symbolic power, I do not offer any fixed definition of how memory functions. Instead, my purpose in this chapter is to examine the doxic conceptions of memory that underpin the symbolic violence of courtroom narrative practices. In particular, I argue that the legal treatment of memory as a static evidentiary object located in the individual’s mind contributes to the legitimacy of law’s practices of examination and the misrecognition of narrative domination in the courtroom. In this sense, this chapter does not examine memory as a bio or neuro object of study, but rather examines the power relations enacted and reproduced through the ways that memory was perceived and treated during the *Ghomeshi* trial.

To begin, I outline how viewing memory as a *practice* facilitates consideration of the shifting, dynamic, and relational aspects of remembering and the ways that remembering is

bound up in narrative configuration and the reproduction of relations of domination. Next, I examine the doxic view of reliable memory that underpinned the courtroom practices during the *Ghomeshi* trial. When memory as a static object that is uncontaminated and located in the individual's mind is taken for-granted as the standard of reliable remembering, legal practices, standards, and relations of power are misrecognized as inherently legitimate methods of examining memory practices. In other words, law's doxic conceptions of memory (re)produce remembering as an evidentiary object about which law can make legitimate truth claims. In the third section, I consider the symbolic violence of *reminding* that took place during the cross-examinations in the *Ghomeshi* trial. That is, I examine how unequal relations of configurational power and legal capital in the courtroom enabled Henein to engage in practices of reminding that highlighted her position as the knowledgeable narrator and recruited the complainants to participate in their own discrediting. Finally, I turn to the conflicts that arose over how memory and forgetting should be understood and what this might mean for the complainants' credibility. In the fourth section, I discuss the complainants' attempts to explain inconsistencies through the notion of *improving memory* and how the defence framed this as an implausible explanation and used the notion of *new* and *different* memory to discredit the complainants as rememberers. In the final section, I explore the struggles that emerged in the courtroom over how forgotten information should be understood, in particular, whether forgetting was the outcome of traumatic experience or deliberate deception. The narrative domination in the courtroom and law's doxic standards of reliable memory shaped how remembering and forgetting could be legitimately defined and explained.

1. Memory, Narrative, and Symbolic Violence

Within much of the contemporary literature on memory, scholars juxtapose archival or reproductive models of memory against current reconstructive understandings of memory (e.g. Engel 1999: 6; Freeman 2010: 263; Kirmayer 1996: 176; Schechtman 1994: 12-13; Sutton 2011: 355-6). In this literature, the archival model is presented as a naïve view that conceives of memory as a storehouse from which recordings of the past can be retrieved and reproduced in the present moment; the reconstructive model is presented as a more sophisticated view that has become commonplace among scholars today and which recognizes that our memories are *reconstructions* of the past that shift and transform based on new experiences and the different contexts in which we remember. Daylen, Harvey and O'Toole (2006: 106) capture this juxtaposition between the archival and the reconstructive model when they state that “we do not store away an unchanging copy of an event or a script. Instead, we reconstruct or recreate past events when trying to recall them”.

According to Campbell (2014: 30-35), the attentiveness in contemporary memory scholarship to different influences on memory has certainly been an important contribution, but suggestions that there has been a paradigm shift are problematic⁷². In particular, she argues that many reconstructivist views of memory continue to privilege an archival model as the standard of accurate remembering, even as the unavoidability of contaminating relational and contextual influences are acknowledged (Campbell 2014: 21-22, 141). In other words, the juxtaposition of archival and reproductive models obscures the fact that both take for-granted that *accurate* remembering involves “unchanging, detailed, reproductive fidelity to past particular events”

⁷² In fact, Pope (1996: 958) points out that the juxtaposition between the former naïve view of memory as a “recording device” and a current view that recognizes malleability and fallibility is completely unfounded. She argues that “[t]he notion that psychology tended to view memory as a near-perfect recording device until the last several years finds no historical support” (1996: 958). On the contrary, psychology’s history is replete with investigations and discussions of memory failure and suggestibility.

(Campbell 2014: 35); the difference is merely that one supposedly views this kind of accurate remembering as possible and the other suggests that distortion is inevitable.

Recalling Bourdieu's (1977: 168-170) discussion of doxa as demarcated in relation to the conventional opinions (i.e. orthodoxy) and unconventional opinions (i.e. heterodoxy) comprising the "field of opinion", we can think of the archival model as orthodox and the reconstructivist model as heterodox. Although the heterodox view of memory as an imperfect reconstruction of the past challenges the orthodox view of memory as a recording of the past, both views leave unquestioned that the various factors influencing memory are ultimately *distortive*. According to Campbell (2003: 8, 194-199; 2014: 23-4, 35), conceiving of the selective, social, and reconstructive aspects of memory as exclusively distortive retains an empiricist standard of accurate memory as an individualized, uncontaminated, and pure re-experiencing of past sensory perceptions, even if that standard is recognized as unattainable. She argues that we need to move away from a fixation on memory distortion and towards a view of remembering that retains a concern with the factual accuracy of recounted events and the archival practices constituting memory (e.g. keeping a journal or photo album) while acknowledging that our (re)definitions of the past's significance in the context of present relations are aspects not just of distortion, but of *good* remembering (Campbell 2003: 17, 96, 187; 2014: 5-6, 31-32). In the apparent shift from the orthodoxy of the storehouse model to the heterodoxy of the reconstructivist model, what remains taken for-granted in *both* models is a shared assumption about what constitutes accurate memory, namely, the degree to which it is undistorted by external influences and the passage of time. As part of the unscrutinised and undiscussed realm of doxa, the image of an uncontaminated recording of the past continues to be experienced as the *standard* against which to judge memory, even if reconstructivist models view this standard as unattainable.

Following several memory scholars (e.g. Campbell 2003: 51; Henry 2011: 14; Lambek & Antze 1996: xii; Ricoeur 2004: 56), I approach the memory as a socially-situated *practice* rather than solely as a cognitive object that is located in the individual's mind and distorted through various external influences⁷³. In approaching memory as practice, I focus on how the ways we remember specific events of the past and evaluate acts of remembering are bound up with relations of domination and the ongoing reproduction of their misrecognition. This understanding of memory keeps with Bourdieu's emphasis on *relations* and *processes* rather than *things* (Bourdieu 1989: 15-16; Wacquant 1992: 15). The notion of memory *practice* also highlights that our views of the past are not static (Apfelbaum 2010: 86; Campbell 2014: 2, 32-33; Henry 2011: 27; Lambek & Antze 1996: xix); memory practices (i.e. the ways we define the past) shift and change as we enter different relations and fields and as we experience other events. As the embodied dispositions of habitus provide us with a *transposable* sense of what is appropriate, relevant, or meaningful in a given situation, each act of remembering will likely be slightly different.

Furthermore, an emphasis on memory as practice brings to the fore the ways in which remembering is inextricably intertwined with practices of narrative configuration. According to Ricoeur (1980: 178-180), configuring episodic events into a significant whole that is organized in relation to a conclusion allows actions and events to be repeated through memory. In other words, narrative configuration enables us to remember episodic events of the past. Similarly, several scholars (e.g. Bruner 1991: 4; Fivush 2012: 230-1; Freeman 2010: 274; Lambek & Antze 1996: xvii) argue that our memories rely on our ability to organize and make sense of the past

⁷³ In so doing, I do not mean to discount the role of cognitive processes or the fact that there are impressions from the past that build up as cognitive structures that shape our present remembering practices; as Bourdieu (1994: 14) argues, our collective and individual histories are inscribed in the cognitive structures and embodied dispositions of our habitus.

through narrative. Elucidating some of Derrida's work on time and memory, Santos (2001: 175) even goes so far as to say that memory "does not have any concrete existence in itself and it is always contiguous to the act of being narrated" and that "memories exist only within our narratives". If we understand narrative configuration to be vital to how we remember and recount the past to ourselves and others, then it is important to consider how the symbolic violence of courtroom narrative practices shapes the authority and legitimacy attributed to rememberers and their memory practices.

Our social success as rememberers depends on distributions of social, linguistic, narrative, and cultural capital within a specific field. As Campbell (2003: 17-18, 48-51) argues, the power relations within which we remember contribute to whether and to what extent our memories and status as rememberers are discredited or legitimated. Moreover, unequal relations of configurational power can impact what one is expected and led to remember, as I explore in a later section on the symbolic violence of reminding. Although personal memory is often perceived as deriving primarily from the personal past of a single individual (e.g. *my* memories are about *my* life and experiences), practices of remembering are constituted through cultural narratives, conventions, and language embedded in the practical sense of habitus (Conway & Jobson 2012: 58-62; Fivush 2012: 226; Gardner 2013: 115; Hirst, Cuc & Wohl 2012: 145; Lambek & Antze 1996: xvii-xx). Cultural and social contexts are not merely external factors that influence and distort the cognitive object of memory, rather it is *through* cultural narratives and knowledge that we form and recollect memories (Freeman 2010: 263-4). In other words, the objective relations, divisions, implicit rules, and value-attributions that have been internalized and embodied to form the cognitive structures of habitus provide us with a practical sense of what to remember and what it means. Our memories of a past event are also always shaped by

the events that follow, as well as by the relational conditions and doxic expectations of the present memory practice (Campbell 2014: 2; Crowe & Lee 2015: 252; Gemignani 2014: 129). There is no such thing as a purely individual memory object untainted by external influences and our ability to engage in successful practices of remembering are conditioned by relations of domination and unequal distributions of configurational power.

Not only are memory practices conditioned by field-specific relations of domination and the dispositions of habitus, but the ability to legitimately narrate the past through memory practices constitutes a key form of symbolic power, that is, “the socially recognized power to impose a certain vision of the social world” (Bourdieu 1989: 21). In other words, there is a reciprocal relation between memory practices and relations of symbolic power. In particular, when our relational position in a given field bestows us with the configurational and symbolic power necessary to engage in practices of recounting, reminiscing, reminding, and commemorating that are perceived and experienced as legitimate, this enables us to speak with varying degrees of authority about the past and its significance to the present (Campbell 2003: 51). The struggle to assert the reliability of one’s memory can thus be understood as a struggle for symbolic power. Conversely, discrediting someone’s competence as a rememberer is an instance of symbolic violence that undermines their ability to speak legitimately about their own experiences and the social world more generally. Since the ability to remember one’s own past and one’s status as a moral person are historically tied together within Anglo-European thought, Campbell (2003: 27-42) argues that discrediting someone as a rememberer can also call into question their personhood and the legitimacy of their beliefs, desires, and values. Of particular concern to Campbell (2003: 100-101) is the way that cultural debates about memory cast certain groups as suggestible and unreliable rememberers, such as women who speak about their

memories of sexual violence. In this way, doxic conceptions of memory and how it operates contribute to distinctions between reliable and unreliable memory being misrecognized as natural extensions of *who the rememberer is*, rather than as the result of symbolic violence. For this reason, the following section considers the doxic assumptions about memory that structure courtroom practices.

2. Law's Doxic Standard of Genuine Memory

Although memory practices are fundamental to legal processes, the malleability, relationality, and fluid nature of memory does not easily fit with law's doxic standards of positivism and objectivism (see Chapter Four). As Henry (2011: 14) puts it, "[l]aw [...] relies on memory for the construction of 'truth' and the delivery of justice, yet memory is at odds with law's claim to knowledge and rationality, and its method of abstraction". Concerns about memories being difficult to access and easy to confuse, distort, or misrepresent have underpinned accusations of "false memory" and been used to justify certain legal practices, such as the release of personal records (e.g. therapy notes) for women claiming to have been sexually assaulted or abused (Campbell 2003: 169; Gotell 2006: 770; Kelly 1997: 183-4; Raitt & Zeedyk 2003: 467). Given that "[i]n the adjudication of every dispute, law traffics in the slippery terrain of memory" (Sarat & Kearns 1999: 3), the legal process cannot simply exclude memory practices as extra-legal, but must bring them into the domain of legal knowledge and authority. It is in this context that legal practices uphold a particular idea of what *reliable* memory is, namely, a static object that is uncontaminated, retrievable and located in the mind of the individual.

Law's doxic view of reliable memory, which I examine more closely in the following subsections, allows memory practices to be treated as evidentiary objects about which legal processes can produce authoritative truth claims. Legal expectations and practices take for

granted that reliable memory functions as an unchanging repository for information about the past; even as it is acknowledged that memories often distort the past, fail or deteriorate, this image of what constitutes *reliable* memory functions as the doxic standard in the courtroom. Moreover, this understanding of memory and the standard against which it should be evaluated can be understood to form part of the juridical habitus, providing legal professionals with a practical sense of what renders an act of remembering (un)reliable. Law's doxic assumptions about memory allow acts of remembering in the courtroom to be subject to a forensic gaze that examines, for example, how a memory may have been contaminated and whether the factual details of each memory practice match those of previous memory practices. In this way, law's treatment of memory contributes to the ongoing misrecognition of relations of configurational domination as a legitimate part of law's impartial, autonomous, and fair search for the truth; that is, it contributes to the symbolic violence of courtroom narrative practices.

In the following sections, I provide a detailed discussion of the doxic assumptions about memory that structured the courtroom practices of the *Ghomeshi* trial. I begin by examining how memory was treated as a static, evidentiary object that should exist independent of reflective and interpretive processes. Next, I consider law's individualist view of memory and how it takes for granted that relational influences on memory are always contaminating. I then turn to the way that legal practices work to break down the past into isolable moments that exist independent of the present. I also discuss the "ground-zero theory of evidence" (Scheppelle 1998: 322) that holds that memories are reliable and relevant based on their temporal and spatial proximity to the events in question. Finally, I demonstrate how law's doxic assumptions about how memory works place conflicting demands on complainants' memory practices; for example, to show that they have a reliable and genuine memory, complainants must not *remember* or *forget* too much.

2.1. “I’m just asking you to tell us, to tell His Honour, what you recall”: Memory as Object, Not Practice

During the *Ghomeshi* trial, legal professionals treated memory as a static object located in the individual’s mind that merely needed to be accessed or retrieved. This aligns with popular conceptions of memory and some cognitive psychological scholarship that reifies processes and practices of remembering by turning them into *memory* conceptualized as a thing or object which, through brain imaging technologies, may be visibly locatable in the brain (Kirmayer 1996: 175; Lambek & Antze 1996: xi; Rubin 2012: 20). The reification of memory also assumes that trustworthy and reliable memories are those which remain static and unchanging over time (Campbell 2014: 35-6; Crowe & Lee 2015: 256; Scheppele 1998: 329-330). Even the notion of reminding, which suggests an interactive practice, can be based on a reified understanding of memory wherein reminding involves bringing to one’s awareness a memory that was there all along, albeit unacknowledged prior to the moment of reminding. Conceptualizing memory changes primarily as indicators of distortion and unreliability (Ewick & Silbey 1998: 105), legal professionals deal with memories as objects, emphasizing and examining the quality of *what* is remembered and obscuring the contextual and institutional *practices* of remembering. As legal professionals enact the practical mastery of legal objectivity embedded in juridical habitus, memories are treated like fingerprints – something left behind by the events which may be incomplete but can nonetheless be analysed objectively and compared to determine if they match.

Furthermore, this understanding of memory rests on an empiricist distinction between mental processes and their raw materials. Discussing the epistemological underpinnings of American evidence law, Scheppele (1998: 324-7) argues that reflection is assumed to improve all

mental operations (e.g. decision-making, evaluations, argumentation) *except* description; accurate descriptions of facts are supposed to exist independent of reflection. Treated as the “raw materials” that are *used in* cognitive practices, rather than an outcome of them, perceptions and memories of what was observed “are supposed to be given, not made” (Scheppelle 1998: 325). In this context, *reflecting* on one’s description of what was supposed to have been merely *perceived* can raise suspicions about the reliability of that description, as I explore further in the section on improving memory. As mentioned above, legal practices depend heavily on practices of remembering, which exist through the transposable dispositions and contextually-specific practical sense of habitus. Memory cannot be separated from the cognitive structures of habitus or the ongoing meaning-making processes that they facilitate. By treating memories as objects that are simply present (or not) and the description of memories as distinct from cognitive processes requiring reflection, legal practices reproduce the doxic standards of positivism in which legal decision-making is presumed to be legitimate when based on the rational assessment of unfiltered “raw materials”.

The legal treatment of memory practices as the description of memory objects leads to some moments of tension during both the in-chief and cross-examinations of the *Ghomeshi* trial. In the following two excerpts, for instance, the second complainant tries to work out the details of what she experienced, while the Crown lawyer wields configurational power and re-directs the complainant to focus on just describing the actual memories:

Excerpt 6.1

Q. And in respect to him pushing you against the wall, do you remember what hand he used?

A. No. I didn’t register which hand it was.

Q. And you’ve shown us the motion that –

A. Like, I'm just going on gut, and it feels like he – I feel like he – I'm just feeling this side of my face, so I can only go with muscle memories, so I feel like he hit me with his left hand.

Q. And you said you're feeling –

A. Left hand, is that right? How does that go? Sorry, I haven't ever acted this out. It would have been his left hand I guess.

Q. Okay. And *when you say you guess, is this something that you remember?*

A. I remember the right side of my face feeling like it got the most impact. (February 4a, 2016: 30, emphasis added)

Excerpt 6.2

Q. So when you say it didn't become more sexualized, was there any kind of sexual activity that continued following the incident that you've described?

A. We might have kissed on the sofa. That's not – I'm not 100 percent sure, but if we did, that's possible. I don't like giving wishy-washy answers, but I also want to cover all bases.

Q. *I'm just asking you to tell us, to tell His Honour, what you recall.*

A. Yeah. (February 4a, 2016: 37, emphasis added)

In these excerpts, the complainant's memories of the events are not available as raw materials; instead, her remembering involves feeling and acting out the events and pointing out uncertainty. In Excerpt 6.1, the complainant struggles to remember the specific details of which hand Ghomeshi used to assault her, but implies that she is still able to act out the event and *feel* where she was hit. Interrupting the Crown in order to continue her memory practice, the complainant talks herself through the experience and pieces together the hand that would have been used. The Crown responds to this memory practice by asking the complainant to clarify if this is "*something* that [she] remember[s]", thereby transforming the active process of remembering into an object that the legal process can examine as evidence.

The complainant's statement in Excerpt 6.2 also demonstrates how her particular position as a complainant-witness in a sexual assault trial may have shaped her memory practices. She indicates that she does not want to mention things she is uncertain about – "I don't like giving wishy-washy answers" – but also wants to make sure she does not leave out anything – "I also

want to cover all bases”. This suggests that the complainant may have experienced a tension between the expectation that she present the details of her memory as wholly reliable and a tacit awareness that any undisclosed information might be used by the defence to discredit her testimony. Upholding the legal reification of memory by clarifying that she is “just asking [the complainant] to tell [...] what [she] recall[s]”, the Crown misrecognizes the influence of institutional power relations on memory practices and suggests that stating *what* is remembered should be straight-forward and independent of context. Enacting the practical mastery of legal standards embedded in juridical habitus, including a tacit competency in how memory is to be treated in the juridical field, the Crown rejects the complainant’s reflective comments and emphasizes the objective contents of memory. The transformation of active remembering into an evidentiary object constitutes symbolic violence; the relations of domination that enable the Crown to control how the complainant could practice remembering were misrecognized as self-evidently legitimate.

The following excerpt from the cross-examination of the third complainant further demonstrates how law’s doxic view of memory as an object underpinned the symbolic violence of the courtroom narrative practices:

Excerpt 6.3

Q. But you would not – other than the occasional run-in at various arts events, you kept your distance, right?

A. Best of my recollection, yes.

Q. Well, sorry, you didn’t say –

A. That’s what I’m saying.

Q. Sorry, you didn’t say “to the best of my recollection” when you were speaking to the police. You told them –

A. Well, there’s a difference between speaking with the media to speaking with the police to now speaking with you. So words get jumbled. But my intention was clear.

Q. No.

A. For me it was clear.

Q. I'm sorry, you were under oath when you spoke to the police, right?

A. Yes.

Q. And you're under oath here.

A. Yes. (February 8, 2016: 83)

When asked in cross-examination about something she had already told the police, the third complainant adds a qualifier – “Best of my recollection” – that suggests she anticipates the possibility of Henein contradicting her statement. While the addition of qualifying statements may be a result of the cross-examination context (Gardner 2013: 117) and could be understood as the complainant's apprehension of Henein's questioning and an attempt to leave space in her account for contradicting evidence, Henein suggests that this statement constitutes an inconsistency with her police statement. In response, the complainant indicates that “words get jumbled” between the media interviews, police statement, and courtroom testifying. As agents enact the transposable dispositions of habitus to recount past experiences in different contexts, their memory practices shift – compared word for word, they will not line up like the ridges on a fingerprint.

Exercising configurational power and enacting the mastery of legal procedure embedded in her juridical habitus, Henein emphasizes that the complainant was under oath during both the police statement and courtroom testimony. In so doing, she suggests that questions of “intention” should play no part in testimonies under oath and that memories recounted under oath in one context should be exactly the same when recounted under oath in another context. In this sense, practices of oath-taking are bound up in law's doxic view of memory as a static object that can be analysed forensically. If oath-taking witnesses are expected to simply describe the facts that imprinted on their memory – an act that is assumed to require no reflection – then each account told under oath can be expected to be the same unless that memory is intentionally

misrepresented or disrupted by external factors. Doxic standards of legal impartiality and procedural fairness underpin what is deemed a disruptive external factor; while the very practice of questioning witnesses could be considered an important factor shaping how complainants remember, the configurational domination of witness examination is misrecognized as *part of* law's impartial processes so long as it can be established that procedural guidelines were followed and the interviewees had no reason to feel unsafe (see Chapter Four). As I discuss in the next section, legal processes treat memory as an evidentiary object whose quality can be contaminated by extra-legal influences, that is, factors other than the legitimate practices of the legal process.

2.2. *"I am alert to the danger [...] of this outside influence": Preserving Memory*

While there was certainly acknowledgement in the courtroom of how memories can be influenced by factors such as interactions with others, exposure to media content, and leading questions, these were primarily treated as potential contaminants that needed to be minimized if the memory was to be accepted as reliable. Like in the debate between the orthodoxy of the archival model and the heterodoxy of the reconstructivist model, what remained doxic in the courtroom discussions over the reliability of the complainants' remembering was that accuracy is determined by the degree to which a memory is uncontaminated. In other words, the image of an undistorted and untainted recording of the past remained the doxic standard of remembering. According to Freeman (2010: 263-269), remembering is always suffused with cultural schemas, social conventions, and the memories of others. He argues that when we speak of memory as *influenced by* these factors, we retain the notion "that it remains possible to separate [memory] out from such factors, that there remains something pure and unsullied, at least in principle" (Freeman 2010: 263). Memory is not *influenced by* situational and relational factors, but rather it

is constituted and only exists through the cognitive structures of habitus which are themselves formulated through the internalization of objective relations (Bourdieu 1989: 19; Lawler 2004: 112). Remembering cannot be separated from the embodied relations and contextual schemes of perception embedded in our habitus.

In the context of law's doxic standard of objectivity, memory is treated within the juridical field as an evidentiary object that can be *influenced* by external factors. This is evidenced in legal efforts to preserve witnesses' memory by, for example, ordering them not to view media content about the case and prohibiting the Crown from asking suggestive questions. The legal concern with preserving memory as an evidentiary object is embedded in juridical habitus, providing legal professionals with a practical sense of what constitutes a contaminating influence. By pointing to the legal fixation on how witness memory might be influenced, I am not denying that conversations, media content, and other factors can cause one to forget things that happened or remember things that did not. However, an emphasis on memory *influences* and *contaminants* overlooks how all practices of remembering are *constituted through* factors that cannot be thought of as external to memory practices, but rather as integral to them.

As they enacted their embodied sense of how memory can be contaminated by external influences, the legal professionals treated certain factors as cause for concern while misrecognizing the constituting nature of other factors. For instance, in the excerpts from the previous section (Excerpts 6.1-6.3.) the symbolic violence of courtroom narrative practices and the differences between giving a police statement and testifying in court under oath were not recognized as constitutive of the complainants' memory practices, but rather they were misrecognized as legitimate legal truth-seeking processes. Conversely, the communication between the second and third complainants was successfully configured by Ghomeshi's defence

team to suggest a contaminated and manipulated memory. Speaking about how the third complainant “discussed the details of her experience” with the second complainant prior to the police interview, the judge states in his ruling: “I am alert to the danger that some of this outside influence and information may have been imported into her own admittedly imprecise recollection of her experience with Mr. Ghomeshi” (March 24, 2016: 18). Law’s doxic understanding of memory as a static object that may be tainted allows for some practices to be seen as exerting a dangerous outside influence on memory while other practices and contexts (e.g. oath-taking, the emphasis on episodic detail, and the lawyers’ configurational power) are not only viewed as non-contaminating, but misrecognized as legitimate aspects of how law preserves and examines memory.

An individualist understanding of memory underpins legal efforts to preserve witness memory and identify potential sources of contamination. In particular, legal practice takes for granted that accurate memories are those which remain unaltered by others. For instance, in the Crown’s re-examination of the third complainant he asks her to clarify that her memory remained her own, that is, that it remained individualized:

Excerpt 6.4

Q. Ms. Henein asked you if you were following other people’s allegations about Mr. Ghomeshi and you indicated that you did to some extent. My question is did following those other allegations in any way impact on your own recollection of what happened to you?

A. Are we talking before when it happened?

Q. Yes.

A. No, not my recollection of what happened, no. (February 8, 2016: 114)

In this excerpt, the Crown attempts to demonstrate that the complainant may have been aware of certain information but that her memory was not contaminated by that information and that her recollection remained *her own*, uninfluenced by others. In legal practice, accurate witness

memories are expected to exist independent of and uncontaminated by relational, social, or cultural contexts. This privileging of individualized memory overlooks how all practices of remembering and the legitimacy attributed to them are constituted by relational, cultural, and social conditions (Campbell 2003: 8; 2014: 5-6; Lambek & Antze 1996: xiii), which are embedded in the practical sense of habitus. As Campbell (2003: 1999) argues, concerns about memory suggestibility and contamination tend to endorse “an implicit model of memory purity: namely, the idea that when others influence our memory they do so only harmfully”. Memories that are perceived to have been exposed to potentially contaminating influences are treated with increased suspicion, as evidenced in the above excerpt where the Crown attempts to assuage legal concerns about external influences by asking the complainant to assert the unaltered and individual nature of her memory.

As legal professionals enact their tacit understanding of memory as an evidentiary object that must be preserved, they treat certain extra-legal relations, contexts, and practices as contaminating while continuing to misrecognize legal processes and relations of domination as part of the *preservation* of memory. In this sense, the doxic notion that memory is an evidentiary object located in the individual’s mind works in tandem with the doxic standards of legal autonomy and objectivity discussed in Chapter Four. Moreover, legal practices privilege immediacy in remembering and treat past events as isolable, which I explore in the next section.

2.3. Breaking down the Past and Separating It from the Present

Exercising configurational power, the Crown lawyers in the *Ghomeshi* trial broke down the episodic dimension of the complainants’ accounts, examining one event at a time and therefore treating each episodic story as distinct and separable (see Chapters Three and Four). This practice enacted a doxic legal view of the past and how we remember it. According to

Crowe and Lee (2015: 258), law tends to treat the past as a sequence of isolable and particular moments that can be considered one at a time. The way we remember the past, however, is not discrete and separable in this way; our memory practices often integrate various experiences and past events and the ways that we remember certain moments are shaped by later moments (Crowe & Lee 2015: 258, 261; Lambek & Antze 1996: xix). Furthermore, remembering is not simply about telling the past as a series of isolable events, but about judging the significance and meaning of the past (Campbell 2014: 31). The doxic perception of the past as a series of discrete events that can be examined in isolation contributed to the ongoing misrecognition of the courtroom relations of narrative domination. In particular, the complainants' lack of configurational power and the practices through which the lawyers manipulated the episodic stories into their own narrative mosaics were misrecognized as legitimate processes for preserving and assessing the raw materials of memory. Law's doxic conception of the past merges in juridical habitus with the doxic element of objectivity, making it seem natural that the significance of the past should not be judged by the rememberers (i.e. the complainants), but rather that the apparently discrete moments comprising memory should be examined one at a time before being integrated into an official legal narrative and determination of the past's significance.

The symbolic violence through which their episodic stories were broken into isolable events during the *Ghomeshi* trial may have constituted a new experience of remembering for the complainants while simultaneously allowing the defence to examine the specifics of their memories for consistency over time. In the following example, the second complainant is cross-examined on the sequence of events constituting the assault that she recounted during in-chief examination:

Excerpt 6.5

Q. And today, do you agree that it is the very first time you have ever told anybody that there was a break between two slaps, and then there was a look in your face, there's silence, and then there was another slap?

A. That may be the first time I've said it.

Q. Do you agree with me it's nowhere in your police statement?

A. It is not in my police statement.

Q. All right. And it was nowhere in the story that you told to the media, I'm going to suggest to you?

A. Maybe ... maybe not in those terms.

Q. Not in those terms? You had a very clear description of it, right? You say that you recall two slaps and then a pause, and an exchange of looks but no words. You don't say anything, right? Mr. Ghomeshi doesn't say anything, but you recall the look on your face though, right? And then there's another slap, yes?

A. Yes.

Q. All right. And so *do you agree with me that's a new version of the sequencing of how things worked?*

A. *I had never spaced it out before so it sounds like a new version.* (February 4b, 2016: 23, emphasis added)

The complainant's added detail during in-chief examination could be understood as a response to the legal demand for episodic specificity; as the Crown exercised configurational power, the complainant's attempts to configure events were interrupted and she was directed to recount minute details, such as the hand Ghomeshi used and the number of slaps. In the above excerpt, the complainant's statement that she "never spaced it out before" suggests that the expectations of testifying and the symbolic violence of courtroom narrative practices constituted an experience of remembering that differed from her experiences giving media interviews and a police statement. To Henein, however, the episodic detail of the account itself constitutes a "new" and thus inconsistent version of events. Legal practices that treat past events in isolation and law's view of accurate memory as a static object allow the specifics of each episodic story to be compared to how the episode was recounted at another point in time, with each instance of non-fit calling into question the reliability and credibility of the complainant's memory. As

exemplified in Excerpt 6.5, even the act of spacing things out in a way that complies with the courtroom relations of narrative domination and the Crown's efforts to "break [...] up" (February 4a, 2016: 29) events can be isolated from its context and construed as an inconsistency and suspicious change to that which should be static – memory.

According to Crowe and Lee (2015: 256), legal practice and discourse tend to treat the past as an entity that is separate from the present and which we turn back towards in order to retrieve relevant content for the present. Similarly, Gardner (2013: 115) argues that traditional historical approaches are based on "an essential disjuncture between the present and the past, and the associated possibility of recovering the past as it was". Although the principle of *stare decisis* (i.e. following precedent and treating like cases alike) is grounded in the notion the past should shape and compel present legal practice, the past is nonetheless treated as possessing an existence independent of the present, that is, it is treated as fixed, self-evident, and discoverable (Crowe & Lee 2015: 256-7; Sarat & Kearns 1999: 5-6). In fact, *stare decisis* functions as "another way of asserting the autonomy and specificity of legal reasoning" (Bourdieu 1987b: 832) by appearing to involve the neutral application of a set of objective precedents that exist in isolation from the present. In this way, legal practice relies on the notion of the past influencing the present, but takes for granted that the past can exist as a fixed entity clearly identifiable from the potentially contaminating influences of the present. This overlooks how the past and its meanings are always constituted through the field-specific objective relations of remembering and the dispositions of habitus. That is, the past cannot be seen or retrieved in isolation from the present (Campbell 2014: 15, 139; Carpenter 2018: 458; Freeman 2010: 274).

Furthermore, legal practices tend to measure memory reliability and relevance based on spatial and temporal proximity to the events in question through what Scheppele (1998) refers to

as the “ground-zero” theory of evidence. Scheppelle’s (1998: 322) use of the term “ground zero” is a metaphor based on military models of bomb destruction in which the point where the bomb hits and detonates is ground zero and the effects of the destruction are measured outwards from that point. In law, ground zero is the point in time and space where the particular trouble at issue took place, such as the alleged hitting, choking, and punching that was the focus of the *Ghomeshi* case. Within the ground zero theory of evidence, legal relevancy and reliability of knowledge are measured outwards from the point of the trouble; the assumption is that “the best knowledge exists at the time of the event itself in the immediate recollection of the people closest to the event. Knowledge then becomes less accurate and more unreliable as one gains distance from the moment in question” (Scheppelle 1998: 327). Similarly, Freeman (2010: 271-2) argues that many theorists of autobiographical memory assume that the further one gets from the immediate sensory experience of what happened, the more distortion and falsification one’s account will have. This privileging of the immediate and skepticism towards remembering rests on an empiricist view of perception – namely, that our observation of the objective world in the immediate moment can be unmediated (as implied by the word ‘im-mediate’) or at least purer and less mediated (Freeman 2010: 271-2). It is as we look back on and recall experiences that we can no longer perceive with our senses that mediation enters in; the further we move away from “ground zero”, the more tainted our accounts are assumed to be. The ground zero theory of evidence that Scheppelle discusses can be understood as part of the juridical habitus. That is, the practical mastery required for their participation in the juridical field provides the legal professionals with a tacit sense that recollections provided closer to “ground zero” constitute more reliable evidence.

Not only does the ground zero theory of evidence rest on the presumption that it is possible for a description of immediate events or experiences to occur without reflection, but it also leaves no space for considering how distance from the immediate events might allow for clarity and contextualization that actually *improves* one's account (Freeman 2010: 272; Scheppelle 1998: 333-4). For instance, women who have experienced sexual violence may have great difficulty making sense of and narrating their experiences in the time immediately following the events and it can take time, distance, and reflection, often with the support of others, for them to look back and describe what they experienced as assault or abuse (Campbell 2003: 87-88; Scheppelle 1992: 139-140; 1998: 331-333). When perceived through the juridical habitus, however, the time between an alleged incident and the reporting of that incident, as well as any events that occur in the interim, are experienced as potentially compromising a witness's memory.

Henein enacted her practical mastery of the ground zero theory of evidence when she worked to undermine the complainants' credibility by questioning them on what they did before their police interview, such as in the following statement she made to the third complainant: "Now, I want to ask you about one of the other things that you did before you went to the police" (February 8, 2016: 57). As Busby (2014: 279) argues, there are persisting cultural assumptions that if a sexual assault is not reported to the police at the first reasonable opportunity, the account is likely to be unreliable because "women would fabricate complaints if given time to think them up". Under current sexual assault laws in Canada, delayed disclosure should not form part of the decision-maker's assessment of complainant credibility or reliability. The judge in the *Ghomeshi* case makes a statement to this effect in his ruling: "there should be no presumptive adverse inference arising when a complainant in a sexual assault case fails to come forward at the time of

the events” (March 24, 2016: 22). Despite express statements that delays in reporting should not negatively impact judgements of reliability, the doxic privileging of immediacy and the ground zero theory of evidence embedded in juridical habitus enabled Henein to call the accuracy of the complainants’ memories into question by highlighting the time they had before reporting and the things they did during that time. In this sense, law’s doxic view of memory and tacit stock stories about the appropriate way to respond to sexual assault combine to create a narrative in which the complainants’ delayed reporting and the things they did during that delay appear both suspicious and contaminating. As examined next, both the complainant’s forgetting *and* her remembering can be used to question the accuracy of her memory.

2.4. (In)Accuracy Is in the Details: The Fine Line between Too Much Forgetting and Too Much Remembering

Although the image of memory as a static object that is consistent over time, untainted by outside influences, and as close to the events in question as possible functions as law’s doxic standard for accurate memory, there is also acknowledgement of the limits of memory. Reflecting the tenor of the reconstructivist view discussed above, legal practice maintains the archival model of memory as its doxic ideal while simultaneously pointing to how distortion and forgetting always contaminate this ideal to varying degrees. That is, there is a recognition within law that events will not be remembered perfectly; some information is bound to be forgotten. When combined with the legal expectation for episodic detail (see Chapter Four), which is particularly prevalent for events close to the ground-zero point, the acknowledgement of memory failure can place complainants in the difficult position of navigating competing expectations placed on their memory practices, namely, that they must both remember *and* forget.

On the one hand, the complainants in the *Ghomeshi* trial were, unsurprisingly, cross-examined extensively on the details that they forgot or about which they were uncertain. This was especially the case when the events in question were proximate to the alleged assaults (i.e. ground zero) or seen to contradict cultural expectations about how women respond to being sexually assaulted. Since the expectation for factual detail was already discussed at length in Chapter Four and touched on again in previous sections of this chapter, I will only provide a few brief examples here: the Crown lawyers asked the complainants to recount details about hand positioning, the specific order of a quick sequence of events, the length of a choke-hold, and body positioning, among many other things; Henein argued that the third complainant's recollection of the assault was not clear because she could not remember if Ghomeshi was "using one hand or two hands" (February 8, 2016: 62); and the defence argued that the first complainant's account of the assault was incoherent because when asked how she got to the ground "she had said thrown and she had said pulled on different occasions and [...] told the police she could not remember" (February 11, 2016: 39). As they provide the episodic stories to be configured by the legal professionals into narrative mosaics, the complainants are expected to remember specific and unchanging details about both the ground-zero events and any post-incident events considered legally relevant in sexual assault cases. Uncertainty or inconsistency regarding these details can drastically undermine credibility.

On the other hand, remembering *too many* details may also raise suspicions about a complainant's memory. In his closing arguments for the Crown, Callaghan argued that the complainants' accounts were more reliable because they admitted to forgetting information and did not provide a suspicious "abundance of detail". He stated, for example, that the first complainant "admitted that her memory was flawed and that there were certain details that she

was foggy on” and that her testimony did not contain “an abundance of detail that would make the complainant’s version suspicious or questionable” (February 11, 2016: 22). Similarly, he asserted that the second complainant clearly remembered certain events but “was also [...] unclear on other details” (February 11, 2016: 26) and the third complainant’s willingness to say she did not remember some things should mean that there are “no concern[s] about an abundance of detail about this distant memory” (29). In recognizing the fallibility and limitations of memory, legal practice rests on the doxic notion that genuine memory contains lapses and missing details; a complainant who claims to remember everything and appears to recount an “abundance of detail” may be suspected of scripting, editing, or completely fabricating her memories.

In the context of law’s doxic conceptions of memory, credible complainants are those who walk the fine line between *remembering* enough details for the memory to be considered sufficient and *forgetting* enough details for the memory to be considered genuine. In this sense, there is a tension between doxic conceptions of what constitutes reliability and credibility⁷⁴. Some unreliability in one’s testimony (e.g. forgotten details) might make the account appear more credible. Too many forgotten details, however, might undermine both the reliability *and* the credibility of the account. This creates a set of competing expectations that are difficult for complainants to navigate. In addition, the notion of “convenient memory” discussed in the final section of this chapter demonstrates how the defence used the configurational power bestowed by their relational position in the courtroom to juxtapose the remembered against the forgotten in a way that further undermined the complainants’ accounts. As I discuss in the final section, the

⁷⁴ Reliability refers to “factors other than honesty that can influence the accuracy of a witness’s testimony” (Callaghan, closing arguments, *R. v. Ghomeshi* 2016: 19). Credibility refers to factors connected to the complainant’s honesty and trustworthiness.

significance of the forgotten is shaped by the symbolic violence of courtroom narrative practices, as well as by cultural expectations and stock stories embedded in habitus. Furthermore, forgotten information provides the defence with opportunities to engage in practices of reminding that rely upon and reproduce the ongoing misrecognition of domination during cross-examination, as I discuss next.

3. “Let’s see if I can assist you there”: The Symbolic Violence of Reminding

According to Bourdieu (1991: 140; 2001: 2), symbolic violence is characterized by misrecognized relations of domination. That is, symbolically violent practices and the domination they reproduce are misrecognized as natural and legitimate (see Chapter Two). Although symbolic violence is an “invisible form of violence” (Bourdieu 1977: 192), the *disadvantages* (re)produced through symbolic violence do not necessarily have to be invisible or unnoticed, but rather they must be experienced as naturally legitimate and therefore kept within the doxic realm of that which is beyond discussion. To take Bourdieu’s classic example of gift-giving (1977: 5-6), when I receive a generous gift from someone, I may experience a sense of obligation that I view as negative and potentially even disadvantageous, while nonetheless recognizing and treating the gift-giving as a legitimate and even kind action. In other words, I can misrecognize the domination while simultaneously experiencing a sense of disadvantage or obligation that is itself perceived as legitimate, even if undesired.

Reminders are typically cues or hints intended to aid in the process of remembering a past event (Daylen, Harvey & O’Toole 2006: 107; Jack & Zajac 2014: 2). As Ricoeur (2004: 38) puts it, reminding provides “clues that guard against forgetting”. Within the courtroom, however, reminding can also become a practice that enacts and reproduces misrecognized relations of domination and therefore constitutes symbolic violence. During the cross-examinations of the

Ghomeshi trial, Henein repeatedly reminded the complainants of events by showing them documents and re-reading their previous statements. These practices of reminding were instances of symbolic violence in which the euphemistic language of assisting memory reproduced Henein as the knowledgeable narrator and undermined the complainants' authority in speaking to their experiences. As argued in Chapter Three, the relations of configurational power during cross-examination positioned Henein as the narrator who configures events, creates narrative twists, and knows where the narrative is going. Conversely, the complainants' lack of configurational power positioned them as characters or audience members who become fully aware of the narrative configuration only as it was unfolded by the narrator. As she created narrative twists and configured inconsistencies, Henein often presented her configurational work as instances of refreshing or assisting the complainants' memories, simultaneously pointing to the unreliability of their memories and contributing to the ongoing misrecognition of configurational domination.

For example, in the following excerpts from the cross-examinations of the second and third complainants respectively, Henein "assist[s]" and "refresh[es]" the complainants' memories in accordance with her narrative configuration:

Excerpt 6.6

Q. All right. And you didn't just go for brunch with him; you went for a walk in the park, right?

A. Maybe, yeah.

Q. Do you remember posing for some pictures?

A. In the park?

Q. Yeah.

A. I don't remember that, no.

Q. *Let's see if I can assist you there.* I'm showing you a picture of you and you're sitting in a park, does that assist you?

A. It does.

Q. You now have a memory of walking in the park with him?

A. Yeah. I think that's Riverdale Park.

Q. With the man that had just hours ago choked you --

A. Yes.

[...]

Q. And you not only went for a walk in the park with him, you were taking pictures with him, right? Do you remember that?

A. I didn't until just now. I don't remember these photos being taken at all, but obviously they were.

Q. Okay. That's you cuddling Mr. Ghomeshi, right?

A. Yes, it is. I didn't know these photos existed. (February 4a, 2016: 72, emphasis added)

Excerpt 6.7

Q. All right. And she tells you: "That's great. Your statements will be part of a Jenga tower." Do you remember [the second complainant] telling you that?

A. Not specifically, but --

Q. Okay. *Let me see if I can refresh your memory.*

A. Mm-hmm.

Q. So the very last sentence you see there, that you write back to [the second complainant] and tell her that you have seen the lawyer and had a good talk, right, that's Ms. Hnatiw.

A. Yes.

Q. And she says to you that "your statement will be part of a Jenga tower. XO."

A. Yes. (February 8, 2016: 63, emphasis added)

In Excerpt 6.6, Henein emphasizes the complainant's interactions with Ghomeshi the weekend following the alleged assault in order to cast the events as strange and present the complainant's actions as in conflict with the claim of assault. When the complainant is uncertain about whether she went for a walk with Ghomeshi and does not remember posing for pictures with him, Henein "assist[s]" her memory through photographic evidence. As Campbell (2014: 26-7) argues, engagement with material artefacts, such as looking at old photos or re-reading letters, are crucial aspects of remembering. In response to the material artefact, the complainant in Excerpt 6.6 engages in a memory practice, trying to recall the location of the pictured event ("I think that's Riverdale Park"). For Henein, however, it is not just the walk in the park that she wants to remind the complainant of, but rather the walk in the park "[w]ith the man that had just hours ago choked [the complainant]". In this sense, this moment of reminding enlists the complainant

in the symbolic violence of Henein's narrative practice. Having been reminded of an event she did not recall and shown photos she did not remember being taken, the complainant not only agrees that she now remembers that the events occurred, but also implicitly agrees with Henein's description of the photos as "cuddling" and insinuation that the walk in the park does not make sense in a narrative of sexual assault.

In Excerpt 6.7, Henein uses a copy of the written messages between the second and third complainants to "refresh [the third complainant's] memory". When the complainant is asked whether she remembers the comment, her response ("Not specifically, but –") suggests that she had something more to say. The response, however, is treated as a straightforward "no" as Henein interrupts under the pretext of helping to refresh her memory. In so doing, Henein maintains control over the direction of the examination and demonstrates that her knowledge about the complainant's past exceeds that of the complainant herself. Through practices of reminding, Henein not only presents the complainants' memories as unreliable, thereby undermining their ability to authoritatively speak about their own experiences, but also turns the complainants' remembering into support for her narrative configurations.

As a form of symbolic violence, the practices of reminding during cross-examination involved the complainants' compliance with relations of configurational domination. Unable to deny the events and lacking the configurational power to legitimately propose an alternate interpretation, the complainants had very little choice but to agree with the underlying insinuations created through Henein's configuration of the evidence. As she reminded the complainants of information she deemed crucial to the narrative, Henein exercised configurational power and enacted her role as the knowledgeable narrator who knows and gradually reveals that which the complainants, as characters and audience members, do not

know. Furthermore, the symbolic violence of reminding in the courtroom relied on and reproduced the doxic element of legal objectivity (see Chapter Four). In particular, the defence's practices of reminding involved bringing forward photos, emails, and recorded statements that were perceived as unmediated indicators of what happened. By allowing the reminders and the objects of reminding (e.g. emails) to be experienced as the revelation of indisputable and objective facts, the doxic standard of legal objectivity contributed to the misrecognition of the relations of configurational power and domination underpinning the defence's narrative work.

Although the symbolic violence of reminding tended to be misrecognized as legitimate by the complainants and the Crown lawyers (who never object to any reminders), there were a few moments when the complainants momentarily disrupted Henein's practices of reminding. For instance, in the following excerpts the first and second complainants anticipate that Henein will use reminding to advance her narrative configuration:

Excerpt 6.8

Q. And six months later, you write to him again, do you remember –

A. Okay.

Q. – that?

A. No. I'm sure you'll refresh me. (February 2, 2016: 45)

Excerpt 6.9

Q. Okay. Does that assist in refreshing your memory as to why you sent him flowers?

A. Ummm, I'm...feel like that's coming. I don't...I feel like you're getting to a point. I don't know what your question is there. (February 5, 2016: 69-70)

Excerpt 6.10

Q. And so what you do to show your upset is you email him after you get back from [sic] Halifax to talk about meeting him at the Geminis, do you remember doing that?

A. I feel that you have an exhibit that you're going to show me.

Q. Oh right. (February 5, 2016: 37)

According to Dowling (2011: 49), narrative audiences are “always conscious of viewing events through the eyes of a narrator” and strain towards the moment “when [they] will have revealed to

them what the narrator has known from the outset”. In fact, this ever-present awareness of an impending revelation could be understood as part of the narrative dispositions embedded in habitus. Although the courtroom relations of configurational power positioned the complainants as characters who were directly implicated in the defence’s narrative and yet as unaware or at least uncertain of the narrative’s trajectory and impending twists (see Chapter Three), they did hear Henein’s narrative configuration as it unfolded, were aware that she was attempting to discredit them, and at times inferred where she was going with her narration. In the above excerpts, the complainants anticipate that these moments of reminding will involve a new detail or narrative twist being exposed, likely one that will further discredit them.

In the above excerpts, the complainants briefly challenge Henein’s euphemized language of “reminding” by demonstrating their awareness of how the reminders are implicated in the defence’s narrative configuration. Excerpt 6.8, for instance, occurs immediately after Henein has read and dissected each line of the first post-incident email that the first complainant sent to Ghomeshi. In stating that she is sure Henein will “refresh [her]”, the complainant implies the inevitability of Henein going through this next email line-by-line to draw out and emphasize its discrediting insinuations⁷⁵. In Excerpts 6.9 and 6.10, the second complainant indicates that she suspects a “point” or “exhibit” is coming, thereby pointing to both her own lack of configurational power and the fact that the defence’s reminders and inquiries about memory are euphemized exercises of narrative control. The complainants momentarily disrupt the euphemistic language surrounding the symbolic violence of reminding by suggesting that these

⁷⁵ This practice is a key demonstration of the defence lawyer’s configurational power. In her cross-examination of both the first and second complainants, Henein reveals emails and letters that she then reads through line-by-line, making key claims about what each line means in the context of her unfolding narrative and suspending the complainants’ ability to offer their interpretations. The memory practice of going through old correspondence is thus co-opted for the purpose of discrediting the complainants.

reminders are not ultimately about memory and are instead part of the defence's efforts to direct the cross-examination's narrative trajectory. The complainants' comments draw attention to the relations of narrative domination and to how practices of reminding contribute to the defence's discrediting narrative. That said, the complainants' brief noncooperation with the euphemistic language of reminding does not call into question the taken-for-granted legitimacy of the courtroom relations of configurational power; that is, even as the courtroom narrative domination is alluded to, it continues to be misrecognized as a hierarchical organization of relations of domination whose legitimacy in the juridical field is beyond scrutiny.

Although reminders are primarily used during cross-examination to deny the complainants' authority over their own experiences, the language of reminding may also provide them with opportunities to challenge insinuations of intentional manipulation. For instance, in the following excerpts the second complainant's emphasis on reminding challenges the implication that she was intentionally withholding information from the police, the Crown, and the court:

Excerpt 6.11

Q. And the one thing you leave out of telling the story to the police under oath in November, and yesterday, and before His Honour, is that you were trying to arrange to see him before you came to the Geminis. Do you remember doing that?

A. I don't. *Can you refresh me, please?*

Q. Yes.

A. Thank you. So I suggest in this email that I spent time with him and our friend (February 5, 2016: 32-3, emphasis added)

Excerpt 6.12

Q. I want to hear your answer. You have never told anyone about this letter, right?

A. I have never told anyone about this letter.

Q. And on February 4th, the day... yesterday when the police caution you, when the police give you every opportunity and you sit down with them, you don't say to them, "You know the truth is this never happened." "You know, you might want to know I

wanted to fuck him the next day,” to use your words. You might want to know that I said I love your hands”. You didn’t tell them any of that, right?

A. That’s right. I never told them that.

Q. You never told His Honour?

A. I never told His Honour.

Q. Until now?

A. *Until now when I was reminded.*

Q. Right. Thank you. (February 5, 2016: 89, emphasis added)

In these excerpts, the complainant emphasizes that she did not remember the information in question. By asking Henein to refresh her memory (Excerpt 6.11), the complainant shows that she did not remember making these arrangements and thus cannot be held responsible for not disclosing them. Similarly, in Excerpt 6.12, which is how this cross-examination ends, the complainant adds an important caveat – “when I was reminded” – to Henein’s assertion that she never disclosed the letter before this moment. In asking to be refreshed and clarifying that she spoke about the letter “when [she] was reminded”, the complainant implies that the information was not intentionally withheld, thereby challenging the defence’s insinuations of intentional manipulation. At the same time, her references to reminding involve denying the reliability of her own memory and complying with the symbolic violence of Henein’s practices of reminding and configurational power. In this sense, the language of reminding was intricately bound up with the relations of symbolic domination in the courtroom. As I explore in the next section, conflicts over how memory and remembering should be understood were also implicated in the symbolic violence of courtroom narrative practices.

4. “This issue of reviving memories”: Improving Memories or New Memories?

During the trial, claims about how memory works became important points of struggle over meaning in the courtroom. In particular, the first and second complainants⁷⁶ attempted to offset the delegitimizing implications of the inconsistencies and missing information that Henein configured during cross-examination by suggesting that memories can improve and attributing memory failures to the effects of trauma. Unsurprisingly, the defence undercut these explanations, asserting not only the unreliability of the complainants' memories, but also framing their claims about memory and forgetting as further instances of deception and manipulation. Law's doxic conceptions of memory contributed to the symbolic violence of witness testifying by allowing any differences between a complainant's multiple memory practices to be misrecognized as an inherent problem of the *rememberer*, rather than an outcome of the relations of configurational domination of the courtroom.

I begin this section by examining the notion of improving memories and how it was used to try to explain differences in how a complainant recounted events when speaking with different people at different points in time. The assertion that memories might *improve* over time did not align with the aforementioned ground-zero theory of evidence embedded as part of the practical sense of juridical habitus, bolstering the defence's ability to undercut this explanation. Furthermore, the way that memory improvement was discussed in the courtroom retained the doxic image of memory as located in the individual. Next, I consider how law's doxic view of reliable memory as a static evidentiary object, in combination with the relations of

⁷⁶ This struggle over explanations of remembering and forgetting primarily involved the first and second complainants because the defence's discrediting work during their cross-examinations focused on inconsistencies between different instances of remembering and on revealing information (e.g. pieces of correspondence) that the complainants claimed to have forgotten about. Conversely, cross-examination of the third complainant emphasized her hostile communication with the second complainant and the sexual activity she engaged in with Ghomeshi after the alleged assault, which she disclosed two days before testifying and admits she never forgot. In this sense, making claims about her improving or traumatized memory would not have provided a useful rebuttal to the main points of discrediting during cross-examination.

configurational power, enabled the defence to successfully undermine the complainants' references to improving memory. Asserting that the complainants' memories were *new* and *different*, rather than *improved*, the defence called into question their competence as rememberers.

4.1. *"The more you sit with a memory, the more clear": Explaining Inconsistencies through Reference to Improving Memories*

In an attempt to explain inconsistencies revealed in cross-examination, the first and second complainants suggested that their memories improved and gained clarity as they reflected on them and discussed them with different people. For instance, in Excerpt 6.13 the first complainant attempts to explain why in an early TV interview she did not mention that she was kissing Ghomeshi when he pulled her hair but then reported the kissing later in her police statement:

Excerpt 6.13

Q. Well, did you forget the – to describe, in your words, sensuous kissing that was going on while [...] he reaches behind your head at the time. You forgot that?

A. I didn't forget.

Q. Did you – you didn't forget it and you knew it on October 29th [during a national TV interview]. Do you agree that you lied?

A. I disagree. I did not lie. This was something that – I was focussing on the main parts. When I went to CBC, I was thinking of the main events. The rest, that comes later. *That's how I am with memories, that's how most people are. The more you sit with a memory, the more clear. If you had to remember something right off the cuff, you don't always have all the details until you sit with it.* And there was no lie.

Q. [...] you don't say, "You know, I don't know what came before, I don't know what came after. I remember him pulling my hair." What you say is something very specific, you say "we weren't being intimate," right? That is different than you are sensually kissing when he grabbed your hair. Do you agree with that proposition?

A. I disagree because I'm on national television. I have not a lot of time to think about it. Getting into all the little details and memories, first off, is embarrassing, and second, I

didn't have all of them and I don't discuss every little detail on – it was – it was a nerve-wracking experience.

Q. I'm just trying to understand [...] Let's work with how your memory works. On October 29th, is your evidence, just so we have it – is your evidence that you didn't remember sensually kissing Mr. Ghomeshi?

A. No, it isn't.

Q. All right. Then I'm sorry, I'm clearly not understanding what you mean. Is your memory you did remember kissing him?

A. *The memories are in there, I just didn't put everything out and I hadn't remembered every little detail until I sat with the story in my head, the experience.* And it's not something I wanted to remember.

Q. Did you or did you not, on October 29th, remember that he was sensually kissing you during the hair pull? That's my question.

A. Did I remember him kissing me? I did.

Q. So when you tell the media – *this isn't about memory*, it's not something you had forgotten. Do we now have your evidence on that? You remembered it on October 29th? You remembered the kissing.

A. *I remembered the kissing and I wasn't sure of the sequence.* [...] And I didn't put it all out there until I was. (February 1, 2016: 119-121, emphasis added)

Without the practical mastery of the ground-zero theory of evidence provided by juridical habitus, the complainant attempts to explain undisclosed information by suggesting that her memories improved and became clearer as she sat with them over time. This is especially evident in the complainant's statement that when you "remember something right off the cuff, you don't always have all the details"; conversely, the ground-zero theory rests on the presumption that our memories are more accurate when we "rush to description" (Scheppelle 1998: 325), instead of reflecting upon or sitting with the memory. In this sense, the complainant's comments on improving memory point to a misalignment between the conceptions of memory embedded in her habitus and law's doxic view of memory.

While the ground-zero theory of evidence holds memories that are closer to the past sensory experience to be more accurate and suggests that describing memory should require no reflection (Scheppelle 1998: 327, 333), the complainant's comment implies that the passage of

time and the opportunity for reflection can facilitate more detailed and confident remembering. As Campbell (2003: 48; 2014: 26) argues, remembering requires assessing the significance of the past for the present moment of narration. This practice of tacitly assessing significance involves enacting and transposing the practical sense of habitus through which agents remember the past and experience certain details as memorable and relevant in a given situation. At the beginning of the above excerpt, the complainant states that she was “focussing on the main parts” and “thinking of the main events”, suggesting that she experienced unclear details about the sequence of events to be less significant than presenting an overall account of the sexual assault, the details of the hair pull, and her experience of it as sudden and unexpected.

Moreover, the complainant’s remembering during the TV interview would have been shaped by cultural and discursive context. As aforementioned, the success of our memory practices depends on relations of configurational power and distributions of capital and women alleging sexual assault may be particularly vulnerable to having their authority as rememberers called into question (Campbell 2003: 51). Although the term “false memory syndrome” is not officially recognized as a psychiatric disorder, the lobbying efforts of the False Memory Syndrome Foundation, which was founded in 1992 as a lobby for parents whose adult children claimed to have recovered memories of sexual abuse, and the writings of influential scholars on false and implanted memories (e.g. Loftus 1997; Loftus & Ketcham 1994; Ofshe & Watters 1994) have greatly contributed to concerns about the unreliability and suggestibility of women’s memories in sexual assault cases (Campbell 2003: 2-7; 2014: 56; Pope 1996: 957-8; Raitt & Zeedyk 2003: 463; Sheehy 2002: 158). According to Campbell (2003: 112-118), discussions and allegations of false memory have called into question the competence of women’s memories in general and framed women sexual abuse survivors as “so suggestible as to be incapable of

commitment to truth” (2014: 67). When inculcated in habitus alongside cultural stock stories about deceptive women (see Chapter Five), notions of women’s unreliable memories may make women who report sexual assault, such as the complainant in the above excerpt, feel wary about including details that sound uncertain or that cannot be confidently placed within the sequence of events. This may be particularly the case for details that could be interpreted as complicating the question of consent, such as kissing. Considered in this context, the complainant’s initial failure to mention the kissing during the TV interview could be understood as the result of both her uncertainty regarding the order of events and her tacit sense of the social precariousness of her authority as a rememberer. Moreover, the demand for episodic specificity and the relations of configurational power during witness examination would have created a different institutional and relational context for remembering, potentially causing different details and previously uncertain elements to be experienced as both clearer and more relevant.

Asserting that the complainant always remembered Ghomeshi kissing her, Henein argues that the discussion “isn’t about memory”, but rather about a lie on national television. Although the complainant suggests that she did not want to “put it all out there” until she was more certain of the details and sequence of events, thereby pointing to how reflection was an important aspect of her remembering, Henein enacts her practical mastery of the aforementioned empiricist distinction between reflection and describing memory. In particular, she suggests that once we begin to talk about “sit[ting] with” and “think[ing] about” memories and making decisions about what to include and when, we are no longer talking about memory, that is, the “raw materials” that need only to be described. In other words, reflective and interpretive practices are perceived as self-evidently separate from the content of memory. When Henein points out that instead of including the kissing the complainant reported that she and Ghomeshi “weren’t being intimate”,

the complainant emphasizes that she was nervous, did not have “a lot of time to think about it”, and was unable to remember everything. That is, she suggests that the TV interview was a stressful, rushed, and uncertain memory practice. In this context of remembering, the complainant tried to emphasize what she was sure of, namely, that Ghomeshi had pulled her hair, that it had been unexpected, and that she had not experienced the hair pull as part of an intimate encounter. Within Henein’s cross-examination, however, questions about how the complainant’s lack of certainty, the expectations of her interlocutors, and the institutional and social context may have impacted her memory practice are rendered irrelevant. As Henein enacts the doxic view of memory embedded in juridical habitus, the question is reduced to one of whether the memory (as an object that can be described without reflection) was there or not, an emphasis that disregards the situated practice of remembering and how it may have differed from the police interview.

In addition to suggesting that memory can improve with time and reflection, the first complainant also implies that changes and uncertainty in memory practices may actually be indicative of authenticity and trustworthiness. In the following excerpt, she responds to Henein’s sarcastic comment about her lack of clarity by emphasizing that her memory practices are not scripted:

Excerpt 6.14

Q. You testified in-chief that, during the course of the kissing and hair pulling, one of the things that happens afterwards is that you’re asked, “Do you like it like that,” or “Do you like this,” right?

A. After.

Q. And you’re unequivocal that it was after?

A. Absolutely clear, it was after.

Q. As clear as you’ve been about everything else, right?

A. These are memories, and in the early days, memories, you remember certain pieces of them, and as you sit with them, you remember more of the peripheral parts, and –

Q. This is something –

A. – *I didn't script a story and memorize it to give to everybody.*

Q. All right. Are you going to answer my question now?

A. Can you repeat that, please?

Q. Sure. Are you clear that he said the words that you said to His Honour yesterday, “Do you like it like that,” or “Do you like this,” after?

A. Yes. (February 2, 2016: 9-10, emphasis added)

By stating that she remembered more as she sat with her memories and that she “didn’t script a story and memorize it to give to everybody”, the complainant enacts a sense of what constitutes credible remembering that exists in tension with law’s doxic assumptions about reliable accounts being those which are consistent across tellings (see Chapter Three). In particular, she suggests that a perfectly consistent account, which tends to operate as a marker of reliability, might be the result of a scripted, memorized, and thus artificial story. On the other hand, errors and uncertainty might indicate some memory unreliability while simultaneously suggesting that the complainant is genuinely, if imperfectly, recounting what she remembers of her experiences. In other words, the complainant’s comment suggests that the conception of trustworthy remembering embedded in her habitus allows space for changes, improvements over time, and even errors. In this sense, she attempts to assert her credibility by attributing it to a degree of unreliability in her memory practices, walking the fine line between too much forgetting and too much remembering discussed previously in this chapter.

After this comment on memory, Henein asks the complainant: “Are you going to answer my question now?”, framing the complainant as the one who took things off topic, despite the fact that it was Henein’s statement – “As clear as you’ve been about everything else, right?” – that prompted the complainant to defend her memories. In so doing, Henein exercises configurational power and presents the complainant’s comment on memory as an irrelevant tangent and an attempt to dodge the defence’s questions. Since the dispositions and practical

sense of her non-legal habitus do not provide her with the tacit mastery of legal standards and expectations that function as legal capital, the complainant's attempt to explain the inconsistencies in her memory as indications of *authenticity* is summarily dismissed through the defence's emphasis on the need to resume legitimate procedures of witness examination (i.e. "Are you going to answer my question now?").

Some of the complainants' comments during the trial seemed to suggest an implicit acknowledgement that memories can be influenced by others. For example, the first complainant mentions how her friend made a comment that influenced her memory of what happened with Ghomeshi in the car (February 1, 2016: 131-1), the second complainant indicates that recounting the events "was different with the police" than with the media (February 4b, 2016: 21), and the third complainant states that "words get jumbled" (February 8, 2016: 83) when one is speaking to the media, giving a police statement, and testifying in court. However, the notion of *improving memories* and the way this notion was used in the courtroom to try to explain inconsistencies took for-granted that legitimate memory must have a clear source solely within the *individual*. In other words, even the references to memory improvement left within the doxic realm of the undiscussed the legitimacy of law's individualized view of memory. For instance, in the first excerpt of this section (Excerpt 6.13) the complainant speaks about how she remembered more details once she "sat with the story in [her] head". Similarly, the second complainant states that she remembered the sequence of events comprising the assault more clearly after she "had time to think about it" (February 4a, 2016: 58). These comments point to an inner process of contemplation, reproducing the doxic assumption that one's personal past is remembered or forgotten via individual cognitive processes (Campbell 2003: 48-9; Lambek & Antze 1996: xiii).

This individualized understanding of memory is also evident in how the Crown sums up the notion of improving memory in his closing arguments:

She told the court that her memory became more clear and solidified as she spent more time thinking about the events in question and as she evoked the memory from the dredges of her mind. We have to recall she tried to push this memory down. Bringing back this memory was painful to her. It took time, and only upon reflection was she able to provide the details she did while testifying. (February 11, 2016: 23)

Since juridical habitus contains a conception of reliable memory as unchanging and static over time, the Crown would have sensed that the complainant's references to improving memory were likely to lead to inferences of unreliability. Accordingly, he attempts to contextualize her explanations by pointing to the suppression of painful memories. Although the Crown's comment in closing arguments allows space for improvement over time, it is a highly individualized account that locates unclear memories in "the dredges of [one's] mind". Furthermore, the references to how a complainant might push down, bring back, and evoke memories "from the dredges of her mind" treats memory as an object that is moved around and hidden by an individual's own cognitive processes. Enacting his tacit sense of law's doxic view of reliable memory and cultural concerns about the suggestibility of women's memory that have tended to discredit women's accounts of sexual violence, the Crown attempts to frame improving memories as an individual cognitive achievement untainted by the perspectives of others. This disregards the possibility that remembering might be *improved* through certain relational contexts (Campbell 2003: 96). For instance, despite the claims of the False Memory Syndrome Foundation, entering a therapeutic relationship or speaking with others who have experienced violence may help some women⁷⁷ sort through the confusion and complexity of a sexually

⁷⁷ It is important to note that therapeutic relations and discourses may also contribute to the *disqualification* of women's accounts, experiences, and narrative authority, particularly when transformed into "expert" knowledge through legal processes (Hengehold 2000: 201-2; Walklate 2016: 10). In other words, remembering in a therapeutic

violent experience and come to remember it as an assault for which they are not to blame (Almog 2007: 296; Campbell 2003: 87-8).

The individualist view of memory functioning as doxic in the juridical field also allows Henein to use the notion of improving memory to discredit the second complainant by emphasizing her *public* memory practices:

Excerpt 6.15

Q. So your memory has improved since you went to the police station November 6th, 2014, is that what your evidence is?

A. My memory has improved when I've taken the time to really consider it, yes.

Q. By November 6th, 2014, you've not only been quietly considering it, you've been public [*sic*] disseminating the story over and over again, right?

A. Yeah. It is a maelstrom though. (February 4a, 2016: 58)

In this excerpt, Henein suggests that even if memory could be improved through consideration (and she certainly does not cede this point), this would not be useful in explaining the complainant's situation because she was "public[ly] disseminating the story", rather than "quietly considering it". This comment presumes at least two things: that any consideration or improvement of memory should occur *before* its public dissemination and that telling one's account in public has the potential to contaminate memory. In this sense, memory is located within the isolated individual and the act of "considering" memory is separated from the description or dissemination of memory. Within the notion of memory improvement raised during examination-in-chief, doxic assumptions about the individualist nature of memory and remembering exist without scrutiny. Furthermore, the misalignment between the complainants'

relation may itself constitute a form of symbolic violence. It is for this reason that I have specified that *some* women may benefit from remembering in a therapeutic environment; I do not mean to suggest that this is a universal experience. Although this dissertation does not examine the power dynamics of therapeutic relations, in a later section I do consider how the notion of traumatized memory privileges unspeakability and may *encourage* co-optation.

sense of how memory works and the ground zero theory of memory embedded in juridical habitus contributed to the discrediting of the complainants' explanations. In the next section, I examine how the defence contested assertions of improving memory by framing inconsistencies and newly reported information as new memories.

4.2. *"We know memories don't get better over time": The Doxic Connection between Static Memories and Trustworthiness*

Throughout cross-examination and closing arguments, the defence worked to undermine the complainants' references to improving memory. This was perhaps most direct in the following excerpt from Robitaille's closing arguments, where the possibility of memory improving is expressly dismissed as nonsensical:

[The first complainant] gave a couple of different explanations for why it is her version is inconsistent. When inconsistencies between her police statement and her evidence at trial were put to her, you'll recall that [the first complainant] indicated that her memory – just want to get it right, Your Honour. She explained that her statement to police was taken in the "early days" of her memory and that, for her, her memory improves as she sits with it. In my respectful submission, that explanation does not assist Your Honour when a statement is taken 12 years after the events. *We know – experienced trial judges know that memories don't get better over time.* (Feb. 11, p. 40-41, emphasis added)

The symbolic power of Robitaille's statement about how memories work is bolstered not only by relations of legal capital and configurational power, which afford her the opportunity to summarize and interpret the complainant's claims of improved memory, but also by the way that it aligns with law's doxic standard of reliable memory as a static object. As aforementioned, legal practices reify memory, treating it as an evidentiary object that can be examined and compared to other evidence, rather than as a situated practice. When changes in memory are acknowledged, they are viewed as either distortive or deteriorative (Ewick & Silbey 1998: 105), as exemplified in the following quote from the judicial ruling: "The courts recognize that trials of

long past events can raise particular challenges due to the passage of time. Memories tend to fade, and time tends to erode the quality and availability of evidence” (March 24, 2016: 22). The notion that memories can *fade* and their evidentiary quality can *erode* upholds memory as a *thing* that is acted upon (e.g. distorted, described, eroded), rather than a social practice facilitated by narrative and shaped by relational context.

As the legal professionals enacted the image of memory and standard of legal objectivity embedded in juridical habitus, they treated memories as raw materials of courtroom evidence that, once described, can be subjected to forensic examination as one might with old, faded photographs. When memory is viewed in this manner (i.e. as an object that gradually fades and becomes less accessible), there is no room for considering how someone might change or even *improve* their remembering as they enter different relational contexts or fields. The defence’s claim that the notion of improving memory is nonsensical resonated with the dispositions of juridical habitus and law’s doxic understanding of memory, adding to its legitimacy and ability to undermine the complainants’ explanations.

During cross-examination and closing arguments, the defence configured inconsistencies and added information as *new memories*, thereby contesting claims of improved memory and calling into question whether the complainants’ memories truly originated in their past experiences. The discrediting force of the terms *new memories* and *new recollections* relied on aforementioned assumptions about the past existing as a fixed entity independent from the present. For instance, when Henein discredits the first complainant’s account of the assault by framing her description in-chief as a “*new memory* [that] is different from what [she] told the police” (see Excerpt 6.16 below), she takes for-granted that *genuine* memories originate solely in the events of the past and thus cannot be caused by the conditions of the present. According to

Campbell (2003: 195), scholars of memory have tended to suggest that genuine memories are the direct outcome of past experiences, making a key assumption about the source of memory, namely, that “my memories must derive *wholly* from my own past” (original emphasis). This implies that memory should derive none of its contents from the present. When this separation of past and present exists without scrutiny as a doxic element, the notion of *new memory* implies a memory with an inauthentic source, that is, one that is located in the present rather than the past.

Speaking about the first complainant’s claim that the e-mails revealed during cross-examination were her attempt to “bait” Ghomeshi into an explanation for the assault, the judge states that “it was only after she was confronted in cross-examination with the actual emails and attachment that [she] *suddenly remembered* not just attempting to contact Mr. Ghomeshi but also that it was part of a plan” (March 24, 2016: 7, emphasis added). The notion that a complainant might have new memories or suddenly remember why she did something suggests that her remembering might not fully derive from the past, rendering her memory practices suspicious and insinuating manipulation. This overlooks how remembering is always shaped by the transposable sense of habitus, distributions of capital, institutional expectations, and practices of the present; for instance, being shown the old emails might have reminded the first complainant why she sent them, but in the context of the trial this was not perceived as an improvement in memory but as a memory suspiciously derived from the present circumstances.

In the following excerpt, the complainant is being questioned on the fact that she told the police Ghomeshi had *pushed* her to the ground, but during examination-in-chief said that he had *pulled* her to the ground. Henein directly disputes the complainant’s claim to have had a clearer and more detailed memory, asserting instead that it constitutes a new or different memory:

Excerpt 6.16

Q. And you agree with me that that is not how you described it yesterday in court?

A. I had more memory.

Q. You had more memory and that *new memory* is different from what you told the police, right?

A. It's more detailed.

Q. *It's not more detailed; it's different*, right? When Mr. Callaghan was asking you how do you get to the ground, you say Mr. Ghomeshi is behind you, you don't know how he got behind you, right, and that he's pulling your hair and hitting you in the head at the same time, right?

A. Correct.

Q. All right. So you didn't tell Mr. Callaghan what you told the police, right? You didn't tell the court the version you gave to the police?

A. The version I gave to the police was early days. I hadn't spent my days thinking about every detail of something I found so painful. I didn't want to be remembered being punched in the head.

Q. You go to the police and you're asked specifically about how you end up on the ground. Can we agree [...] so we can move on, that what you told the police is different than what you told the court yesterday, are you prepared to –

A. The memory –

Q. – admit that?

A. – I had then was not as clear as it is now.

Q. *No, it's different. It's two different memories*, right?

A. That's how my memories work.

Q. All right. Your memories work, you can have one memory one day and a different one the next?

A. No, it's more clear.

Q. It's more clear, okay. But you were able to recall who performed on Play, you were able to recall your interviews, you're able to recall what blouse you're wearing, but your memories around what actually happened, those keep changing?

A. Perhaps I'm trying to block it out of my mind. (February 2, 2016: 23-24, emphasis added)

Just before the above excerpt, the complainant explained that the different words she used to describe how she got to the ground (i.e. pulled, pushed, and thrown) were all referring to the same thing: “They’re one and the same, going down with a hair pull. It wasn’t like he said, here, have a seat” (February 2, 2016: 22). For her, the significance of the incident and its relevance to the present was that she was forcefully and violently brought to the ground while Ghomeshi was

pulling her hair. Within different instances of remembering, the complainant used different words to capture this experience, but she asserts that these inconsistencies are simply a question of clarity and detail. Enacting her practical mastery of law's doxic standards of reliable memory, Henein emphasizes that the accounts constitute *two different memories*. In so doing, she not only discredits the complainant's account of the events at Ghomeshi's house, but calls into question her competence as a rememberer. Furthermore, relations of configurational power allow Henein to juxtapose the complainant's "different memories" of the assault against her recollection of seemingly less relevant details: "you were able to recall who performed on Play, you were able to recall your interviews, you're able to recall what blouse you're wearing, but your memories around what actually happened, those keep changing". In this sense, the details and consistency of certain recounted elements are configured to highlight the apparently *unfixed* and *inconstant* nature of the complainant's account of the assault.

The doxic gendered binaries and relations discussed in Chapters One and Five (i.e. women as naturally more dependent, passive, emotional, and irrational than men) can lead to increased concern and suspicion about the malleability and unreliability of women's memories, particularly their memories of sexual violence. According to Campbell, women may be discredited as rememberers through the notion that their memories have been "corrupted by their dependencies" (2003: 8), that is, changed through the influence of others. In this context, falling short of law's doxic standard of reliable memory as static and unchanging may be particularly discrediting for women testifying to sexual assault. Asserting that the complainant's memory is "not more detailed; it's different", Henein suggests that the complainant is unconcerned with the truth or factual accuracy of her memory practices. Prior to the above exchange, Henein asks the first complainant the following question: "And your truth, would you agree with me [...] keeps

changing?” (February 2, 2016: 17). Cultural representations of therapeutic practices and support groups for survivors of sexual violence often present such contexts as unconcerned with the truth (Campbell 2003: 88-91). For instance, in a *Toronto Star* article the day after the *Ghomeshi* verdict, Margaret Wenthe describes protesters and those who declared they believed the women as “a quite shrill and defiant constituency that isn’t particularly interested in facts or evidence or burden of proof” (March 25, 2016). The discrediting force of Henein’s claims that the first complainant’s truth “keeps changing” and that she “can have one memory one day and a different one the next” rests on the misrecognition of women as naturally prone to emotional irrationality and the associated doxic assumption that women claiming sexual assault and their feminist supporters are often unconcerned with the facts or the truth of events. Instead of inconsistencies in the complainant’s accounts being the result of varying levels of clarity and detail within different contexts of remembering, Henein presents inconsistencies as evidence that *her* truth is changing and shifting and thus cannot be *the* truth.

In both the defence’s closing arguments and the judicial ruling, the existence of different memories within the complainants’ accounts were characterized as a “carelessness with the truth”. In the next excerpt, for instance, the judge suggests that the differences in how the second complainant described the kissing, choking, and slapping sequence constituted a “troubling [...] shifting of facts”:

[64] An inability to recall the sequence of such a traumatic event from over a decade ago is not very surprising and in most instances, it would be of little concern. However, what is troubling about this evidence is not the lack of clarity but, rather, the shifting of facts from one telling of the incident to the next. Each differing version of the events was put forward by this witness as a sincere and accurate recollection.

[65] When a witness is comfortable with giving differing versions of the same event, it suggests a degree of carelessness with the truth that diminishes the general reliability of the witness. (March 24, 2016: 11)

Within law's doxic conception of truthful memories as unchanging and untainted objects, a complainant who provides different details or sequences of events is presumed to be careless with the truth. Sincere and reliable remembering are equated with providing an unchanging set of facts. Although the differences in the complainant's account could be understood as varying levels of clarity and detail shaped by the specific relational context and symbolic violence of different memory practices, they are instead presented as different memories, that is, as two contradictory evidentiary objects. Furthermore, individualist conceptions of memory allow this dissonance to be attributed solely to the complainant and her unreliability or dishonesty, discrediting her as a rememberer.

In this way, the doxic standards of reliable memory embedded in juridical habitus contributed to the misrecognition of changes and discrepancies as self-evident indicators of the rememberer's unreliability. As the distinction between reliable and unreliable memory was misrecognized as the outcome of the *rememberer*, the symbolic violence of the courtroom narrative practices through which the past was remembered and configured during the *Ghomeshi* trial existed without scrutiny. The unequal relations of configurational power in the courtroom and the defence lawyers' practical mastery of doxic legal standards enabled them not only to configure the complainants' episodic stories, but to present configured inconsistencies as indicative of the complainants' untrustworthiness and "carelessness with the truth". As discussed in the next section, relations of narrative domination and law's doxic conceptions of memory also shaped how forgetting could be legitimately perceived and explained in the courtroom.

5. Accounting for the Forgotten: Traumatized Memory or Convenient Memory?

The ability to explain the significance of *forgotten* information can be an important practice of symbolic power in the courtroom, as is demonstrated in this section. During the

Ghomeshi trial, there was conflict over whether the information and events the complainants claimed to have forgotten could be attributed to the impacts of trauma or whether they were the outcome of deliberate deception. In the first subsection, I examine how the first and second complainants suggested that the trauma of their experiences and the nervousness they felt when recounting what happened caused them to forget or be uncertain about some details. Although the notion of traumatized memory may help us attend to the difficulties of narrating certain experiences, I problematize the way that an emphasis on trauma may also privilege unspeakability and unnarratability as signifiers of victimization. Next, I explore the way that the defence lawyers configured the complainants' forgetting as "convenient" and implausible. Exercising configurational power, the defence lawyers suggested that the first and second complainants were intentionally misrepresenting their memories and presented claims of forgetting as further instances of manipulation and deception. In this sense, practices of defining the forgotten were bound up in the symbolic violence of the courtroom, specifically the lawyers' ability to configure and attribute meaning to events in a way that was misrecognized as a natural extension of their legitimate role in the trial.

5.1. "Maybe I didn't want to remember": Explaining Forgotten Elements as the Result of Trauma and Nervousness

When challenged in cross-examination with undisclosed information and inconsistencies, the first and second complainants at times suggested that the traumatizing nature of their experiences caused them to forget certain details. In the following excerpts, for instance, the first complainant attempts to explain that the painfulness of her experience and the nervousness she felt recounting it caused her to miss information when giving her statement to the police:

Excerpt 6.17

Q. All right. And do you remember that you tell the police at page 15, if you want to take a look, please, about a third of the way down, again, when you're trying to describe how you end up on the floor, what you tell the police is "I don't know how I got there"? [...] You did tell that to the police?

A. I did. I did.

Q. All right.

A. I'm looking at it.

Q. And –

A. I'm not finished.

Q. I'm sorry. Go ahead.

A. I'm not finished. When I was describing this, like I said, I'm describing being pulled down. I was nervous. *I was being punched in the head violently, and confused, so that's where I'm saying I don't know how I got there.* It's my early nervous statement and I'm still telling you my – my story to the Crown yesterday was to the best of my ability, my recollection.

Q. Do you accept that what you tell the police is what's written there?

A. I accept that's what's written there. (February 2, 2016: 19-20, emphasis added)

Excerpt 6.18

Q. All right. So you didn't tell Mr. Callaghan what you told the police, right? You didn't tell the court the version you gave to the police?

A. The version I gave to the police was early days. *I hadn't spent my days thinking about every detail of something I found so painful. I didn't want to be remembered being punched in the head.*

[...]

Q. It's more clear, okay. But you were able to recall who performed on Play, you were able to recall your interviews, you're able to recall what blouse you're wearing, but your memories around what actually happened, those keep changing?

A. *Perhaps I'm trying to block it out of my mind.* (February 2, 2016: 24, emphasis added)

Excerpt 6.19

Q. You didn't tell the police about that [Ghomeshi getting her coat before she left]?

A. I told you my police statement, *I was nervous. I had to start remembering things that I didn't really want to remember this.* (February 2, 2016: 28, emphasis added)

In Excerpt 6.17, the complainant assertively makes space for her explanation by stating that she had not finished looking at or speaking about what she told the police⁷⁸. She states that her initial

⁷⁸ Though it is important to note that Henein's configurational power and practical mastery of the standard of legal objectivity discussed in Chapter Four allows her to emphasize "what's written there" in a way that dismisses the complainant's explanation as irrelevant to the facts at hand.

lack of clarity about how she got to the ground was due to the violence and confusion of the experience and the fact that she was nervous. In Excerpt 6.18 (a lengthier portion of which was discussed previously as Excerpt 6.16), the complainant suggests that the differences in her account of the assault were not only the result of an improving memory, but also caused by her attempts to avoid thinking about a painful experience and perhaps even to “block it out of [her] mind”. Excerpt 6.19 echoes these explanations; the complainant attributes missing information in her police statement to nervousness and the difficulty of remembering events that she “didn’t really want to remember”.

In speaking during closing arguments about the inconsistencies in the first complainant’s account, the Crown also mobilizes the image of painful and thus blocked memories. In particular, he states that the complainant was “candid in saying that she tried to forget about this incident and bury the memory” (February 11, 2016: 22) and he urges that “We have to recall she tried to push this memory down. Bringing back this memory was painful to her. It took time, and only upon reflection was she able to provide the details she did while testifying” (23). In this way, both the Crown and the complainants explain forgetting and lack of clarity primarily as individualized memory failures caused by the repression of painful experiences (see Campbell 2003: 58; Hacking 1996: 68; Scheppele 1998: 332).

The second complainant similarly attempts to explain that she did not disclose some of the correspondence revealed during cross-examination because she forgot about it. In the following excerpt, Henein has just read out an email that the complainant sent to Ghomeshi after the alleged assault; in the email, the complainant indicates it was nice to see him at the Gemini Awards and asks him for career advice. Explaining that she “had forgotten about this ‘cause

[she] ha[dn't] seen this piece of correspondence in such a long time" (February 5, 2016: 40), the complainant points to the confusion and repression that can characterize traumatized memories:

Excerpt 6.20

Q. But the one thing you don't tell anybody is that you write to him, right? The guy you say just reminded you of sexual assaulting you?

A. Yeah, it was weird.

Q. Well, not only was it weird, it doesn't make sense right?

A. It doesn't make sense *unless you're trying to glaze over something and really pretend it never happened, and squash it down and try to move on.*

Q. Now we're not normalizing your interaction with him. This is not you trying to make sure he knows he's a good host. Now you're trying to squash it down and move on?

A. I'm talking about the more recent event. And also, *when dealing with trauma it's not a straight line and then it's done and it's cool. It's a cyclical thing, which there are triggers and reminders and ...*

Q. No, but you said it was. You said it was. You told the police you didn't really have any dealings with him afterwards, except professionally. (February 5, 2016: 39, emphasis added)

When confronted with an email that she did not disclose and that, according to Henein, "doesn't make sense" in a narrative of victimization, the complainant explains that "when dealing with trauma" memories might be "squash[ed] [...] down" and remembering may be a "cyclical thing" full of various "triggers and reminders". This framing attributes both the perceived strangeness of the email and her failure to mention it to the complexity of dealing with traumatized memories. The second complainant provides a similar explanation when given the opportunity in re-examination to speak about the "love letter" (as Henein refers to it) that was revealed in cross-examination: "I don't know what I was thinking but ... this letter exists. I totally forgot about it. I guess I wanted to forget about it or whatever" (February 5, 2016: 93). The complainant suggests

that the desire to avoid thinking about the events surrounding a traumatic experience may have encouraged her to forget about the letter she sent to Ghomeshi⁷⁹.

In pointing to the lack of clarity and possible repression of particular details surrounding painful experiences, the complainants and the Crown echo some of the scholarship on traumatic memory which argues that remembering and narrating traumatic experiences tends to involve fragmentation, contradiction, disorganization, and missing information (Almog 2007: 299; Henry 2011: 79; Scheppele 1992: 139; Segovia, Strange & Takarangi 2017: 95-6). In fact, some scholars suggest that traumatic events cannot be understood or processed at the time of their occurrence and thus cannot be fully described or witnessed (Henry 2011: 107; Santos 2001: 182). In her critique of the ground-zero theory of legal evidence, Scheppele (1998: 331-332) argues that people who have experienced trauma will be unable to meet legal expectations for witnesses to provide orderly, factual narratives of events.

While discussions about the difficulty of narrating traumatic experiences importantly point to the unsuitability of demanding complete consistency and coherence from narratives of victimization, they also have an underlying doxic logic that equates traumatization with unspeakability and unnarratability. For instance, Scheppele (1998: 332) argues that:

The narratives of people who have been traumatized will be exactly the opposite of what the law requires: these will not be orderly narratives stating “just the facts” of a traumatic event as if recorded by a videocamera. Instead, it will be *a sign of the trauma itself* that such narratives will be inadequate and even inaccurate. (emphasis added)

⁷⁹ Discussing the hundreds of love letters and notes that Karla Homolka wrote to Paul Bernardo despite his abusive behaviour, Kilty and Frigon (2016: 56) suggest that these letters demonstrated Homolka’s adherence to cultural expectations of passive femininity. Women’s responses to experiences of violence can be complex as they navigate not only the violence itself, but also the array of expectations embedded in the practical sense of habitus regarding how women should behave in heterosexual relationships and in instances of trauma and victimization.

Similarly, Azoulay (2007: 50) argues that rape captures all aspects of the term trauma because of its violence, sexual content, violation of the body, and the fact that it “induces shock and *some degree of muteness*” (emphasis added). By perceiving muteness or inadequate narration as a natural outcome of genuine trauma, discussions of traumatized memory may unintentionally present trauma survivors as lacking voice – or, at least, lacking a coherent and articulate voice. Analyzing scholarship on Holocaust witness testimony, Hirsch and Spitzer (2010: 398) argue that muteness, the breakdown of speech, and silence have come to signify “the ‘true’ and ‘complete’ witness”. This image of genuine witnessing risks dismissing the knowledge that witnesses can share through their narratives and may encourage the appropriation of witness testimony by those who claim to *speak for* those who cannot speak for themselves (Hirsch & Spitzer 2010: 391, 402-3).

In the context of a sexual assault trial, the doxic conflation of trauma and unnarratability aligns with the misrecognition of passive femininity as indicative of genuine female victimhood (see Chapter Four). When gendered tropes of female vulnerability and conceptions of traumatized memory are embedded in habitus, they provide agents with a tacit sense that a woman’s claims of victimization and traumatization are more trustworthy if her memories are fragmented and she needs someone to speak for her. In this way, the notion of traumatized memory as unnarratable relies upon and contributes to the reproduction of doxic images of passive femininity that present women primarily as “helpless and overwhelmed” (Campbell 2003: 81; see also Bonnycastle 2000: 76; Bumiller 2008: 91-2; Larcombe 2005: 3). The emphasis on unspeakability, as well as the tendency towards applying trauma as an explanatory device for diverse memory activities, prompt Radstone and Schwarz (2010: 8) to urge scholars to use the notion of trauma “critically, self-reflectively, and with an element of caution”.

In critiquing discussions of traumatized memory, I do not mean to suggest that we ignore the various factors that may make it difficult to remember and narrate experiences of trauma. Instead, my purpose is to point out how these discussions rest on doxic assumptions about the unnarratability of trauma that perceive forgetting as the failure of individualized memory and misrecognize the practices of symbolic violence through which forgotten information is configured. When combined with the conflation between victimization and traumatization that Walklate (2016: 10-12) identifies as characteristic of contemporary uses of the term trauma, these assumptions may create a difficult double bind for those who attempt to narrate experiences of victimization. In particular, the complainant in a sexual assault trial is faced with competing narrative expectations: on the one hand, the legal context demands consistent, clear, and coherent episodic stories that speak with detail about the events at ground zero; on the other hand, genuine experiences of victimization are expected to be traumatizing and thus difficult to narrate and even unspeakable. In this sense, *incoherent* narration of episodic stories may imply the unreliability of a complainant's memory and *coherent* narration may call into question the genuineness of her traumatization and, by extension, her victimization. By speaking about "block[ing]" painful memories and the confusion of "dealing with trauma", the complainants and the Crown in the *Ghomeshi* trial enact their tacit sense of unnarratability and lack of voice as the ultimate signifiers of a genuinely traumatized memory. They attribute forgetting to the traumatic nature of the experiences and the difficulty of remembering trauma and, in so doing, misrecognize the relations of narrative domination that impacted the complainants' memory practices.

The double bind created by doxic assumptions about the unnarratability of traumatized memory, combined with Henein's aforementioned upheaval of the complainants' claims to

passive vulnerability⁸⁰, allow Ghomeshi's defence to powerfully present the complainants' suggestions of trauma and traumatized memory as insincere attempts to hide their deception and manipulation. This is especially evident in Henein's closing arguments:

The theory which [the second complainant] found great comfort in in explaining her conduct simply does not hold water here. The way that people who are traumatized in long term relationships has nothing to do with her and her dishonesty under oath. [...] People respond to life experiences in a number of different ways, but lying repeatedly to the police, to the prosecutors, and under oath in this court is simply not one of them. There is not an expert that will come and testify that perjury is indicative of trauma. [...] What the witness cannot do, in my respectful submission, is lie and conceal their conduct and then, when caught out, say "Oh, gee. That's just how victims of abuse behave". (February 11, 2016: 79-80)

Configured within Henein's narratives of manipulation, the complainants are characterized not as passive victims struggling to narrate traumatic events, but rather as narratively powerful women who, among other things, actively pursued Ghomeshi, acquired legal representation, and recounted their experiences to the media. Given the doxic association between *traumatized* memory and *unnarratable* memory, the complainants' narrative capital outside the courtroom, that is, their ability to publicly narrate their experiences to a large audience, called into question whether they were truly traumatized, allowing Henein to dismiss the complainant's "theory" that traumatization impacted her police statements and court testimony. Instead of being attributed to the individual failures of traumatized memory, undisclosed information is configured by the defence as "dishonesty under oath" and "perjury". In this context, any insinuations of traumatized memory are framed as further instances of deception and manipulation, that is, as attempts to explain away perjury once "caught out". Exercising misrecognized configurational

⁸⁰ As demonstrated in the previous chapter, the doxic conflation of sexual victimization with passive female vulnerability not only reproduces images of women as helpless and dependent, but also provide opportunities for women's claims to sexual victimization to be undermined by pointing to factors that seem to suggest a *lack* of passivity.

power, Henein uses the complainants' explanations of forgetting to bolster her narratives of manipulation, as further explored in the next section.

5.2. "Is it possible you have a convenient memory?": Forgetting as Deception and Manipulation

Memory practices always involve forgetting (Lambek & Antze 1996: xxix, xxviii; Radstone & Schwarz 2010: 4). That is, as we remember and recount experiences, there are always going to be things that were experienced but not recalled. However, the *significance* attributed to that which is not recalled and whether it is even defined as an instance of forgetting are shaped by institutional, cultural, and social contexts (Campbell 2003: 57-8), as well as the dispositions of habitus that give us a practical sense of what unrecalled information means within a given context. According to Campbell (2003: 54-58), the social and institutional positioning of narrators, the cultural frames through which their accounts are interpreted, and the expectations placed on their testimonies contribute to whether certain pieces of unrecalled information are understood as significant forgetting.

Furthermore, the ability to define the significance of the forgotten functions as a key form of symbolic power that enables interlocutors to undermine the authority of memory claims (Campbell 2003: 58). By emphasizing unrecalled information and suggesting that it should have been remembered, interlocutors can assert what they expect of memory practices and challenge the speaker's legitimacy and competence as a rememberer. In the courtroom, defining what counts as significant forgetting and how it should be understood can constitute key moments of symbolic violence in which the lawyers exercise misrecognized configurational power. In addition, agents may *struggle* over the meaning of unrecalled information (e.g. whether it is a reasonably forgotten detail or an inexplicable instance of forgetting), though they do so within relations of unequal legal and narrative capital. The complainants' lack of configurational power

during the *Ghomeshi* trial and the defence's narration of them as manipulative women shaped how their claims of forgetting were interpreted as well as their ability to successfully explain unrecalled information.

To discredit the first and second complainants, Ghomeshi's defence team suggests that their claims to have forgotten certain information (e.g. the content of their post-incident emails to Ghomeshi) are implausible, particularly when juxtaposed against what they do claim to remember. This is exemplified in the following two excerpts, where Henein accuses the second complainant of having a "convenient memory":

Excerpt 6.21

Q. And you tell [the police detective] about the barbecue, right?

A. Yeah.

Q. But you don't tell him about the cuddling in the park, right?

A. I totally forgot about it.

Q. But you remembered saganaki, you remembered what you had for dinner?

A. I did. I totally –

Q. And you remembered that you were sitting at the brunch and he said to you at some point – you say Mr. Ghomeshi said, "Hey, you're a racist," and that bothered you?

A. Yes.

Q. But you don't remember cuddling with the guy you say choked and slapped you?

A. Memory is an interesting thing. I don't remember these photographs being taken. I don't remember – I know that we had gone for a walk, but I don't remember these photographs, and I don't remember cuddling with him in the park. That stuff is – I guess because it clearly didn't leave an impression on me.

Q. *Is it possible [...] that you will not remember it unless I show you and I can prove it? Is it possible you have a convenient memory?*

A. No, I don't have a convenient memory. (February 4a, 2016: 75-6, emphasis added)

Excerpt 6.22

Q. And you didn't tell the police about the snuggling in the park the next day, right?

A. No, 'cause that's because it had completely slipped my mind.

Q. Slipped your mind that you were snuggling with the man you say slapped and choked you?

A. Yeah, I was surprised when you presented the photographs because I forgot that they had been taken. I had no memory of that.

Q. Well, but you had a memory going to the art show and you told the police you had a memory of going to the barbecue. You explained to His Honour that you were just trying to be polite, right? Yes?

A. Yes.

Q. You had a memory of the Saganaki cheese, right?

A. And yet I forgot about the park. The memory is a funny thing. I'm surprised that I forgot that.

Q. Surprised you forgot that you were cuddling with him the next day, in the grass?

A. Yeah, I'm surprised. I don't remember. It didn't make an impression on me.

Q. That you were cuddling with him, that didn't make an impression on you but the cheese did? Is that your explanation for why you didn't tell the police that before you walked in or His Honour that under oath, until you were confronted with the photo?

A. Absolutely. I have no memory of that.

Q. You have no memory of cuddling with him at the barbecue then, that picture?

A. I don't remember the photograph being taken and that's ... I'm telling you that.

Q. *Is it possible [...] that you just seem to forget the stuff that shows that you've been lying?*

A. Oh, no, I'm not lying about anything. I'm ... more imprinted on me is the things which were impactful [sic] like him choking me or things that I found strange or that that made me feel awkward, so I guess our walk in the park didn't make me feel really anything.

(February 5, 2016: 20-21, emphasis added)

In these excerpts, the second complainant is accused of conveniently “forget[ting] the stuff that shows [she’s] been lying” and only remembering certain things when the defence shows her and “can prove it”. By alleging that what the complainant claims to have forgotten and remembered is much too “convenient”, Henein configures the complainant’s forgetting as instances of intentional deception and manipulation. This rests on tacit assumptions embedded in both the shared socio-political and cultural habitus as well as the legal habitus about what is and is not relevant to a memory and account of sexual assault. That is, in order for it to be unbelievable that the complainant remembered the barbecue and the Saganaki cheese but forgot “cuddling in the park”, the relevance of post-incident intimacy must be perceived as self-evident. As Scheppele (1998: 330) argues, the relevance of evidence depends on whether it “appears to change the probability that some alleged fact is more or less true”. In the context of doxic cultural stock

stories that frame women's post-assault conduct as important indicators of whether the alleged assault actually occurred (see e.g. Anderson 2010: 650, 655; Johnson 2012: 625; Temkin & Krahé 2008: 32), Henein is able to suggest that the relevance of the post-incident "cuddling in the park" is so obvious that it could not have been genuinely forgotten. This is particularly evident in Henein's assertion that the complainant "seem[s] to forget the stuff that shows that [she's] been lying". The discrediting force of this accusation requires the complainant's "cuddling" with her assailant the day following an assault to be tacitly perceived as something that renders suspicious her claims to have been assaulted.

The notion of "convenient memory" is underpinned by an assumption that what we remember and what we forget should not appear to benefit the legitimacy of our account in the present. As aforementioned, legal practice takes for granted that accurate memories are objects located in the individual's mind that are described with little to no reflection, selection, or mediation. This doxic view of memory suggests that genuine memories about our experiences are somewhat beyond our control; that is, memories are supposed to simply be there or not and thus should not align with what might appear advantageous for the rememberer in the present. While memories might fade, it is presumed that the significant details will remain. The details that are defined as significant, however, are shaped by the narrative practices and symbolic violence of the courtroom. In particular, it is not the rememberer (i.e. the complainant) who defines the significance of recalled and unrecalled information, but the lawyers. The relations of configurational power that enable the defence to configure unrecalled information are misrecognized as part of the legitimate legal process of examining and challenging witness memories. By defining what *should be remembered* because of its presumably obvious significance, the defence suggests that the complainant is intentionally misrepresenting her

memories and falsely claiming to have forgotten important information that it would have been impossible to forget, especially given the apparently insignificant details the complainant did remember. Through the notion of “convenient memory”, Henein configures the second complainant’s forgetting as disingenuous and a further instance of a manipulative woman feigning vulnerability.

Although she does not use the term “convenient memory”, the discrediting insinuations of this notion are also evidenced in Henein’s cross-examination of the first complainant. For instance, before discussing the complainant’s confusion about whether or not she was wearing hair extensions during the hair pull, Henein provides a lengthy summarization of all the details the first complainant *did* remember about the night Ghomeshi assaulted her (e.g. who they were with, the conversation they were having, what she drank, and so on). Exercising configurational power, Henein asserts that the complainant’s “recollection of that night [...] is pretty good” (February 1, 2016: 104), emphasizes that she is “able to recall [...] all sorts of details” (108), and *then* highlights the complainant’s uncertainty about the hair extensions, rendering the uncertainty particularly suspicious. Similarly, in closing arguments, Robitaille summarizes the inconsistencies in the first complainant’s account and then states the following: “while Your Honour considers these inconsistencies, it is appropriate, in my respectful submission, to take a look at what the witness is able to recall in this time period” (February 11, 2016: 40). Reviewing the details that the first complainant *did* recount, Robitaille argues that “[t]his is a witness who has very detailed memories about the events of the time period but simply cannot come up with a coherent account of what happened in that house”. In this way, the relations of configurational power in the courtroom enable the defence lawyers to juxtapose what was *remembered* and what was *forgotten* in a way that discredits the complainant.

In the following two excerpts, the first complainant is questioned on the fact that during in-chief examination she recounted drafting an email in anger to Ghomeshi after the assault, but claimed not to remember having sent two “friendly” emails to Ghomeshi:

Excerpt 6.23

Q. The person that you say under oath, not just to the police when you’re emotional, but to the court when Mr. Callaghan asked you under oath that you hadn’t communicated with him –

A. Tr –

Q. – that’s not true, right? That’s a lie?

A. It was not a lie. At the time I did not recall.

Q. It was a lie?

A. It was not a lie. At the time, I did not recall.

Q. *You recalled the angry e-mail. How could you forget the friendly one?*

A. I – it took me – you haven’t let me explain. (February 2, 2016: 40-41, emphasis added)

Excerpt 6.24

Q. You never said to them, you know what, I tried to bait him, to use your words, to communicate with me?

A. I remembered that later.

Q. When was that?

A. Not long ago.

Q. You remembered it?

A. I remem – I didn’t – I didn’t remember everything. I remembered drafting e-mails I didn’t even think I sent. [...] I remember doing an[*sic*] with the picture, and I said I was angry.

Q. [...] that is not an angry photo. It’s an –

A. I didn’t want to –

Q. – attractive photo, –

A. – send –

Q. – right? It’s a photo showing your entire body in a string bikini, right?

A. I wanted him to call me.

Q. Yes, you did want him to call you, but you didn’t tell the police about that –

A. I didn’t remember –

Q. – and you didn’t tell the Crown.

A. – that.

Q. You just said a few moments ago you did remember?

A. No, I did not remember when I did my statement. I did not remember until pretty recently that I remembered putting together an e-mail, *but I remember reading these* and I knew the motivation behind my picture, all of this was to get Mr. Ghomeshi to phone me so I could ask him why he punched me in the head. I had no interest in him. I was in another relationship. (February 2, 2016: 50-1, emphasis added)

During in-chief examination, the first complainant stated that she had “a vague recollection of composing an email when [she] was angry, but [she] [doesn’t] remember if [she] even sent it” (February 1, 2016: 67). Implying that the complainant conveniently remembers only what appears to support her allegations, Henein suggests it is implausible that the complainant “recalled the angry e-mail [and] [...] forgot the friendly one”. However, when we consider the complainant’s explanation that she sent the emails to “bait” Ghomeshi into calling her so she could demand an explanation for the assault, it is possible that the “angry e-mail” and the “friendly one” are actually the same thing. In other words, the complainant could have remembered that she felt angry while drafting the emails (as she indicates during in-chief examination), but forgotten their content, which is not unrealistic given the ten-year lapse since the alleged assault. Being shown the emails in cross-examination may have reminded her about the purpose behind them, namely, that she sent “friendly” emails when she was angry in an attempt to elicit an explanation. Within the defence’s narrative configuration, however, the angry and friendly emails are assumed to exist in contradiction to one another, pointing to an implausible and suspicious combination of forgetting and remembering.

Moreover, the defence further discredits the complainant by suggesting that she knew about the “friendly” emails all along. At the end of the second excerpt, the complainant states that it was only recently that she “remembered putting together an e-mail, but she remember[s] reading these and [...] knew the motivation behind [her] picture”. Although this could mean that *as the complainant read the emails in cross-examination*, she remembered writing them and why

she did so (i.e. “I remember [*as I am*] reading these”), these statements are configured very differently by the defence in closing arguments: “this witness’s evidence that “I remember reading these” [...] is evidence that this witness knew about these e-mails before she hit the witness box. They didn’t go into some deep recess of her mind. She knew about them” (February 11, 2016: 44-45). By arguing that the complainant remembered the emails *before* cross-examination, rather than being reminded of them *during* cross-examination, the defence suggests that the complainant claimed forgetting in order to mask her intentional withholding of information. This discrediting requires the relations of narrative domination within which the complainant was shown these decade-old emails to be misrecognized as the legitimate legal examination of memory objects. Without legal capital or configurational power, the complainant could not legitimately rework and refine her memory practices as she read the emails, leaving her little opportunity to explain what reading the email again may have meant in terms of her remembering. In the defence’s closing arguments, however, the complainant’s comment that she “remember[s] reading these” is presented as evidence of her intentional deception. In this way, the defence lawyers exercised configurational power as they attributed significance and meaning to undisclosed information.

Accepting the defence’s juxtaposition of the “angry” and “friendly” emails and the insinuation that the obvious relevance of the “friendly” email makes it implausible that the complainant forgot it, the judge states in his ruling that “[t]his is not an email that [she] could have simply forgotten about” (March 24, 2016: 7). Not only does this overlook the possibility of the “angry” and “friendly” emails being one and the same, but it also dismisses aforementioned insinuations of traumatized and thus repressed memory; the memories “didn’t go into some deep recess of her mind”, but rather they must have been present and intentionally withheld. In this

sense, the courtroom relations of configurational power, specifically the defence's ability to create narrative twists that deconstructed the complainant's claims to vulnerability (see Chapter Five), contributed to the symbolic power of the defence's presentation of the complainant's forgetting as a deceptive façade.

In the conflicts over how forgetting should be understood (e.g. as the outcome of traumatized memory or an instance of manipulation), what remained taken for granted was the view of memory as a decontextualized object located in the individual's mind that is either present or repressed. Not only does this misrecognize how relations of narrative domination shape and are reproduced through courtroom memory practices, but it also overlooks the role of cultural stock stories about sexual assault in practices of remembering. As discussed in the first section of this chapter, cultural narratives, conventions, and language facilitate our memory practices (Freeman 2010: 268-9, 274; Hirst, Cuc & Wohl 2012: 143-4; Kirmayer 1996: 175; Lambek & Antze 1996: xvii-xx). In particular, they constitute part of the practical sense of the socio-political and cultural habitus through which we experience events as memorable and meaningful. In this way, cultural stock stories of sexual assault that are embedded in our habitus may provide women with a tacit sense of what constitutes normal post-assault behaviour and thus what can be legitimately spoken about, making experiences and actions that break with cultural frameworks (e.g. "cuddling with" or sending "friendly" emails to one's assailant after the alleged assault) *feel* less worthy of remembering or recounting. Moreover, doxic conceptions of women as naturally more dependant and emotional than men underpin concerns about the suggestibility, unreliability, and malleability of women's memories, allowing their competence as rememberers to be called into question (Campbell 2003: 101; 2014: 67). In discussions of both "traumatized memory" and "convenient memory", memory and its apparent failures were located

in the individual minds of the complainants, contributing to the misrecognition of how both remembering and forgetting are practices constituted by culturally dominant frameworks of meaning and the symbolic violence of courtroom narrative practices.

Conclusion

Memory practices are bound up with the unequal distribution of narrative capital and symbolic power in a given field. In particular, narrative capital and configurational power enable agents to speak with varying degrees of legitimacy about the significance of the past and what is remembered about it. Since remembering involves imposing a vision of the past and its relevance to the present, having one's practices of remembering recognized as authoritative, reliable, and accurate constitutes a key form of symbolic power. Moreover, unequal distributions of narrative capital and configurational power enable some agents to discredit others' memory practices and their competence as rememberers. When the credibility and reliability of their memory is called into question by someone whose relational position bestows them with a great deal of configurational power, rememberers may be denied the ability to make authoritative claims about their own past and what it means. In this way, legal judgements about the reliability and trustworthiness of a witness's memories are inseparable from the symbolic violence of courtroom narrative practices.

This is particularly evident in Henein's practices of reminding. Enacting her practical mastery of legal objectivity and exercising the configurational power afforded by her position in the courtroom, Henein presented her evidence through the euphemized language of reminding. In so doing, she highlighted her position as the authorized narrator of the past and further undercut the complainants' ability to authoritatively recount their own experiences. Moreover, practices of reminding involved the complainants complying with the unequal relations of configurational

domination underlying the defence's practices of discrediting. Given that the insinuations of the defence's reminders were shrouded in the legitimacy attributed to objective evidence-seeking and the relations of configurational power did not enable the complainants to legitimately (re)frame the defence's evidence, the complainants had little choice but to agree with Henein's statements and configuration of events. In this way, the symbolic violence of memory practices can (re)produce certain agents as more or less authorized to speak of and narrate the past than others, regardless of who may have experienced the events in question.

One's legitimacy as a rememberer is shaped not only by unequal distributions of field-specific capital and configurational power, but also by the ways that memory is understood and treated. For instance, law's doxic image of reliable memory as a static object contributes to expectations of consistency that may disadvantage complainants who are asked to recount their experiences multiple times, in different contexts, and to different interlocutors. Embedded in the dispositions of juridical habitus, law's doxic conceptions of memory provide legal professionals with a tacit sense of what constitutes both reliable memory and a competent rememberer. It was within the context of courtroom narrative domination and law's doxic conceptions of reliable memory that the Crown lawyers, complainants, and defence lawyers in the *Ghomeshi* trial struggled to define and explain remembering.

While the first and second complainants claimed that their memories improved over time, the defence dismissed the notion of improving memories, asserting instead that inconsistencies in the complainants' accounts constituted *new* and *different* memories. The discrediting implications of the defence's notion of new memories rested on law's doxic assumptions about the past's independent existence from the present. By arguing that the complainants' memories were *new*, the defence suggested that they did not originate solely in the past but derived from an

unauthentic source, namely, the circumstances of the present (including their involvement in the social media circus that encircled this trial). Conflicts over how *forgetting* should be understood also arose during the trial. In particular, the complainants and the Crown suggested that missing information in the complainants' accounts should be attributed to the impacts of trauma.

Dismissing insinuations of traumatized memory as a façade, however, the defence argued that the missing information was much too "convenient" to be the outcome of genuine forgetting. Configured within the defence's narrative of manipulation, the complainants were presented as intentionally misrepresenting their memories and then making convenient claims of forgetting.

These conflicts over how the complainants' remembering and forgetting should be understood were not only shaped by unequal distributions of legal capital and configurational power, but were delimited by doxic assumptions about memory – especially in relation to sexual assault. Despite conflicts over whether memory can improve or whether the complainants were indeed suffering from traumatized memory, there was an underlying doxic logic that took memory to be an object that is located in the individual's mind and which can be damaged, contaminated, and may sometimes be inaccessible. This disregards the relational, institutional, and cultural contexts of memory practices and misrecognizes the unequal relations of legal capital and configurational power that shape who is successful as a rememberer. During the *Ghomeshi* trial, remembering was treated as an individualized act of describing *what* one remembers, rather than a socially-situated practice that involves (re)assessing the significance of the past through the dispositions of habitus and which cannot be separated from the present circumstance and its relations of domination. Law's doxic conceptions of how memory operates and what constitutes reliable remembering allow witnesses' memory practices to be treated as evidentiary objects that can be subjected to forensic examination and about which law can make

authoritative truth claims. When memory is perceived as a static object located in an individual's mind that may or may not be accessible, contaminated, or misrepresented, the relations of narrative domination that condition and structure legal examination are (re)produced as part of the inherently legitimate practices and standards for assessing the reliability of witnesses' remembering. Distinctions between reliable and unreliable memories are misrecognized as natural outcomes of the *individual's* successes or failures as a rememberer, rather than as the exercise of varying degrees of configurational power. In this way, law's doxic conceptions of reliable memory contribute to the ongoing misrecognition of symbolic violence in the courtroom.

Conclusion

According to Bourdieu, critical analyses that consider the relations of power, distributions of capital, and doxic underpinnings of a field of practice are important because they offer us “a small chance of knowing what game we play” (Bourdieu & Wacquant 1992: 198). The goal of this dissertation has been to examine the symbolic violence of courtroom narrative practices and the doxic elements that contribute to their ongoing reproduction. In other words, I was interested in how the doxic standards, rules of practice, stock stories, and organization of positions embedded in the habitus of various legal agents contribute to the misrecognition of relations of domination in the courtroom. Analyzing the narrative practices of the *Ghomeshi* trial provided an empirical referent for considering the broader issue of symbolic violence in the legal game. This meant that I considered not only the narratives circulating during the trial (i.e. what was said), but also, crucially, what the narrative practices of the trial can tell us about the habitus and capital of different legal agents, the (de)valuation of certain forms of habitus in the legal field, connections between legal capital and configurational power, underlying doxic elements, and what these dimensions mean in terms of misrecognized forms of domination.

By using Bourdieusian theory to analyse the symbolic violence of courtroom narrative practices, I contributed to feminist socio-legal critiques of law’s discursive power. In particular, I considered how “law’s power to define” (Smart 1989: 164), that is, its symbolic power, is unequally distributed amongst courtroom actors based on their habitus and legal capital and how these unequal power relations in the courtroom are misrecognized as a legitimate part of law’s fair, impartial truth-seeking processes and a natural extension of “choosing” to bring one’s experiences before the law. Instead of focusing on the discursive outcomes of legal process and

law's power, I analyzed the misrecognized relations of domination that made the (re)production of certain discourses and narratives possible.

To consider the symbolic violence of courtroom narrative practices and their specific elements and forms of domination, I mobilized the concepts of narrative capital and configurational power. Narrative capital refers to the factors that operate within a specific field to provide a narrative with a greater chance of being heard and deemed legitimate. For instance, juridical habitus translates into narrative capital in the legal field by providing legal professionals with a practical sense of the doxic element of legal objectivity that allows them to create narrative configurations that seem indisputable. Like other forms of capital, narrative capital is field-specific. This means that the dispositions and factors that contribute to one's narrative capital in one situation (e.g. when giving interviews to the media) do not necessarily translate into narrative capital in another field. The narrative dispositions of one's habitus have to be in alignment with the doxic standards and valuations of the field in order for them to function as capital. Furthermore, relations of domination in a field are constituted through unequal distributions of various forms of field-specific capital. This means, for example, that the narrative domination of the Crown and defence lawyers during the *Ghomeshi* trial was based on their qualifications, resources, and competencies being valued in the legal field as legal and narrative capital.

Drawing on Ricoeur's understanding of narrative and my empirical examination of the court transcripts, I proposed the concept of configurational power as a form of symbolic power. Narrative construction requires not only recounting a succession of events (i.e. the episodic dimension), but drawing them into meaningful, causal relation to one another (i.e. the configurational dimension). The term *configurational power* refers to unequally distributed

opportunities to legitimately configure a series of episodic events into a narrative mosaic that imbues those events with particular meanings. During the *Ghomeshi* trial, the Crown and defence lawyers exercised configurational power over the complainants' accounts of episodic stories, a relation which constituted a form of symbolic violence in the courtroom.

In Chapter Three, I explored some of the key practices through which the lawyers controlled the complainants' narratives and which were conditioned by unequal relations of configurational power and narrative domination. First, the complainants were not permitted during in-chief examination to narrate their experiences by flowing from one event to another in a way that made narrative sense to them, but rather their episodic stories became disconnected through the question-and-answer framework of legal examination and the Crown controlled how the events could be ordered and made into a narrative whole. While they were at times given opportunities to provide lengthy responses, the complainants' position in the courtroom did not afford them configurational power and their attempts to connect and interpret episodic events were typically interrupted by close-ended questions and re-directions. Second, the relations of configurational power during cross-examination and the defence lawyer's legal capital allowed her to create key narrative twists that highlighted her position as the knowledgeable narrator and enabled her to upend the complainants' accounts. Third, the configurational power that the defence lawyers' position in the courtroom bestowed on them allowed them to configure inconsistencies in the complainants' accounts while discrediting the complainants' attempts to configure a sense of narrative coherence in their own words. Finally, the Crown and defence lawyers were able to draw events into configurational wholes through their closing arguments, but the complainants did not have the configurational power needed to impose a narrative ending or sense of closure on the events that they recounted.

In this sense, the narrative practices of the courtroom constituted forms of domination conditioned by unequal relations of configurational power. Even as the complainants were required to recount their episodic stories in order to participate in the trial, it was the lawyers and judge who were able to legitimately make assertions about what the episodic events *meant* and how they were causally connected. The symbolic violence of the courtroom narrative practices functioned through misrecognition. That is, the relations of configurational power and narrative domination were misrecognized as legitimate components of the legal elicitation and examination of witness testimony. Moreover, the symbolic violence of the *Ghomeshi* trial was bound up with the misrecognition of certain traits as natural indicators of female victimhood and with cultural stock stories embedded in the practical sense of the socio-political and cultural habitus. That is, it reproduced the misrecognition of gendered binaries and the patriarchal relations of power that structure and underlie them.

The last three chapters of my dissertation focused on critically examining the doxic elements that contributed to the ongoing misrecognition of the relations of narrative domination in the courtroom. In Chapter Four, I argued that key tenets of legal positivism and liberal legalism functioned as doxic elements that allowed the courtroom relations of configurational power to be misrecognized as necessary for the achievement of a fair, impartial trial. In particular, the doxic standards of legal impartiality, autonomy, and objectivity are embedded within the juridical habitus, providing legal professionals with a practical mastery of the legal game and its rules and bestowing legitimacy on their narrative practices. Without the legal capital provided by juridical habitus, the complainants' efforts to configure, interpret, or move between episodic stories were treated as suspicious, legally irrelevant, and threatening to legal standards. The narrative dispositions of the complainants and their attempts to use the language

of objectivity and relevance did not translate into legal capital. Enacting the practical mastery of their juridical habitus and the configurational power it provided them, the lawyers competed with each other to configure narrative meanings from the complainants' episodic stories while simultaneously framing their configurational work in accordance with doxic legal standards. In the process, the symbolic violence of the courtroom was reproduced. As legal objectivity, impartiality, and autonomy existed without scrutiny as the standards allowing legal procedure to dispense justice, the narrative domination of witness examination was misrecognized as a natural component of law's fair search for the truth – one which the complainants “chose” to undergo by bringing their experiences before the law.

In Chapter Five, I examined how doxic gendered binaries, patriarchal relations, and cultural stock stories about sexual assault were bound up with the symbolic violence of the courtroom narrative practices. In particular, I argued that the agents' explanations, disclaimers, and attempts to create (or prevent) certain insinuations pointed to the tropes of femininity and stock stories about sexual assault that are embedded in the socio-political and cultural habitus and that provided them with a tacit sense of what events were significant and what they meant. Throughout in-chief examination, the complainants attempted to describe events in ways that highlighted Ghomeshi's active pursuit of them, their own hesitant interest, the sudden emergence of a violent stranger, their initial desire to placate Ghomeshi in spite of his violence, and their eventual compliance with legal processes. Although these descriptions aligned with the traits of passivity, responsibility, and compliance that were misrecognized as natural indicators of female victimhood and thus had the potential to bolster the credibility of their claims, the symbolic violence of the trial and the complainants' lack of configurational power undermined the success of their explanations.

During cross-examination, the defence created powerful moments of peripeteia that suddenly revealed things were not as they seemed; the complainants were presented as manipulators who had deceived the court. The discrediting insinuations of the defence's narrative configurations rested on stock stories embedded in our collective socio-political and cultural habitus about infatuated and scorned women, as well as on the tacit suspicion of juridical habitus towards the presumed emotionality of women's sexual assault testimonies. These dispositions of habitus allowed the defence's narrative twists to function. That is, they provided the legal audience with a practical sense of what suddenly revealed information meant and how juxtaposed events were causally connected. The gendered categories of perception, patriarchal relations of male initiation, and stock stories embedded in habitus allowed the defence to create powerful discrediting insinuations through the revelation and careful juxtaposition of seemingly objective evidence. In this sense, the gendered structures internalized within juridical habitus contributed to the misrecognition of narrative domination in the courtroom. Moreover, the gendered assumptions and internalized relations of power (e.g. women's 'natural' passivity, dependence, and emotionality in relation to men) that allowed the defence's narrative twists to be perceived as having a self-evident meaning were reproduced as doxic even as the legal professionals expressly denounced rape myths.

As I explored in Chapter Six, doxic conceptions of memory allowed distinctions between reliable and unreliable memory to be perceived as the failure or success of individual remembers, rather than the outcome of symbolic domination. Examining how remembering was treated in the *Ghomeshi* trial, I argued that inculcated within juridical habitus was a conception of reliable memory as a static and uncontaminated object located in the individual's mind and an accompanying tacit sense that remembering typically falls short of this ideal. Remembering is a

practice that involves (re)assessing the past through the practical sense of habitus; this means that memory cannot be separated from the conditions of the present. The meaning and legitimacy attributed to one's memory practices are shaped by unequal distributions of narrative capital. In particular, relations of configurational power can contribute to an agent's ability to legitimately narrate their past experiences or, conversely, to an agent's ability to discredit someone else's remembering. In other words, memory practices can constitute key moments of domination in which configurational power allows certain agents to authoritatively narrate the past and call into question the competence of other rememberers. For instance, the courtroom relations of configurational power enabled Henein to discredit the complainants' remembering by presenting inconsistencies as *new* memories (rather than *improved* memories) and forgotten information as intentional deception (rather than an outcome of trauma). When perceived through the conceptions of memory embedded in juridical habitus, however, memories are treated as evidentiary objects that can be known through legal examination and the relations of domination through which rememberers are deemed (un)reliable are misrecognized as part of the inherently legitimate legal practice of evaluating witness testimony. By contributing in this way to the misrecognition of domination, law's doxic view of memory helped to reproduce symbolic violence in the *Ghomeshi* trial.

Theorizing the Narrative Games of the Sexual Assault Trial

The detailed examination of the *Ghomeshi* trial provided in this dissertation contributes to feminist critiques of the sexual assault trial by considering the symbolic violence through which complainants are narratively constrained and the doxic conditions facilitating its reproduction. Feminist critiques of the sexual assault trial tend to focus on problematizing aggressive cross-examination techniques and identifying what the Crown and judge should do to protect

complainants from these tactics. Within broader feminist critiques of legal discourse, the focus tends to be on law's discursive outcomes and what these discourses mean for gendered power relations. The analysis of symbolic violence provided through this dissertation directs our attention to the subtle relations of domination embedded in both cross *and* in-chief examination that are misrecognized as legitimate components of achieving legal impartiality and autonomy. Although I retain a concern with the gendering discourses reproduced through the *Ghomeshi* trial, I have primarily focused on the relations of configurational domination, distributions of capital, and organization of positions in the courtroom that made the construction of certain narratives and the (re)production of gendered binaries possible.

Merging theoretical and empirical work, I used my analysis of this specific case to explore how courtroom narrative practices are structured through and reproduce symbolic domination. Although I only looked at a single case, the analyses and observations of this dissertation can deepen our understanding of the power relations underpinning sexual assault trials. As discussed in Chapter One, socio-legal feminist scholars have pointed to law as a “gendering practice” in that it “constrains and enables – i.e., constructs – womanhood” (Chunn & Lacombe 2000: 16). By examining the trial through Bourdieusian theory, we gain a better understanding of the doxic conditions and misrecognized relations of domination that underpin the gendering practices through which complainants’ testimonies are elicited, re-configured, evaluated, and discredited. In other words, consideration of narrative domination and the (de)valuations of habitus that facilitate it provides insight into the underlying doxic elements and relations that condition law’s gendering processes. Moreover, it allows us to examine how law’s “power to define” (Smart 1989: 164) is not just located in legal process or legal discourse, but rather is unevenly distributed amongst various positions in the legal field, constituting relations

of domination. Although symbolic power is always bestowed based on field-specific relations of capital and thus is not *possessed* by agents, it is nonetheless *exercised* by agents occupying different positions in a given field. In this sense, thinking in terms of symbolic power and symbolic violence helps us to consider the connections between structuring conditions and social practice. Objective relations of symbolic power structure the practices of a given field and are internalized in different agents' dispositions of habitus. At the same time, these relations are produced and reproduced through agents' ongoing narrative and social practices.

Feminist scholars have repeatedly raised concerns about the sexual assault trial constituting a form of re-victimization. By analyzing the ways that complainants are required to provide episodic stories that are then manipulated by legal professionals into narrative mosaics, we can identify unequal relations of configurational power as a form of symbolic violence and domination and examine the doxic elements that allow for its ongoing misrecognition. Furthermore, thinking in terms of symbolic violence helps us to consider how complainants comply with the narrative domination of the trial as a prerequisite of having their day in court. The complainants' habitus and their narrative capital outside the courtroom do not translate into configurational power or capital within the legal field. Without the juridical sense that "constitutes the entry ticket into the juridical field" (Bourdieu 1987b: 820), the complainants' role in the trial is limited to providing the episodic content that is broken down, evaluated, and configured into a narrative whole by legal professionals. Even as the complainants' testimonies were necessary to the functioning of legal process, they were policed through practices of interruption and re-direction and treated as potential threats to legal standards of objectivity, impartiality, and autonomy. Moreover, the misrecognition of courtroom relations of

configurational power allowed inconsistencies and withheld information to be perceived as faults in the *complainants'* accounts after they had been given “every opportunity” to tell their story.

In this context, factors that purportedly make the sexual assault trial more just and less biased against complainants (e.g. the express rejection of rape myths, attempts to limit “whacking the complainant”, and the provision of every opportunity to tell one’s account) may paradoxically contribute to the misrecognition of narrative domination in the courtroom. For example, there are now restrictions on whether a defence lawyer is permitted to bring forward sexual history evidence about the complainant, but these restrictions continue to misrecognize objectivity and impartiality as self-evident standards of a fair trial and the unequal configurational power bound up with these standards continues to exist without scrutiny. It is thus important to consider the symbolic violence that is instantiated and (re)produced through some of the same practices presumed to contribute to law’s rationality, impartiality, and legitimacy. I have argued here that a Bourdieusian narrative approach can help facilitate this type of investigation.

This dissertation moves the discussion beyond what is said or not said during the sexual assault trial and towards consideration of the unspoken and tacit premises that *condition* what can be said, by whom, in what manner, and with what degree of legitimacy. Through Bourdieu’s concepts of habitus and doxa, we can think about the schemes of perception and dispositions through which agents *experience* the world around them. For instance, even though Ghomeshi’s defence lawyers expressly stated that their arguments had nothing at all to do with rape myths, their narrative configurations and moments of peripeteia nonetheless relied on stock stories about sexual assault embedded in our collective socio-political and cultural habitus to provide the legal audience with a tacit sense of the significance of different events, such as a sense of suspicion

when a complainant's post-assault interest in Ghomeshi was revealed. Similarly, the doxic conceptions of memory and standards of legal objectivity allowed the legal professionals to legitimately express concerns about the contamination of the complainants' memories and to redirect the complainants through an emphasis on factual details. In this way, thinking in terms of doxa and habitus helped me examine the cognitive structures, internalized relations, and forms of misrecognition that contributed to and were reproduced through the symbolic violence of courtroom narrative practices.

Furthermore, considering the unequal relations of configurational power during sexual assault trials provides insight regarding the distress of testifying. In their interviews with female sexual assault complainants about their experiences when reporting sexual assault to the police, McMillan and Thomas (2009: 274) found that the police's focus on what the women perceived to be unimportant details contradicted "the emotional and personal nature of the account" and added to the women's distress. The women in their study suggested that they needed to be able "to 'tell their story', in an uninterrupted and free-flowing manner" (McMillan & Thomas 2009: 274). Robust questioning without explanation increased their feelings of being disbelieved. Limitations on one's ability to legitimately configure events into a meaningful whole or draw connections between the different events constituting one's experiences may also increase feelings of distress.

The relations of configurational power during in-chief examination make it extremely difficult for complainants to capture and relate their experiences even as they are told that this is their opportunity to tell their story. Moreover, the configurational power of other legal agents, such as defence lawyers, allows one's personal experiences to be ordered and connected in discrediting narrative configurations whose insinuations are difficult to refute because they are

implied in the unspoken causal inferences between events and appear embedded in a series of factual observations and evidence. In other words, it is difficult, particularly when being cross-examined, to convincingly say something like: “Yes, those events did happen, but not for the reasons you’re implying they did”. Refuting narrative insinuations requires a convincing re-configuration of events, something that legal witnesses are unlikely to have many opportunities to legitimately do. By thinking in terms of configurational power, we can consider the ways in which the narrative practices of the sexual assault trial continue to constitute symbolic violence despite the changes in legislation, push back against aggressive defence strategies, and express rejections of rape myths. Watching your own experiences being configured into a series of events that drastically differs from how you understand those events and creates negative insinuations about you that are extremely difficult to refute is likely to be a distressing experience indeed.

There are many different ways that future research projects could further expand our understanding of the symbolic violence bound up in legal responses to sexual assault and the doxic conditions contributing to its reproduction. While this project focused on a sexual assault trial, future research might examine relations of configurational power in the context of other stages of the legal process, such as the police interview or the forensic examination; research could also examine different types of sexual assault cases, such as HIV non-disclosure cases. It would also be worthwhile to consider cases in which the defendant testified as this would allow us to examine the factors contributing to whether or not the defendant exercises configurational power, which may also shed light on the decision to testify in the first place. In his analysis of the William Kennedy Smith rape trial, Matoesian (2001: 180) argued that the defendant’s status as a medical student allowed him to use his expert knowledge to treat the prosecutor’s questions

as “request[s] for an explanation [of medical possibilities] – rather than, say, solely as an accusation or allocation of responsibility”. In this sense, it would be worthwhile to examine the forms of capital (e.g. educational qualifications) that may translate into narrative capital and configurational power in the courtroom, perhaps contributing to the decision to have the defendant testify.

Another potential avenue for future research could involve interviewing Crown and defence lawyers about some of the courtroom strategies that they engage in their efforts to construct a convincing case. These interviews would not use the terms narrative capital or configurational power, but could involve providing vignettes and then asking the lawyers the story they might try to construct in court, how they would go about doing so, and the ways they would attempt to prompt the witness. The responses provided during such interviews might provide interesting insights about the dispositions of juridical habitus and how relations of configurational power in the courtroom play a role in how lawyers prepare their case.

One of the key doxic elements underpinning the symbolic violence of the courtroom is the misrecognition of legal process as the natural response to sexual assault and the legitimate path to justice. In this context, seeking a just response to sexual violence is equated with entering the legal field and complying with the symbolic violence of the legal process. This raises questions about the relations of configurational power and narrative capital in legal approaches outside the courtroom, such as collaborative or transformative justice. When the goal is resolution and healing, very different factors might translate into narrative capital and configurational power, constituting different relations of power. Since these alternative

approaches are often nonetheless part of the legal field⁸¹, it would also be worthwhile to consider whether (and how) the practical mastery of doxic legal standards embedded in juridical habitus constitutes a key form of capital in these legal practices. In other words, we could examine the narrative power relations, forms of capital, and (de)valuations of habitus constituting a different kind of legal game. The opportunities for building upon this dissertation project, however, extend beyond examination of legal responses to sexual assault. As I discuss in the next section, the theoretical contributions of this project could be put to work to examine the narrative power dynamics in a variety of contexts and fields.

Towards “Homological Reasoning”

Throughout this dissertation, I demonstrated the insights to be gained from sustained engagement with Bourdieusian concepts in combination with a narrative approach. These insights extend beyond the specific case studied or the project’s empirical focus on sexual assault trials. For Bourdieu, social scientific research tells us not only about the empirically specific situation, but about its underlying processes, rules, and relations (Bourdieu & Wacquant 1992: 75). Arguing that the opposition between “the universal and the unique [...] is a false antinomy”, Bourdieu advocates for “homological reasoning” (Bourdieu & Wacquant 1992: 75) in which aspects of a particular study are extended to provide insights about other fields and situations.

For instance, in his preface to the English-language edition of *Distinction*, Bourdieu (1984/2010: xiiv) suggests that his analyses of the relations between French lifestyles and distributions of economic and cultural capital have valid implications beyond the project’s

⁸¹ For instance, Ottawa’s Collaborative Justice Program is physically located in the Ottawa Courthouse and its Resolution Agreements are often presented to the judge at the time of sentencing. The program therefore works in tandem with more conventional legal processes.

empirical focus. He encourages readers not to allow the particularities of the project to prevent them from “reflecting onto [their] own society, onto [their] own position within it, in short, onto [them]self, the analyses [they] [are] offered” (Bourdieu 1984/2010: xiv). Similarly, he argues that his study of French academia in the 1960s may be transposed to provide insights about other “professional universe[s]”, particularly when accompanied by empirical examination (Bourdieu & Wacquant 1992: 75). According to Bourdieu (1992: 234), the researcher’s task is “both to particularize her object, to perceive it as a particular case [...] and to generalize it, to discover, through the application of general questions, the invariant properties that it conceals under the appearance of singularity”. In other words, the relational approach that Bourdieu advocates encourages us “to grasp particularity within generality and generality within particularity” (Bourdieu & Wacquant 1992: 75).

This dissertation examined a particular instance of symbolic violence and narrative domination in the courtroom. The narrative practices considered took place specifically in the context of the *Ghomeshi* trial. For instance, the conflict between notions of improving memory and new memories arose out of the particular circumstances of that case and may not occur in all or even most sexual assault trials. As I mentioned above, this project can help scholars better understand the misrecognized relations of domination that are bound up in the narrative practices of sexual assault trials, but it does not attempt to capture over-arching patterns or make generalized claims about what occurs in most sexual assault cases. In this sense, I do not want to universalize the observations of this project as somehow representative of sexual assault trials or legal processes in general.

That said, this dissertation’s observations about the symbolic violence of courtroom narrative practices and the doxic logic that contributes to their reproduction have implications

beyond the particularities of the project's empirical focus. That is, the empirically specific analyses of the narrative power dynamics in the *Ghomeshi* trial can, through homological or relational reasoning, provide insight on how unequal distributions of misrecognized narrative capital and configurational power are implicated in the relations of domination constituting different fields of practice. Bourdieu's emphasis on the merging of theoretical and empirical work helps to facilitate moving beyond empirical particularities. When theoretical concepts are put to work in the context of empirical examination, the specific empirical project is able to both draw on and contribute to wider theoretical projects about, for instance, the relations between narrative practices and symbolic violence.

While the practices and struggles over meaning that took place during the *Ghomeshi* trial cannot be universalized as representative of sexual assault trials or courtroom dynamics more generally, we can nonetheless draw theoretical insights from this case. For instance, the analysis of narrative practices in the *Ghomeshi* trial points to the ways that doxic standards embedded in legal habitus can constitute a key form of legal capital and contribute to the ongoing misrecognition of forms of domination. In a different way, analyzing the stock stories embedded in our collective socio-political and cultural habitus that enabled the defence's narrative twists to function showed how rape myths (and other types of cultural stock stories) cannot be easily expelled from legal process, as they form part of the tacit sense through which agents infer meaning. The examination of how memory was treated and understood during the trial points to how practices of remembering and evaluations of a rememberer's (un)reliability are conditioned by relations of domination and doxic elements of the legal field. In this sense, the observations of the analyses extend beyond the single case that was examined.

Moreover, this dissertation offers more general theoretical insights about the ways in which narrative practices are conditioned by and help to reproduce misrecognized forms of domination. In other words, the analysis of the *Ghomeshi* case provided in this dissertation helps us better understand the symbolic violence of narrative practices in different situations and fields. For instance, the concepts of narrative capital and configurational power could be used to examine the power dynamics of narrative practices in refugee application processes, in which it is expected that “applicants tell a good story [...] that predominantly conforms to the conventions of model narratives” (Vogl 2013: 64). A Bourdieusian narrative approach like the one used in this project encourages consideration of narrative practices not for what they tell us about the past, but rather for what they can tell us about the habitus of agents and the relations of domination constituting the particular field of practice. Furthermore, thinking in terms of narrative capital allows us to examine how qualifications and dispositions contributing to the perceived credibility and plausibility of a narrative in one field may not translate into symbolic power in another field. This type of work may be particularly suited to comparative analyses in which the skills, dispositions, experiences, or markers functioning as narrative capital in one social space are compared with what constitutes narrative capital in a different social space. For example, in the current project I could have juxtaposed the processes of legal witness examination against the complainants’ media interviews with an eye to the parallels and distinctions between relations of configurational power and the factors contributing to the symbolic power of the agents’ various narrative practices. Such a comparative project could provide empirical examination of Bourdieu’s argument that capital is always field-specific.

The key takeaway of this project is that narrative practices are structured through unequal relations of configurational power that are misrecognized and therefore operate as a form of

symbolic violence. Examining the symbolic violence of narrative practices in a sexual assault trial allows us to put our finger on hidden and subtle relations of domination that structure narrative construction in the legal game. Even though my empirical focus is narrow, the theoretical implications of this project extend beyond the case and the context of the courtroom. Much narrative scholarship focuses on the structures of narrative, the constitutive nature of narrative practices, what narratives can tell us about people's experiences, or the discourses that constrain what can be said. This project and my development of a Bourdieusian narrative approach helps us to bring together consideration of structuring conditions, narrative practices, and the cognitive schemes of habitus underlying agents' perceptions. Importantly, this approach directs our attention to the internalized and misrecognized relations of power that condition the constitutive aspects of narrative. Considering relations of configurational power also gives us a more complex and nuanced understanding of the narrator position, which involves more than just sharing one's experiences and can be occupied by someone who appears to be merely eliciting the narrative, as the Crown lawyers did during in-chief examination. Moreover, the concept of configurational power builds on Bourdieu's work by helping us to think about how symbolic power is not just about being able to *speak* legitimately, but also about being able to legitimately *order* the content of what is being said. This dissertation demonstrates that when we examine relations of symbolic power, we should also consider how various positions differently equip agents to configure events, meanings, and comments to form a narrative whole.

By putting Bourdieusian concepts to work in combination with the concept of configurational power developed in this dissertation, we can move beyond analysing the narratives that are present and how they are constructed and towards consideration of the doxic elements, symbolic domination, and dispositions of habitus that *condition* the construction,

regulation, and evaluation of narratives. More generally, this dissertation demonstrates how Bourdieusian concepts and a narrative approach can be fruitfully combined to yield insights about the narrative power dynamics of a given social space, namely, the juridical field. Although I have explored this in the context of law, specifically a sexual assault trial, future projects could take up these ideas and concepts to look at vastly different fields of practice and their underlying logics. I understand this kind of theoretical transposition as being an important aspect of viewing “generality within particularity” or, to paraphrase Mills (1959) on the sociological imagination, of the creativity that allows social scientists to bring together ideas, theory, and empirical detail in innovative ways. Drawing general ideas out of empirically-specific projects and using these to think through the particularity of a different empirical area can promote a “playfulness of mind” (Mills 1959: 211) that leads to imaginative theorizing and insightful analyses. Scholars may find important parallels and differences between the observations of this project and their own work, leading them to new ways of looking at the forms of symbolic violence reproduced in their empirical field.

Crucially, however, the concepts mobilized in this project must not be fetishized, that is, viewed and applied them “in themselves and for themselves” (Bourdieu 1992: 228). Exploring questions of narrative capital and configurational power means “put[ting] [the concepts] in motion and [...] mak[ing] them *work*” (Bourdieu 1992: 228). In other words, this project develops and makes use of concepts that cannot be merely identified as present or absent in the field and social space being studied, but rather used as a kind of “conceptual shorthand” (Bourdieu 1992: 228) that orients the researcher to a whole network of power relations and misrecognized forms of domination that structure narrative construction. In this sense, the concepts mobilized, developed, and put to work in this project should not be rigidly applied, but

rather extended, put in conversation with the work of other thinkers, adjusted in relation to empirical observations, and used to inspire new ways of thinking about social relations.

Final Remarks

As scholars in the area of sexual assault have repeatedly demonstrated, coming forward to report and testify to sexual violence is incredibly difficult and those who do so are often met with disbelief, insensitivity, and various efforts to minimize the traumatic impact of their experiences. Over the past several decades, changes in legislation have been passed in an attempt to address these issues, but, as this dissertation has demonstrated, the relations of domination that facilitate the discrediting of complainants are not simply about what evidence is permitted, what questions may be asked, or how we understand consent. Without suggesting that these issues are unimportant or the legal changes insignificant, I have argued that forms of symbolic violence through which lawyers configure episodic stories disadvantage sexual assault complainants in ways that tend to be misrecognized as legitimate aspects of legal procedure. In cases of sexual assault, where complainants may already experience a great deal of difficulty making sense of and speaking openly about their victimization, the symbolic violence of courtroom narrative practices may constitute an experience that is distressing in ways that are difficult to put one's finger on and articulate.

Furthermore, stock stories of sexual assault and doxic legal standards embedded in habitus may provide legal professionals with tacit concerns or presumptions about the insufficiency or untrustworthiness of a complainant's account, contributing to the distress caused by disbelief. By critiquing the symbolic violence of narrative practices in the legal game, I am not suggesting that we should change legal practice to make it easier to convict and sentence those accused of sexual assault. As previously mentioned, I agree with those who argue that we

should not view conviction rates and the severity of punishments as a measure of how appropriately law deals with sexual assault; doing so continues to misrecognize legal responses as the path to justice. Instead, I am suggesting that we must remain critical of assertions that it is possible for the legal process (perhaps with certain legislative changes) to provide a fair and impartial medium for hearing and evaluating complainants' accounts. It is crucial that we consider how misrecognized forms of domination, as well as the standards and practices built into the system from which we seek justice, reproduce disadvantages at the level of who can narrate, in what way, and with what authority. It is not just about whether rape myths are openly accepted or rejected, whether sexual history evidence is permitted, or how consent is officially defined – though, of course, these issues remain important. Operating beneath these issues, there are doxic assumptions about what constitutes a legitimate trial, a reliable rememberer, and a plausible account of sexual assault that have a significant impact on narrative practices that work to discredit complainants. When unequal relations of configurational power and practices of symbolic violence are misrecognized as legitimate aspects of telling one's story in court, inconsistencies are perceived as evidence that the *complainant's* narrative is flawed – that it has *failed legal examination*.

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