

Lost in Translation

*The Legal appropriation of the voice of child sexual
abuse victims in Ireland*



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Summary

This thesis sets out to examine the way in which legal reasoning constructs child sexual abuse in general, and how that works in Ireland in particular. In order to examine from a sociological perspective the construction of sexual abuse I apply a critical framework derived from feminist studies, Foucault's theory of knowledge and power and postcolonial/subaltern theories to highlight the foundations of the knowledge constructions involved. This critical approach is brought to bear on the aspects of knowledge, power, discourse and voice encountered in the data set of the Appellate Court decisions from 1930 to 2004 and the accounts of survivors. In all 3,000 pages of legal opinion were analysed along with five published auto/biographical texts recounting personal stories of child sexual abuse.

The main contention of this research, arising from this examination is that the focus of judicial concern is the law as opposed to justice. The law it seems has a natural scepticism regarding the value of other knowledges, including knowledges produced by victims. Legal knowledge is derived from tradition, and in particular a patriarchal tradition, as this study among others shows. The theoretical framework adapted allows for an analysis of shortcomings of the Irish legal system in relation to its processing of child sexual abuse cases. The essential properties of objective rationality in law are held in constant tension with the requirement to affirm the cultural and subjective reality of child sexual abuse.

This research thesis concludes that unless the judiciary comes to open critical reflection on their practices the legal institution must be deemed unequal to the task of dealing with child sexual abuse. All of this is predicated on the argument, and the central finding of this thesis, that victims' voices, child or adult, are lost in the translation to legal truth.

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Chapter 1: Introduction

The topic of child sexual abuse has been a matter of controversy in Ireland for several decades now. The issue is one that has provoked strong emotions on many sides. Criticism has been levelled at the Catholic Church for fostering a repressive sexual climate that enabled or encouraged abuse. Church leaders have been accused of prioritising the interests of their church over those of the abused. On the other hand it has been argued that the abuse scandals have been used by people hostile to Catholicism as a ‘witchhunt’ to further their own agendas. The victims of abuse, and their support organisations, have generally tried to widen the debate and to hold not only the churches but also the State to account for the injuries inflicted in the past and for the social reforms needed to adequately redress them. Likewise, feminists and other intellectuals have argued the need to examine, not only the role of the State and the churches, but more generally, the role of law, family, patriarchy and Irish sexual practices.

Culturally child sexual abuse is positioned as a secret, one that should not be voiced and therefore cannot be heard, (see Chapter 2). The primacy afforded the family under the Irish Constitution has meant that the sexually abused child has been located on the periphery of Irish Law. This study explores from a multi-theoretical perspective the way in which child sexual abuse has been framed within the senior levels of the Irish judicial system. More particularly, it will examine the relationship between the constructions of ‘sexual abuse’ in the Irish legal system and the understandings of abuse as related by those who have experienced it. The legal system, as mediated by the law courts and ancillary institutions, is primarily devoted to upholding the law as the supreme and final authority in the state. However, the primary objective of abused individuals is to have their pain and suffering acknowledged and understood and to seek

redress for the injuries they have endured. These two different agendas often come into conflict, sometimes in ways that generate even more painful experiences for adult survivors of child sexual abuse.

My goal is to explicate how the law understands the issue of child sexual abuse in the arena of the courts, how it constructs that abuse and the people who have been party to it. Furthermore, I want to demonstrate how abused individuals and groups come to take responsibility for constructing themselves, challenging the role of victim that has been assigned to them and rejecting passivity in favour of empowered agency. To achieve these twin goals the study is situated within a framework of knowledge, of discourse and of power.

1.1 Contextualising the study

As a mature student, recently returned to university, I was inspired by sociology's investment in acknowledging and seeking ways to liberate the voice of less powerful groups and individuals in society. At the same time stories of sexually abused children were constantly being reported in the media. In each successive account of abuse, terms such as 'vulnerable', 'powerless', 'dependent' and 'silenced' were relentlessly reiterated. The issue, it seemed to me, cried out for sustained sociological analysis. Child abuse is an obstinate and persistent problem and it seemed important to find out what structural or cultural factors contributed to this situation. The resolution of child abuse cases frequently leads to the courtroom yet the law may play an obstructive role in tackling the issue as often as it works to vindicate the rights of victims and find resolutions. It became obvious, therefore, that the starting point for research ought to be the legal system.

I have identified legal knowledge as a significant, even dominant, element in the broader social understanding of the issue of child sexual abuse, (see Chapter 2). I will examine how it is constructed, who has the power to produce it, and the role it plays in how this issue of child sexual abuse is understood. Truth, credibility and knowledge construction are the building blocks upon which this analysis is built. I will bring together three important theoretical perspectives – feminist jurisprudence, Foucault's concepts of discourse/knowledge/power and a subaltern interpretation - to carry out this work, (see Chapters 2 and 3) Drawing on these three different though complementary perspectives this theoretical framework enables a robust analysis of the problem of the legal construction of child sexual abuse. My approach places the experience and interest of the child at the centre of concern, and reads the child's experience through the discourses of power (as constructed through court proceedings), of gender (the patriarchal context of the law) and through the subaltern voicing (as constructed through survivor accounts and memoirs).

Society has long looked to the law as the arbiter of morally reprehensible sexual behaviour. Incest was seen as a sin in the eyes of the Church, but not outlawed until the 1908 Incest Act which was applicable in the Irish jurisdiction as well as in the United Kingdom. This Act recognised that sexual intercourse between blood relations was a risky practice, but the prohibition was centred on the biological danger rather than on the activity itself, for the Act did not include stepfathers and stepchildren. According to Jackson (1999), individual fathers demonstrated their sense of conflict between exercising parental rights associated with authority and the moral consciousness of the shame associated with abuse by carrying out their activities in secret, outside the view of the wives and neighbours.

Present knowledge of child sexual abuse is dominated by the rational-legal perspective in liberal democracies such as Ireland. The understanding and local management of the problem has been appropriated by a disciplinary community, or set of expert systems. A variety of approaches to child abuse is reflected in distinctive combinations of epistemology and methodology that are adopted by psychologists, social workers, psychiatrists, criminologists, feminists and sociologists. Research questions and methodologies vary across disciplines. Contemporary knowledge of child sexual abuse is thus highly fractured. For example, a feminist perspective might foreground the gendered aspect of sexual abuse while a social work perspective might concentrate on the welfare of the family unit and a medical perspective might focus exclusively on the physical symptoms and harm caused. It is in court proceedings and in the rule of law that these perspectives may be brought together and a reconciliation of these different knowledge systems achieved.

1.2 Interrogating the law

Given the importance of law as a means of social control and as the final arbiter of truth in society, and given the importance of appellate judgements as a source of law, it is instructive to interrogate the inherent logic in the way law constructs the issue of child sexual abuse. While law has the power to shape social knowledge it simultaneously reflects the culture in society; therefore the culture in Irish society is also under examination.

Knowledge has been organised into different disciplines over a long period of time, and these different disciplines enjoy different types of prestige. Law and medicine, in particular, have been granted ‘cognitive exclusiveness’ (Larson 1977). Bounding knowledge in this way achieves particular purposes: it indicates possession, it

limits appropriation and it facilitates control over the manner in which the particular knowledge may expand into and relate to other knowledges. Gieryn argues that the sciences 'have often come up winners in the long history of such boundary disputes' (1983: 783-84) and law is commonly aligned with scientific knowledge. While many disciplines have shown an apparent willingness to relax their knowledge boundaries, the reality is they still maintain a monitoring attitude. Particularly relevant here is the contested knowledge claims between traditional positivistic scientists and feminist critiques. Feminists concerned with the issue of scientific knowledge (Keller 1985; Harding 1987; Bordo 1989 and Longino 1990 in particular) argue that the production of scientific knowledge is itself bound up with gender relations. They contend that scientific knowledge cannot be abstracted from the social world and that its production, construction and dissemination are therefore susceptible to criticism.

In this thesis law is problematised as the site of a discursive struggle where competing meanings and discourses are the real contest. By concentrating on the discursive element rather than centralising gender, it is possible for a subaltern feminist analysis to subvert the legal metanarratives of fairness, objectivity and justice. This approach has the capacity to interrogate the kind of reasoning that underpins judicial proceedings on child sexual abuse and to expose its latent biases and contradictions. Through the genealogical method Foucault set out to trace the development of knowledges in order to reveal the relationship between knowledge and power. He does so by patiently exposing the procedures and practices within institutions that produce discourse and consequent power effects. Analysing the texts from the Appeal Court allows for a systematic interrogation of the judicial discourses about the perpetrators and victims of child sexual abuse. It enables the identification of who is allowed to speak, what they are allowed to say and how they are allowed to say it. This study

points to the particular regimes of power and knowledge that lie at the core of the legal system, shows how they are maintained over time and how the assimilation of new knowledge is frequently resisted.

As knowledge is the issue at the centre of this study, it is necessary to target particular areas for analysis. Foucault locates legal knowledge under ‘technical knowledge’, knowledges that are ‘disciplined’ in accordance with normalising techniques of power. The power of the law is based on the premise that it operates within the parameter of scientific knowledge. Chapters Five, Six, Seven and Eight analyse judicial opinions and this analysis sets out to substantiate this premise about legal knowledge.

Subjugated knowledges – knowledges that supposedly do not belong in the legal arena – incorporate emotional and rational knowledge. These are the ‘suppressed’ knowledges of victims and they appear in auto/biographical narratives, as victim impact statements within the court and as published work in general society. They are subjugated in the Foucauldian sense because they have no authoritative backing from legitimated institutions; they are unscientific in their content because each is a subjective testimony. In Chapter Five, however, I detail the shared experiences voiced by adult survivors of child sexual abuse and argue that this ‘voicing’ challenges the marginalisation imposed in the legal arena and enables survivors to claim a space for their knowledge.

In the confrontation between scientific knowledge (deployed in court) and subjective truth (expressed in personal testimonies) I shall consider where truth, knowledge and ethics reside and the role of gender within this frame. My aim is to draw attention to two constituencies: the judiciary who judge cases concerning the sexual abuse of children and the voice of the children themselves, notwithstanding the

fact that the abused have now mostly reached adulthood. The analysis of auto/biographical narratives will show the potential for integrating new knowledges into the dominant discourses on child sexual abuse opening up new ways of thinking about the subject. I conclude that the essential properties of objective rationality in law work in opposition to a recognition of the cultural and subjective reality of child sexual abuse (as outlined in Chapter 5). The legal system is constituted in such a way that it is excludes or controls other ways of knowing in the social system. In Chapters 6-9 the scrutiny of judicial reasoning develops this point

1.3 Justification for the Research

Sexual relationships between older and younger people are ‘normal’ in the sense that they have always been present in society and this fact appears unlikely to change (De Mause 1991). How we view this activity, on the other hand, is very moveable indeed and changes both temporally and spatially. In other words, the meaning of adult/child sexual relationships is socially constructed. Child sexual abuse, like any other social phenomenon, has both a history and a construction and its emergence as a unit with social meaning did not happen in Irish society until the 1950’s onwards when it became a phenomenon reported in the media which, in turn, triggered state and societal intervention. Documented research over these last fifty years has constructed the sexual relationship between adults and children as psychologically and emotionally detrimental. While the rhetoric of society appears to accept this claim the rate of successful prosecutions in court is extremely low. In fact ‘less than five per cent of rape and sexual assault cases come to court. Of those, three and a half percent or less result in a conviction and not all result in a custodial sentence’ (2006 Irish Independent). Although ‘law presents itself as an institution dedicated to upholding legal codes of

conduct and moral values' it is precisely within law that such claims are silenced (Taylor 2004: 1).

Law is examined by socio-legal academics, by philosophers and legal anthropologists. Social policy researchers question the dynamics between families and state (legal and action orientated) while philosophers deal with both abstract conceptual questions on the nature of law and legal systems and normative questions about the relation between law and morality and the justification for various legal institutions. The sociological perspective developed in this study looks instead at the legal interpretation of child sexual abuse, the subjective experience of the victims, and the disjunctions which exist between these two perspectives. I seek to uncover the manner in which knowledge is constructed, processed and bounded within the judicial system. I ask whether the adult survivor of child sexual abuse can speak, and crucially, be heard within the judicial system or if their voicing must occur outside of that system. I demonstrate the value of including the voice of the victim in deliberation on child sexual abuse. This thesis does not set out to find a remedy for all of the problems that are uncovered. That is the task of future research. In this study the primary quest is to assess the legal processing of the issue of child sexual abuse and the place of the voice of the abused within that process.

1.4 Methodology

This study interrogates the law in relation to the issue of child sexual abuse. It does so by examining and juxtaposing the judicial opinions of the Appellate Court of Ireland from 1930 to 2004 and the published accounts of those who have experienced abuse (see below for details). Using discourse analysis, the legal and non-legal narratives are dissected. I rely primarily on the analytical methodologies of archaeology and

genealogy developed by Foucault. A feminist theoretical approach is also built in to the methodology because it offers valuable insights into how law colonises knowledge and experience (Smart 1989, 1995). Victims of abuse struggle to speak within the parameters set out for them in the societies to which they belong. In the narration of their stories through legal discourse the true meaning of their experience is frequently “lost in translation.” Effectively, they lose control of their own stories. The colonisation of victims’ knowledge is central to power relationships and this practice will be exposed as I move through the discursive analysis of these judgements. Narratives, stories, voice and knowledge are all inextricably bound up in language. The examination of the language and discourses in these texts provides a most incisive means for retrieving the hidden processes that serve to block challenges to the dominance of law.

The reason why this study focuses on appellate judgements is that there are huge constraints on accessing material from legal trials dealing with child sexual abuse just as there are to accessing individuals who have experienced abuse, in a meaningful way. Judicial opinions from the Court of Appeal are public documents. Choosing legal opinions rather than interviews meant that I was studying an institutional discourse, rather than an individual one. This proved to be important because the cultural power of legal discourse lies in its capacity to resist subjugated knowledges. I opted to study auto/biographical stories about abuse experience because I wanted to see if there were issues within these narratives that did not, or could not, be fully engaged in legal terms. It could be argued that limiting the research to secondary data restricts the quality of the findings and there is some validity in this. However there are a number of advantages to adopting this approach. *Firstly*, confining the study to written text provides a consistent medium and produces a coherent analysis. A *second* strength of discourse analysis is its

attention to meaning, how it sheds light on the underside of the surface rhetoric of the judiciary. The focus on meaning and interpretation, rather than on the links between a small number of attributes or on a description of the legal world, gives depth and emphasis to the findings. *Thirdly*, it is suitable for tracing processes of meaning construction, how discourses are formed and disseminated and how they contrive to shore a hegemonic knowledge which views women and children as unreliable witnesses to truth. *Finally* the discursive analysis makes a key contribution to the epistemological and ontological debates about the reality of child sexual abuse. In Chapter 3, I develop these points and argue that a qualitative discourse analytic methodology provides the most useful tool for understanding the explicit and the hidden ways in which victims of sexual abuse are treated as subaltern subjects in law. Consequently, they cannot achieve justice in this forum. I relied on two sets of data in particular, legal texts and auto/biographical narratives (See Chapter 3).

1.5 Organisation of thesis

Chapter 2 outlines the significance of the issue of child abuse and reviews the main sociological approaches to the law and to legal reasoning. Chapter 3 develops the conceptual framework derived from Foucauldian, Feminist and Subaltern theories- which is deployed to frame and interpret the data analysed in the substantive chapters. Chapter 4 on methodology details how and why particular data was selected for analysis and reviews the approach adapted to discursive and narrative analysis. The analysis commences in Chapter 5 with the presentation of a discursive reading of the subjugated knowledge of the adult victim of child sexual abuse derived from personal narratives and testimonials. I highlight the importance of voice in the construction of agency and change. The following chapters, 6-9, document the workings of the Appellate courts

and the various procedures and discursive strategies deployed which ensure that the legal framing of the issue of child sexual abuse occurs within a closed system which is not capable, as currently constituted, of actively listening to the voice of the survivor of child abuse.

This thesis questions how the law understands child sexual abuse and how the law manages child sexual abuse strategically and discursively. It assesses the extent to which individuals who narrate their experiences of abuse contribute to legal knowledge, and evaluates how the law represents those knowledges and experiences. I argue that while the law and personal testimony are hierarchically positioned in terms of the validity accorded to their respective knowledges, uncovering the victim's voice at least creates the potential to move subjugated knowledge to centre stage. Legal texts show a concern for 'fairness'. The processes of law itself are understood by the citizen as a space where wrongs and harms will be judged and resolved in the fairest way possible. Legal rules and legal knowledge are primarily oriented toward this objective. Victims are more concerned that their understanding of justice will be acted out in the courts. But for this to be achieved, they would have to have a much stronger voice in the court system. My analysis suggests that the system, as it is set up, does not operate in a way that facilitates the adequate administration of justice (as opposed to law) for survivors of child sexual abuse.

In the cases presented for analysis here we see that legal methodology as practiced in the Appellate Courts defines its own boundaries and in so doing, defines what has legal value and what is not acceptable for inclusion. The judiciary retain all of the power in terms of dictating what forms of knowledge may be disclosed, incorporated or excluded from the frame of interpretation. The law frames knowledge about child sexual abuse through an objective lens and does not countenance information that falls

outside of that frame. For victims, there is no claim to objectivity; rather there is a stated (and therefore transparent) declaration of experience from a subjective point of view. Victims narratives are highly personalised accounts of abuse, they speak for themselves, but they are open to interpretation. The reader may accept or dismiss the accounts which they offer. They have their own validity but do not bear the legitimacy that is conferred in the court of law. In law there is no room for any language other than legal language. Having no experience, being *outside* the experience, is equated with being neutral and objective and therefore most suitable in reasoning about competing claims in the sphere of child sexual abuse. For victims this is a limit to the value of the legal process because legal language does not have the capacity to incorporate experience without hearing the emotions of experience. Legal language operates as a force of de-politicisation, it diffuses pain and harm. When emotion is acknowledged it brings context into play and broadens the ‘did he/didn’t he’ question and thus allows law to respond to the complexity of the issue of abuse.

If, as Simone de Beauvoir (1973: 161) declares, ‘the representation of the world, like the world itself, is the work of men, they describe it from their own point of view, which they confuse with the absolute truth’ then the importance of the presence and absence of voice is obvious. The construction of the truth about child sexual abuse is held exclusively by those in the legal domain, and victims’ voices are not given genuine space for expression. This restricts the conceptual openness of legal knowledge and therefore the powerlessness of the victims is maintained.

Judicial opinions have been absolutely crucial in constructing the logic of law. My reading of the Appellate Court proceedings suggests that the judiciary employ a patriarchal approach in their reading of the law. The discourses reveal many taken for granted assumptions about the problem of child sexual abuse, and show a distinct

disinclination to interrogate the interests of powerful institutions. The dislocation between constructions of child abuse through legal discourse and the lived reality of child abuse is exposed through the readings of auto/biographical narratives. I believe that such stories can provide confirmation of and/or resistance to other hegemonic discourses. They are an invaluable resource to counter hegemonic discourses for the future.

Chapter 2: Child sexual abuse and the law as a sociological concern

This Chapter provides a context for understanding the genesis of child sexual abuse as a problem and reviews the relevant sociological literature on the law. To provide a comprehensive overview of the literature relevant to the legal treatment of child sexual abuse, I will limit myself to examining the direction taken by emerging knowledges and how these interface with the legal system. The process of legal reasoning will be examined and the means through which victims develop a subjective understanding and prepare to establish voice will be explored. Specifically, I will introduce the debates and arguments on the position of victims in legal proceedings and the critique of law that has emanated from Luhmann, Habermas and Foucault. Particular attention will be paid to the feminist critique advanced by Smart and Finley to determine the most useful theoretical direction for the study. Finally, the concept of the subaltern will be introduced as one promising pathway to include the voice of the abused child. The theoretical approach taken in the thesis is further developed in Chapter 3.

2.1 The prevalence of child abuse

Child sexual abuse is considered a modern phenomenon. The ‘common-sense’ view of childhood is that, by and large, life has improved and that children are now recognised as important and valued members of our society. Yet it was not until the latter half of the twentieth century that the issue of child-abuse was ‘discovered’, i.e. publicly spoken about or *officially* acknowledged, although as we will show there was a general awareness of the problem many decades before this. In the Western world, a

combination of factors such as the insistent voice of the women's movement, the sheer numbers of reported occurrences and the connection of the troubled behaviours of the victims of abusive childhoods, meant that the issue was moved into the public realm. The media's exposure of institutional and church related abuse of children was a major factor in making these issues public in Ireland. However, the reality is, as Foucault demonstrated in *History of Sexuality*, that sexual activity between adults and children occurred in most societies throughout history.

Louise Jackson (1999) studied legal depositions of abuse cases which came into the London courts, in the period 1870-1914. Recognising the limitations of such depositions 'shaped as they were by the questions of police officers, lawyers, and judges' (p.134), she argues that they help us to understand the strategies of sexual regulation that pertained in various working-class neighbourhoods. While acknowledging that a large number of incidents of sexual abuse remained secret and hidden, sexual abuse was discussed, problematised and reported. Indecent assault or sexual abuse by a neighbour or a stranger was usually reported for it was seen as a violation which, once perpetrated could never be remedied, i.e. there was recognition of the pattern of repeated offences by abusers. Abuse, therefore, was reported for the protection of society, although it must be noted that Jackson's research on the regulation of child sexual abuse in London, does not necessarily mean that the public reaction was the same in Ireland.

Contemporary research on child sexual abuse is inspired by three key questions – how much - or the prevalence of child sexual abuse in society, what harm – what are the individual and social effects of such abuse and finally, who can we believe? (Nelson 1997). Let us briefly review each of these areas.

Studies about the prevalence of the problem in Ireland are consistent with data from other western countries. The most comprehensive report on the Irish situation was carried out in 2001 by a team from the Royal College of Surgeons in conjunction with the Dublin Rape Crisis centre (McGee, Garavan, de Barra, Byrne and Conroy. 2002). Over 3,000 randomly selected Irish adults took part in the study (n =3,120). This represented a 71 per cent participation rate of those invited. The results claim that one in five women reported experiencing contact sexual abuse in childhood and in a quarter of these cases the abuse involved penetrative sex – either vaginal, anal or oral sex. This means that twenty per cent of all women in Ireland experience sexual abuse at some level, some more serious than others. With men the figure was one in six, (just over sixteen per cent) of all boys experiencing penetrative sex. Twenty seven per cent of all Irish children, that is, one in four, have experienced sexual abuse before the age of seventeen (McGee et al. 2002). Figures such as these exemplify problems in researching abuse because the gap between this stated experience and disclosure statistics means that the problem is resistant to research. If only a small minority of incidents of abuse experienced by either boys or girls is reported, comprehensive research and consequent build-up of knowledge is not possible (Kelly, Burton and Regan 1998).

Most people who disclosed sexual violence did so to friends or family members. Almost half (forty seven per cent) of those who disclosed experiences of sexual violence in the Irish study reported that they had never previously disclosed that abuse to others. Thus in a study of over three thousand adults, over three hundred and fifty people disclosed instances of abuse for the first time to another person (McGee et al. 2002).

Statistics for the prevalence of child sexual abuse in Ireland are recorded by the legal system in such a way that that it is difficult to establish the actual incidence of

abuse. The number of cases that are reported, the rate of attrition for these cases, how many criminal procedures are taken (or not taken) by the Director of Public Prosecution, details of convictions and sentences, are recorded separately and it is difficult to link these different statistics together. This makes it impossible to accurately follow the incidence of legal involvement in child sexual abuse. If one adds to this the distinction between cases of adult and child rape and the categories of charges that cause confusion even for the judges and legal personnel, then one can see that this area of law is mired in complexity. Furthermore, the legal system contributes to the reluctance to report abuse because many victims lack confidence in both the police and judicial processes (Edwards 1996: 331). This reluctance to engage with the official state institutions conversely increases the vulnerability of the victim since the perpetrators can commit their crimes safely in the knowledge that they may never face arrest, prosecution or punishment.

A comparative study of legal processes in the European Union (Bacik, Maunsell and Grogan 1998) provides statistics from various countries on the number of rape cases that are reported; these statistics detail how many prosecutions were taken and the level of convictions of these cases. Comparing these figures with the information on the legal system in those countries has the advantage of showing the factors that increase the likelihood of reporting, of giving voice to abuse. Bacik et al. found no uniform method for recording statistics across the European countries that were researched. The fact that the relevant information is either not made available in Ireland, or is not systematically collated and processed is of major concern.

The effects of experiencing child sexual abuse include feelings of shame and stigma, guilt and self-blame, low self-worth, lack of trust in others or low sense of entitlement to help, (Hooper and Warwick 2006: 469). The association of such

personality deficiencies with child sexual abuse is problematic in the way that it reinforces the victimhood of women and children. It is also political in the way that it gives power to experts to appropriate the knowledge about abuse (Hacking 1995). Nevertheless it is still the case that these harmful effects constitute our knowledge about the problem.

The third element within the literature is the issue of veracity. Because the element of credibility is central to the court process, researchers from a legal studies perspective, along with psychology researchers, tend to examine how truth is constructed in law (Ellison 2005; Raitt and Zeedyk 2000). Foucault is a useful counterpoint here because he shifts attention away from establishing what is the 'truth', toward 'how certain discourses claim to speak the truth and thus can exercise power in a society that values this notion of truth' (Smart 1990: 196).

2.2 Uncovering child Sexual abuse

The tremendous growth in research about child sexual abuse (CSA) emerges in social policy, sociology, criminology, psychology, psychiatry and health disciplines. Psychology concentrated on the child as a developing adult and on men who are sexually violent, whereas social policy, medicine and law focused on the protection of the child. From this base, later academic work broadened to include a more extensive social field, recognising that no problem exists in isolation from the general social environment. Feminist literature concentrated on issues of power and patriarchy, and this was supported by more general social research about social problems of class, such as the frustration of poverty. Sociological knowledge about child sexual abuse is mainly located in the feminist approaches which deal with violence against women.

The disciplinary attention to child sexual abuse is premised on a relatively new accepted awareness of the reality of child sexual abuse in North America in particular, but also in Ireland, the United Kingdom and Australia, countries which share the same common law tradition. Some topics, like the testimony of children as witnesses and the problems associated with memory, have generated a particularly extensive literature (Spencer & Flin 1993). ‘Much CSA research tends to be characterised by an educated liberal optimism – that nearly everyone wants the best for children, that most people are engaged in a rational search for the facts, that conventional academic investigation methods will uncover these facts, and that what reputable professionals say to them about CSA can broadly be trusted’ (Nelson 1997). Such liberal optimism owes much to the dominance of the “welfare model” of CSA and the leading role social work has been accorded in tackling the problem, particularly in the early stages of awareness (Dingwall et al. 1983; King and Piper 1995). The research agenda broadened to focus on aspects of the criminal prosecution (Myers et al. 1999; Taylor 2004:4) and the psychological consequences of experiencing sexual abuse in childhood (Dent-Brown 1993; Jenkins 1997; Mullen et al 1993). Nelson argues, however, that it was only feminist research that could provide a robust critique of approaches grounded in liberal principles. Despite the crucial role played by feminists in foregrounding the subject, they provide only a partial voice within all the disciplines involved (Nelson 1997). The present study may go some way to explain why this is the case.

Four large independent studies on the subject of incest (Justice & Justice 1979; Lukianowicz 1972; Maisch 1972; Meiselman 1979) were undertaken following the exposure of the issue by women survivors and feminists, but it took high-profile scandals to bring the issue into the public domain, forcing institutional responses such as the establishment of protocols for dealing with child sexual abuse cases.

The McMartin preschool trial was a day care sexual abuse case of the 1980s. Members of the McMartin family, who operated a preschool in California, were charged with numerous acts of sexual abuse of children in their care. Accusations were made in 1983. Arrests and investigation took three years to complete and the trial ran from 1987 to 1990. The McMartin case affected the way the criminal justice system and criminal court proceedings in the United States handle child sexual molestation accusations and resulted in legislation that further protects sexually abused children in and out of the courtroom.

The 1987 Cleveland child abuse crisis in the United Kingdom also contributed to paradigmatic shift away from silence and toward disclosure in relation to child sexual abuse. Over the course of a few months, two pediatricians' diagnosed sexual abuse in 121 children from 57 families in the Cleveland area. Most of the children were removed from their homes under place of safety orders. This unprecedented situation came at a time when professionals were beginning to acknowledge the reality of child sexual abuse. The report of the Cleveland Inquiry opened its conclusions by stating: 'We have learned during the Inquiry that sexual abuse occurs in children of all ages, including the very young, to boys as well as girls, in all classes of society and frequently within the privacy of the family' (Butler-Sloss 1988). The crisis resulted from 'a lack of proper understanding by agencies of each others' functions and a lack of communication between agencies and a difference of opinion by middle managers which weren't recognised by senior staff and then affected those on the ground' (Butler-Sloss 1988: 243). Five years later, the Kilkenny Incest Inquiry (1993) in Ireland was to draw a similar conclusion.

The child protection system came under significant pressure as the rate of disclosure increased, and inevitably some scapegoating of professionals ensued

(Richardson 1993). Allegations of “false memory” and “false memory syndrome” became a feature of defenses in child sexual abuse cases in both the United Kingdom and the United States, although there is little evidence of such a defense being entered in the Irish case.

According to Richardson two competing discourses on child sexual abuse have since developed. The first version emphasises family support, suggesting that conflicts of interest between adults and children can be resolved amicably by the various players involved. This approach is embodied in ‘post-Cleveland’ legislation and procedures directed at children where the abuse has already come to light because the child has made a disclosure. The second version holds that the majority of sexually abused children are trapped in silence, unable to disclose and unable to get over the hurdles imposed by the investigative and legal systems (Richardson 2003:11). It is this second version that directs the path taken by this study.

It can be argued that the sensational way in which these very public investigations (McMartin and Cleveland) were handled- as moral panics fanned by the media- provoked real conflict within and between the knowledges that frame the issue of abuse. In turn, sensationalism may have contributed to the myths- “it didn’t really happen”- surrounding disclosures of victims of abuse. Nevertheless, it must be acknowledged that high profile cases such as McMartin and Cleveland were axiomatic to the development of knowledge and awareness of the issue of child sexual abuse

2.3 Documenting child sexual abuse in Ireland

Tom Inglis (1998b) argues that for historical reasons to do with economic underdevelopment and the strength of the Christian churches, the culture of sexual repression was almost a ‘norm’ in Ireland. The sudden disclosure of abuse by hundreds of adult survivors of child sexual abuse over decades (for example there were 371

allegations of sexual abuse within educational institutions alone to the Commission of Child Abuse) can also be best explained by locating it in the social context of a shift in church-state relationships of power and heightened economic development. The sheer number of disclosures had the effect of presenting the issue as new and as fresh knowledge from which the law had to learn. This obscured the history of legal patriarchal reasoning about the issue that was already long entrenched.

It is noteworthy, that Ireland's first major report on child sexual abuse was contained, kept hidden and secretive to avoid sensationalism. This decision was provoked by a political concern about how the moral culture of the newly established state might be undermined by the content of the report. The tight-knit institutional response, was facilitated by the patriarchal web that was in place at that time whereby the Catholic Church controlled both education and health institutions and had huge influence in both state and legal decisions and policies (Inglis 1998).

The Carrigan Report on the incidence of sexual crime was commissioned in June 1930, to consider if further change was necessary to the Criminal Law Amendment Acts of 1880 and 1885. The impetus for this was the legislative changes to these Acts in England, Scotland and Northern Ireland in the previous decade, which meant that the law against sexual offences in Ireland was more lenient than the other jurisdictions. Thus, the focus was on the legislation rather than on the supportive services of child protection. The Carrigan Committee found:

‘That there was an alarming amount of sexual crime increasing yearly, a feature of which was the large number of cases of criminal interference with girls and children from 16 years downwards, including many cases of children under 10 years; that **the police** estimated that not 15 per cent, of such cases were prosecuted, because of (1) The anxiety of **parents** to keep them secret in the interests of their children, the victims of such outrages, which overcame the desire to punish the offenders; (2) The reluctance of parents to subject their children to the ordeal of appearing before a **public Court** to be examined and

cross-examined; (3) The actual and technical embarrassments in **the way of** a successful prosecution of such offenders owing to (a) the difficulty of proof, from the private nature of the offence, usually depending on the evidence of a single witness, the child; (b) the existing law, or the rule of practice in such cases, requiring corroboration, or requiring the Judge to warn the Jury of the danger of convicting the accused upon the uncorroborated evidence of the witness' (Kennedy 2000: 355).

The spotlight was shone on the legal processes and stressed the ways in which prevailing judicial practices resulted in children sometimes being treated not as victims but as accomplices in a crime:

'The latter assumption must tend to defeat the object of the statute, for the jury is most likely to acquit the accused if the Judge must warn the jury that the juvenile witness, with whom a sexual offence is alleged to have been privately committed by the accused, is an accomplice, whose uncorroborated evidence it would be dangerous to accept. We are satisfied the operation of this, is responsible for grave miscarriages, of Justice. (Carrigan quoted in Kennedy)'

The report criticised protracted procedures which put "a strain upon the child, under which not infrequently she or he breaks down, and the prosecution fails or must be abandoned. 'Indeed, it may be believed that the frequency of assaults on young children is to some degree attributable to the impunity on which culprits may reckon under this protection.'" (ibid: 26). It is the contention of this thesis that the court system to the present day remains reluctant to give voice to the victim of abuse, and that court procedures and protocols as well as legal reasoning are constituted in such a way as to afford greater protection to the perpetrator than the victim.

The Carrigan report contradicted the representation of Ireland as an island of 'saints and scholars', the national identity promoted at the time. Mark Finnane acknowledges the role of key Catholic prelates in formulating post-independence social policy, and he emphasises the role of other agencies and institutions, including An Garda Síochána and the courts, in shaping the post-independence "moral order"

(Maguire 2006). The Department of Justice were strongly advised against the publication of the Carrigan Report by one Irish cleric who declared that:

‘It would be far better if a bill dealing with matters reported on by the commission could be passed into law without public discussion in the Dail. A judge or two, a lawyer or two, a well-balanced priest or two, an experienced police officer, meeting in private, and all sharing the Catholic view on the moral gravity of sexual offences, could give government much helpful advice.

Rev. J. Canavan, S.J., to Geoghegan, n.d. (N.A.I., DJ H247/41B). (Finnane 2001: 526)

This view was supported by another religious advisor who argued that:

‘...such a report would not create a good impression. It would lead many to say, as the departmental report suggests, that the influence of religion has failed in this country’. *Rev. M. J. Browne to Geoghegan, 13 Nov. 1932 (ibid.) (Finnane 2001: 527)*

We can see here the complicity between Church and State, resulting in the silencing of the report and its effective removal from the public domain. The political context surrounding this report provoked a response that placed the child low on the ladder of concern.

Not surprisingly, developments in legislation for and about children have been tortuously slow in Ireland relative to other jurisdictions such as the United Kingdom. All the 19th century legislation was replaced by the Children Act, 1908, popularly known as the Children’s Charter. This Act applied a unified system of law in England, Wales and Ireland. The Children Act, 1908 dealt with various topics, eg. the prevention of cruelty to children, protection of infant life, and provision for juvenile offences. Important provisions provided the constitutional basis for reformatories and industrial schools. This continued to be the primary legislation for vulnerable children in Ireland until it was amended by the Child Care Act, 1991, almost a century later and which was

not fully operational until 1996. The 1991 Act was replaced by the Children Act, 2001 which was signed into law in July 2001. There seems to be a considerable lacuna in the development of children's rights in the law. In light of that, this study will pay particular attention to the forms of legal reasoning employed by the judiciary in the Appellate court in the development of law through the creation of precedent, and the manner in which that reasoning directs or resists changes in legislation.

Since the Carrigan report, Irish child abuse inquiries and those specifically in relation to child sexual abuse cases, have focused predominantly on the deficiencies within the relevant child protection systems and institutions which rendered a particular child(ren) vulnerable (See McGuinness, 1993 (Kilkenny Incest Case); North Western Health Board, 1998 (Sophie McColgan); Department of Health, 1996 (Madonna House). These inquiries were undertaken contemporaneously with the disclosure of the incidences and subsequent media exposures. The Report of the Kilkenny Incest Investigation, published in 1993, was the first major child abuse inquiry in Ireland. It examined the circumstances surrounding the continued physical and sexual abuse by a father of his daughter over a thirteen year period during which the family was known to a number of child protection professionals. It received major coverage in the media, and is generally regarded as having provided the catalyst for widespread overhaul and expansion of the child protection services (Buckley 1999:21). It also provided an insight into the deficiencies of the child protection system, including the legal system. The most well documented report of physical and sexual abuse within a group of institutions was *The Commission to Inquire into Child Abuse*, emanating from the Office of the Minister for Children and Youth Affairs. This was established to examine, *retrospectively*, evidence of abuse from 'persons who allege they suffered abuse in childhood, in institutions, during the period from 1940 or earlier, to the present day'

(Commission 2002). Although instituted by the Irish government the Commission encountered resistance from many quarters and eventually the Chief investigator (Justice Mary Laffoy) resigned. The Department of Education which historically had drafted and implemented the legislation governing children and condemning many children to a life in institutional care, was notable for its non-cooperation with and resistance to the Inquiry. The disjuncture between the rhetoric of child-centred concerns and the reality of resistance to public and legal exposure of the problems is a theme which runs through the current study. Is the judiciary a part of this problem? To what extent can we deduce from the legal reasoning underpinning judgements in the Appellate Courts a form of patriarchal hegemony at work? What happens when there is a general shift in concern and willingness to foreground the issue of abuse, as has happened with retrospective adult accounts of abuse, (for example, Raftery and O'Sullivan, 1999; Doyle, 1988; Moore, 1995; McKay, 1998.)? Is the legal system capable of a response?

2.4 Legal Reasoning

Ultimately this thesis is about legal reasoning. It sets out to uncover the judicial reasoning and justifications for that reasoning in the Appellate Court about cases dealing with child sexual abuse. Max Weber in developing his idea of the legal rational form suggested that domination was attributable not to particular people, but to abstract norms. The term 'legal reasoning' can be used in both a broad and a narrow sense. In the broad sense it refers to the psychological processes undergone by judges in reaching decisions in cases that are presented before them. These processes comprise ideas, beliefs, hunches, conjectures, feelings and emotions. It could be said that, in this broad sense, legal reasoning is part of the biography of the judge/s. In the narrow sense, on

the other hand, ‘legal reasoning’ focuses on questions of law and refers to the arguments that judges give in support of the decisions they produce. This sense involves the logic of legal argument, and the relationship between reasons and decisions. The analysis of these two positions on what the law is, how it works, and as a consequence, the decisions of the judiciary are crucial for this project. The critical enterprise here is to hold Irish criminal law up to scrutiny in its dealings with child sexual abuse, in terms of the standards which it professes to hold. This will inform the direction taken in the analysis of the data. The question here is whether Irish Appellate judgements consist of a clear and determined set of norms which are based on a coherent set of principles, or if they represent a contradictory set of approaches which are somewhat obscured by the rhetoric of neutrality and objectivity which emanate from the legal profession. By deconstructing and scrutinising carefully the texts from the Appellate Court I will reveal the ideological dimensions that interweave with the rationality thesis and in so doing, create the potential to serve certain power interests. ‘The judges are not simply the neutral occupants of a value-free role; they form part of the socio-political elite, which operates through a discourse of rationalism, individualism and neutrality’ (Norrie 2001).

Legal reasoning must be viewed in the context of law’s relationship with knowledge from other systems, and the particular history and tradition of legal understanding. The legal context can be viewed from different perspectives and two, in particular, are relevant here. Firstly there is the systems perspective that positions law in relation to other social disciplines. To this end the most important theorists involved in analysing law as a social system are Luhmann, who views it as a closed system, Habermas, who seeks to idealise the communicative potential of the legal system and Foucault’s critical commentary on law’s power through discourse. Secondly, the

feminist perspective that critiques the gendered nature of law and the way this is expressed in judicial texts. These perspectives are particularly relevant because of their focus on communication and voice.

2.5 Luhmann: Law as a Closed System

‘Law constructs order from the outside noise of the external world’ says Luhmann (1988: 337), giving law a specific function, as part of the societal community in the social system. In a traditional undifferentiated world, law complemented the rule of King/Ruler/Religion. In modern fragmented societies law is seen as its replacement. It does so through procedures formulated in terms of the general principles of equality of social participation. Drawing on the theory of Maturana and Varela (1980), which defined and explained the concept of living systems, Luhmann and Teubner theorise society in terms of a complex system of interconnected parts. A system is defined by its boundary; this means choosing which entities are inside the system and which are outside. Increasingly, the world fragmented into a group of subsystems all differentiated from each other. As the world increased in complexity the division into systems facilitated a form of social organization, in which each system operates selectively in terms of its openness to information transfers across systems. Selecting only a limited amount of all information available outside the system allows each system to process its own requirements. Nevertheless, all social subsystems are systems of communication. Competing discourses from differing sub-systems are produced, each declaring their versions of reality. Because of the disappearance of a normative consensus, law (or some body of knowledge) must have the authority to construct the final or definitive version of this reality. But how does Law construct this version; does

it choose from the available, competing discourses the one considered to have the greatest validity? Not according to Luhmann.

Luhmann describes the state of modern subsystems with the term autopoiesis. The important element taken from Maturana and Valero is the recursive nature of autopoiesis, which involves the repeated application of a function to its own values (Encarta 2009). This means that the communication with other systems is totally dependent on and derived from a selection process that is determined by each system's internal criteria. This aspect of Luhmann's theory is crucial for how I can understand the judicial decisions taken and justifications for those decisions in the Appellate court cases. For example it will help us appreciate how the introduction of the Victim Impact Statements fit into legal reasoning. For Luhmann, systems are cognitively open, but operationally closed (1988: 19-23). Developing his theory of law in terms of producing social order, Luhmann sees its real function as 'the exploitation of conflict perspectives for the formation and reproduction ofgeneralised behavioural expectations' (*ibid*: 347). Thus, when a violation of a legal norm occurs, the legal system's function is to reaffirm or shore up those norms. This is accomplished through law's internal processes, which are based on the binary code of lawful/unlawful (Luhmann 1989:140). Law is a self-reproducing system of communication – or, as Cotterrell puts it, paraphrasing Luhmann, law is a self founded discourse that defines what is legal or illegal. This binary coding is understood as a system of 'self-referential validity' (2006). It is the reality produced by the system delving into its own understanding to create/construct that reality. This patently involves a process of circular thinking, whereby the 'world becomes frozen in its existing realities' (Gabel 1980) and it is one which provokes an analysis of the concept of precedence, (see below). However, Luhmann argues, the system takes into account whether or not certain factual conditions

are met – ‘law’s conditioning program’ – by the other system (*ibid*: 140). This provides law with its ‘cognitive openness’. This ‘whether or not’, ‘if/then’ structure, entails a way of thinking that is specifically legal (King and Piper 1990). In order for the legal system to maintain its autonomous (and privileged) status it is vital that the element of cognitive openness, its communication with other systems, is restricted. Otherwise it will become ‘contaminated’ with non-legal knowledge. It is this notion of the potentially subversive impact of ‘contamination’ by the experiential knowledge of victims that is at the heart of this thesis.

‘The crucial feature of modern society is the loss of a unifying mode of cognition. Society is seen as fragmented into a multiplicity of closed cognitive networks’ (Teubner 1989:738). Although the concentration is on the ‘system’, Luhmann’s notion of social autopoiesis involves procedures of information, understanding and expressiveness, and this brings the individual into the frame. It has been argued that autopoiesis avoids a focus on law as constituted by either rules or decision-makers,. Instead, autopoiesis sees law made up ‘of legal communications, defined as the synthesis of three meaning selections: utterance, information and understanding’ (Teubner 1989: 739). These communications, in turn, ‘are interrelated to each other in a network of communications that produces nothing but communications’ (*ibid.* 740). The result is the ‘self reproduction of a network of communicative operations by the recursive application of communications to the results of former communications. Law as a communicative network produces legal communications’ (*ibid.* 739-740).

The criterion according to which information is selected and processed is meaning (Strydom 1999) and both social systems and psychic or personal systems operate by processing meaning. Luhmann differentiates between ‘social systems; and

what he calls ‘psychic construction’ or the internal mental activities of individuals. He accounts for these as individual closed autopoietic systems. Following his logic of autopoiesis this necessarily means that the individual and the system cannot relate directly to each other. This will have important implications for the way law deals with child sexual abuse when it comes to listening to the voice of the victims. Valverde acknowledges, from her own research, that ‘extra-legal’ knowledge is bound to be dominated by the relatively closed system of legal knowledge:

‘To say that legal processes transform beyond recognition outside knowledge claims, such that law’s own logic is not at all threatened, and is in fact reinforced, is a statement which certainly describes, rather too abstractly but nevertheless accurately, a lot of my own research on the fate of extralegal knowledges in legal arenas.’(Valverde 2006:595)

She argues, however, that Luhmann misses the important point that there is, in fact, a two-way flow of knowledge between law and other knowledges outside the system, even to the effect that many other ‘systems’ of knowledge become legalised. When we examine the relationship between expert, individual experience, ‘popular provenance’ (Valverde 2006) and legal knowledge we shall see if there is a cross flow between these knowledge systems, and what the implications of that are for victims of abuse.

2.6 Habermas: Law as a System of Communication

Habermas theorises law somewhat differently although he shares the notion of the centrality of communication in the legal system. Focusing on modernity as a differentiated and rationalised social system, he argues that society develops into what he terms ‘lifeworld’. This lifeworld involves institutions of socialisation – family, religion, education etc. Crucially however, our rationalised society is centered on or around systems of economy and politics. He contends that these systems have split off from the lifeworld and efficiently organise society’s external environment around money and power. To achieve their goals of profit and efficiency the systems penetrate

back into the lifeworld, effectively colonising them. In this process he proposes that society is dominated by strategic instrument rationality at the expense of the truly social or human element. In contrast to Luhmann's closed autopoietic concept, Habermas insists that **all** action is relational. He begins by 'locating rationality in structures of interpersonal linguistic communication', recognising that humans have develop their rationality through language community. This relational communication is weakened through systems' colonisation and Habermas sets out to resolve this problem through the central concept of intersubjectivity (Habermas 1987).

In keeping with the Frankfurt school tradition he is critical of positivism and scientism – the notion that valid human knowledge is restricted to empirically testable propositions arrived at through disinterested, value-free inquiry. Such a position prohibits attributing a rational element to meaning, values and experience. Neither does it take into account how psychological and social structures affect our modes of thought. Influenced by Thomas Mead's theory of Symbolic Interactionism and also applying the hermeneutic concept, Habermas recognises the way we can understand the motives, values, emotions and thoughts of others – subjectively – to acknowledge their world but always through our a *priori* experience. He says "every process of understanding takes place against the background of a culturally ingrained preunderstanding' (1984:100). This discourse theory sets us on the path to understanding why judges reason in the way they do, in that we can view their forms of reasoning against the backdrop of the socio-historical and cultural context. Attention must also be drawn to Habermas's instruction that '...The interpretative task consists in incorporating the others interpretation of the situation into ones' own..." (1984:100). The problem with accepting this uncritically lies in not acknowledging the disjuncture between legal knowledge and others' experience particularly when it involves

disproportionate levels of power between the teller and receiver (victim and judge). As with text we can relate to each other's reality if we enter into "a dialectical movement from the text to our interpretation, checking against the text, then modifying the interpretation, in a silent dialogue of one subjectivity with the written projection of another" (Grady and Wells 1985). Knowledge is derived from relating, not from the individual consciousness; the medium that facilitates this production is language.

For Habermas relating through language is best carried out in the 'ideal speech situation'. In a successful act of communication, the speaker and hearer agree that the process contains the five key processual requirements (1) no party affected by what is being discussed should be excluded from the discourse (this is the element of generality); (2) all participants should have equality possibility to present and criticize validity claims in the process of discourse (individual autonomy); (3) participants must be willing and able to empathize with each other's validity claims (ideal role taking); (4) existing power differences between participants must be neutralized such that these difference have no effect on the creation of consensus (neutralising power); and (5) participants must openly explain their goals and intentions and in this connection desist from strategic action (demanding transparency) (Habermas 1993:31; 1990: 65-66). It occurs to us that such a vision of this utopia of 'ideal speech situations' is just that – the idea is attractive but how is it to be achieved? Where are the voices of abused children, which have been systematically silenced, supposed to fit into this paradigm of communication? Must they go through a prior phase of empowerment before they are able to give voice to their experiences? These questions cannot be answered satisfactorily by Habermas. The subaltern perspective (examined below) offers a more robust framework within which to locate the voice of the victim.

Habermas requires from participants 'communicative competence' or the ability to master linguistic rules in order to make full use of language functions.

Competence involves communication involving three elements:

Subjective, containing the "totality of experiences to which only one individual has privileged access"

Intersubjective: where "Every consensus rests on an inter-subjective recognition of criticisable validity claims; it is thereby presupposed that those acting communicatively are capable of mutual criticism" (p.119)... invoking the hermeneutic tradition

and thirdly

Objective because "The concept of communicative action presupposes the use of language as a medium for a kind of reaching understanding, in the course of which participants, through relating to a world, reciprocally raise validity claims that can be accepted or contested".(p 99)

Each element must be capable of being subjected to rationality. The objective of this communication, according to Habermas, is to arrive at a critical ability which will support the individual in the quest for liberation from domination (of ideology) and ultimately lead to the transformation and rationalisation of society. The knowledge thus created is grounded in discourse, through the social theory insists on the recognition of equal value of all discourse – scientific, persuasive or expressive – and that generates continual and continuous reflection.

'The fundamental faith in the power of reason ...becomes the central tenet of establishing truth claims. When all of the ordinary constraints on the free exchange of ideas (such as differences in status, power, authority, and *ethos*) are lifted, Habermas believes that good faith discourse between individuals will allow them to reach a consensus about truth and the validity of norms. Thus, truth does not reside 'out there', but instead resides within the community' (Stickle 2004).

How does Habermas's theory operate in the legal context? Given the dominance of the system (political and economic) over the lifeworld (social) and of their separation, the part played by law is crucial. To re-integrate these elements law

provides the link – by legitimating the operation of both. A modern society, complex and differentiated, requires rules that operate beyond those values that are characteristic to particular traditions, i.e. they must be based on abstract principles instead, generalisable and subject to critique (Deflem 1996). Deflem continues “Morality then becomes a personal matter of concrete but subjective moral- practical concerns, while law, as a social institution with external force, materialises abstract normative standards for the whole of society” (ibid). Law’s normative content is extrapolated through discourse and, of necessity, must be constructed interactively if it is to sustain its legitimacy. Thus its compelling force comes from within. Crucially, Habermas sees law as the medium through which social norms are institutionalised but not to the extent that they are fixed forever. Criticism ensures that there is a continual questioning, justification and ‘correction’ of values, in line with the society in which they operate. Criminal law is distinctive in its moral centering. When we come to examine in detail the specifics of the relationship between law and child sexual abuse we can assess if the knowledge produced in this relationship is/can be defined in terms of ambivalence – if individual ‘rights’, are achieved and determined within terms dictated by the state, the economy and by law itself.

The basic weakness of Habermas’s project is in the disjuncture between ideal theory and real rationality, between intentions and their application. Along with Foucault I argue that the problem with Habermas’s theory is rooted in an insufficient conception of power (Foucault 1976)¹ Habermas himself observes that discourse cannot by itself ensure that the conditions for discourse ethics and democracy are met (Habermas 1990: 209). For instance, his theory is unable to confront the implications of

¹ Translated by Gerald Moore, 2007. ‘The Meshes of Power. Pp. 153–169 in *Space Knowledge and Power: Foucault*. Edited by Jeremy Crampton and Stuart Elden. Ashgate Publishing Ltd.

an extreme imbalance of power in the discursive arena of the court room. This is the predicament in Habermas's thinking: he describes to us the utopia of communicative rationality but not how it 'gets done'. Habermas himself mentions lack of "crucial institutions," lack of "crucial socialization" and "poverty, abuse, and degradation" as barriers to discursive decision-making (ibid.), but he has little to say about the relations of power that create these barriers and how rationality and power may be changed in order to begin the kinds of institutional and legal change, improvements in welfare, and enforcement of basic human rights that could help lower the barriers. In short, Habermas lacks the kind of concrete understanding of relations of power, which is needed for the change desired by victims of abuse.

2.7 Foucault: Law as a System of Discourse / Power / Knowledge

Foucault sets out to challenge, 'every abuse of power, whoever the author, whoever the victims' (Foucault quoted in Miller 1993). Denying the possibility of the ideal speech situation espoused by Habermas, particularly in legal realities, Foucault contends that speech is constrained and unequal and that speech and expression actually reflect relations of power. Foucauldian writers approach law from two perspectives. The first group sees 'law' as a metanarrative – an overarching story that 'explains' society as we know it now (Hunter: 1993; Murphy: 1997; Douzinas: 1994; Goodrich: 1987). The second group of contributors employs the idea of 'law as discourse' (Van Krieken 1996; Cotterrell 2006; Bix 1993: 85), applying it to the world and using Foucault's historical methods to provide evidence for this application of 'law as discourse' to society. The analysis presented in this thesis follows the latter line of theoretical development. Specifically, I contend that there is an important link between

discourse and power and this can contribute to our understanding of the precepts of legal reasoning. For instance, we can theorise the concept of 'Precedence' through the lens of Foucault's theory of discursive power.

As noted above by Luhmann as a system of knowledge law finds meaning within its own domain. The practical way of achieving this is to reach back into and build upon previous knowledge constructions, a task which is accomplished through the concept of precedent. The practical (and legal) understanding of 'Precedent' is central to the reasoning of the judges in the Appellate Court. The operation of the doctrine of *stare decisis* is best explained by reference to the English translation of this Latin phrase. "Stare decisis" literally translates as "to stand by decided matters". The phrase "stare decisis" is itself an abbreviation of the Latin phrase "stare decisis et non quieta movere" which translates as "to stand by decisions and not to disturb settled matters" (Duhaime 2009). This institutes a policy whereby, once a court has made a decision on a certain set of facts, lower courts must apply that precedent in subsequent cases where the facts are substantially the same. The doctrine of precedent declares that cases must be decided the same way when their material facts are the same. Obviously it does not require that *all* the facts should be the same as this would be entirely impractical. We know that in the flux of life the facts of a case in their entirety are unlikely to persist, but the *legally* material facts may recur and it is with these that the doctrine is concerned.

Common law is based on precedent, that is, the system of deciding cases using legal principles developed in earlier case law, as distinct from statutory or constitutional laws. Common law changes over time, principally because of the insertion of new knowledge(s) and because of shifting social contexts.

"The object of the common law is to solve difficulties and adjust relations in social and commercial life. It must meet, in so far as it can, sets of fact abnormal as well as usual. It must grow with the development of the nation. It must face and deal with changing or novel circumstances. Unless it can do that, it fails in its function and declines in its dignity. An expanding society demands an expanding common law." (Duhaime 2009, quoting Justice McArdie in *Prager v Blatspiel and others* 1924 King's Bench Division 599)

Consistency and objectivity are at the heart of the common law system. The idea of Precedence is not simply that a judge is referred to earlier decisions of the courts for guidance; he/she is bound, in practice and through tradition, to apply the rule of law contained in those decisions. To operate a doctrine of precedent, the legal system requires three elements or practices: law reporting, hierarchical court structure and binding elements which involve *ratio decidendi* (the rationale for the decision) or the underlying and core principle of the law upon which a case is decided. The statement of the rationale involved entails the general reasons and the underlying principles given for the decision or the general grounds upon which it is based, detached or abstracted from the specific particularities of the case which gives rise to the decision (Duhaime 2009). Judges are expected to decide cases according to the best application of precedents (and other legal sources such as the Constitution and statutes) to the facts at hand.

However, it is not simply a matter of following rules, for if this were the case then computers could do the job equally well, if not more accurately. Few scholars in the law or other disciplines believe that judges are totally constrained in this manner (Dickson 2001, Leavenbrook 2000, Murphy 1991, for example), because they also retain the responsibility to reinterpret and revise the law to adapt to changing social conditions and philosophies. The legal institution is also concerned with the disruptive effect that would result from sharp changes in the path of reasoning and so it is more likely to bring about change in a gradualist way. Problems occur when a particular

knowledge, such as child sexual abuse, is suddenly and dramatically brought into the public domain. A cultural lag can then develop between the legal/judicial knowledge and the levels of awareness and concern that prevail in the wider social environment. Following Dent's lead, the *sociological* understanding of the way in which the principle of precedent in law operates is encapsulated within a theoretical framework derived from Foucault. My aim is to approach legal precedent from a sociologically grounded perspective.

Foucault's treatment of the discursive formation allows us to 'get inside' the legal reasoning that emanates from this regulation. Two basic distinctions proposed by Foucault are the difference between discourse and language on the one hand, and between discourse and logic on the other. Broadly speaking, one might argue that discourse is what has been actually said, while language and logic are what can be correctly said under the particular collection of criminal laws pertaining to a subject. In Foucault's words: "[...] discourse is constituted by the difference between what one could say correctly at one period (under the rules of grammar and logic), and what is actually said. The discursive field is, at a specific moment, the law of this difference. It thus defines a *certain number of operations which are not of the order of linguistic construction or formal deduction*" (Foucault 1991: 63 emphasis added). This study of the discourse that constitutes cases passing through the Appellate Court attempts to focus on what is actually said, interpreting also what is not said, rather than on the legal *raison d'être* for saying it.

Broadly defined, a discursive formation refers to a group or family of statements (Deleuze 1988: 5). For Hunt and Wickham, a discursive formation is a 'system of more or less stable elements of a discourse that are linked or associated' (1994: 9). *Formation* refers to the specific set of rules of constitution and existence of all the statements and

the concepts and theoretical options that form the background to these statements. This constitutes the legal system, but it is not static and immutable across time. *Transformation* occurs when new rules of formation come into effect and modify the whole ‘architecture’ and operation of an existing assembly of these same statements, concepts and theoretical choices. Transformation is effected by the introduction of a fresh organisation of the discursive formation through the recomposition of some of them, the elision of others and the emergence of new ones. Setting out to search for ‘transformations’ or indeed, a deliberate resistance to transformation, is an investigative aim of this thesis. The ability and means to disperse discourse is the ability to control, limit and perpetuate a discursive formation (Foucault 1981: 62). The modes of control are operated through the system of discursive *practices*. These practices regulate the behaviour of the subjects within the discourse – the legal actors – who are socialised into the system and propagate the discourse to those who follow behind, perpetuating the formation. This conceptualization is useful for developing a sociologically grounded understanding of the concept of precedence and in particular, its centrality to the disposition of cases passing through the Appellate Court.

The legal discursive formation is constituted by and constructed through the process of repeating previous statements. This process provides a subtle and imperceptible means for controlling the legal system by empowering the judges to control the way law works. In summary, therefore, it can be argued that legal discourse has been formed and maintained by a particular group. The judiciary are largely a self-regulated group whose particularised knowledge is demonstrated through a process of legal reasoning that lays great store in the concept of precedent. Through the continuing application of the principle of precedence, common law, though capable of incorporating new knowledge, is primarily oriented toward retaining the status quo.

Foucault argues that ‘the role of discourse is controlled, organised, redistributed, by a certain number of procedures whose role is to ward off its powers and dangers, to gain mastery over its chance events, to evade its materiality’ (1982: 49). At the heart of these procedures is the constant repetition of previous juridical statements, so that they become ‘Truth’.

Unlikely though it may seem, there is no actual ‘rule’ of precedent. The concept of *stare decisis* is a reliance on the *ratio decidendi* of the previous decision. At the same time, there is no specific way of determining what the actual reason was for deciding a case one way or the other. This ‘fuzziness’ is central to the successful operation of the practice; it allows space for judicial interpretation which means that common law is ‘produced’ rather than ‘discovered’ by the judges and lawyers. Why does this distinction matter? If we understand that judges play a role in constructing the reality they reason about, they can be understood to reproduce the discursive practices of the legal discursive formation. It follows from this discussion that the choice and/or interpretation of previous statements by the judiciary results in the production of a discourse around child sexual abuse that is susceptible to critique. Foucault himself found that a problem he encountered in his study of madness was that he himself contributed to the exclusion of madness by making it an object of analysis. Thus, by studying the discursive practices embedded in Precedence, we also must be careful not to slavishly repeat the ‘truth’ that it espouses. Instead the task here will be to look for power - who gains, who is excluded and who is constituted in what way – through the deconstruction of the taken-for-granted role of precedence in law.

A critical reflection on the relationship between systems and structures and the outcome of judicial legal reasoning is crucial. Through the use of a discursive standpoint it allows us to identify previously unvoiced patterns, and this will correct

passive acceptance of legal rhetoric and justifications for decisions. However, in order to contextualize the concept of voice that is imperative to this study we need to incorporate a further subjective and reflective interpretation. It is my contention that a feminist perspective will provide this deeper and more complete insight. Analysing the law through the lens of systems and structures is one way of understanding the judicial texts under review and it seems particularly useful when employing a discursive standpoint. I suspect though that it does not provide the optimal way of contextualizing the concept/use of voice in this thesis, or at least not as useful as a feminist approach does.

2.8 Feminism: Law as a Patriarchal System

The dominant liberal version of law is that of law as the expression of abstract, universal rationality, universally applicable. Accordingly, law involves the application of principles and rational argument: “Logic and doctrine rather than power and influence are considered decisive” (Simpson & Charlesworth 1995: 86). However, this argument fails to take into account the human element that is also involved in reasoning. Human beings are not simply reason; rather reason is one of the components of being human. In the liberal framework, law is considered a discrete set of principles, separate from other forms of social control and independent of social, political, economic and personal interests, or any other form of context (Luhmann 1991; Hunt 1986; Goodrich 1986). It is applied in a formalistic way (so that its use can be predicted in advance and its justification challenged later) (Bottomley et al. 1997:12). In a more narrow sense, law is a deductive system of internally consistent rules. This system is seen to be internally consistent despite apparent inconsistencies and contradictions, and choices between different possible outcomes are resolved by applying legal rules to

objective facts. Thus, it is argued, apparent inconsistencies can be reconciled through relating them to the rules, and the proper application of the rules to the facts makes the just outcome more or less inevitable (Bottomley et al. 1997). However the problem with this assessment lies in the failure to focus on the foundation of the rules themselves. From a feminist standpoint it is argued that the rules from which legal reasoning is derived fails to ‘take into account the experiences and values that seem more typical of women than of men’ (Bartlett 1993:551). Lucinda Finley categorically argues that:

‘The legal system and its reasoning structure has been framed on the basis of life experiences typical to empowered white males.....Law’s reasoning structures shares a great deal with the assumptions of the liberal, intellectual and philosophical tradition[and] is thus congruent with the patterns of socialization, experience and values of a particular group of privileged educated men. Rationality, abstraction, a preference for statistical and empirical proofs over experiential or anecdotal evidence and a conflict model of social life corresponds to how these men have been socialized, and educated to think, live and work.’
(Finley 1993:572)

Finley cogently argues that legal reasoning is flawed because it fails to acknowledge women in the very way it is structured. Central to this argument is the concept of power. Men traditionally have had access to power and express this legally. The concepts of patriarchy, gender, knowledge and power are central to radical feminist analysis of the relationship between law and child sexual abuse. It is not about one or other of these concepts but the overlap between them all. Carol Smart draws on Foucault’s theory of ‘discourse’ to examine women’s relationship to law. Smart is concerned with ‘definition’ and ‘identity’, and with law’s active role in defining women – in constructing what she calls ‘the category ‘Woman’ (Smart, 1992). By revealing the extent to which ‘law is implicated in our everyday lives’ even when we are unaware of its presence Smart shows how we can best employ discourse theory (1995: 2). This

method of analysis enables her to examine the processes through which discourses construct women as gendered subjects. In other words, law's relationship to women's experiences is not as direct and one-dimensional as earlier liberal, radical and socialist feminists perceived it. It is not merely a case of law discounting the realities of women's lives rather, she argues, the Foucauldian perspective is capable of revealing that law has a more subtle and implicit role in actively shaping women's experiences in the first place. The spotlight turns on to law and discourse, rather than on to structure and agency. The focus is on 'deconstructing Truth and analysing the power effects that such claims to Truth entail' (Smart, 1995:45). This focus informs the current study which attempts to shed light on how adult survivors' experience of voicing abuse is actively shaped by and constituted through the law.

Feminist theorists (Gilligan 1982, Smart 1992, Burbules 1994) recognise the ultimate power that language contains:

'Language, in this view, is not a structure that stands over and against us, but a social practice that we change, and are changed by, every time we participate in it. Because communicative relations are situated in specific contexts and social institutions, the possibilities and limits of language to allow us to engage in a reflexive examination and reconsideration of identity provide a critical lens through which those contexts and institutions can be judged.'

(Burbules: 1994).

Thus, they confront the way law constructs particular definitions of practices (rape and sexual abuse) and of players (perpetrators, victims, experts etc. and ultimately of 'woman'). The power to challenge law's definitions is the agency that feminists want. There is a real danger that the overarching power of law's discourse is so strong that it will be impervious to opposition. As Fegan terms it, the dominance of '*law's constructions, (arguably the most powerfully constitutive discourse of our social world) their subtlety and endurance – their ideological import*' are so successful that '*many women may share in these ideals*' (Fegan, 1999:246). Thus we need to focus not on

what we know, rather on how we know. This is the precise focus of this study. By examining the discourses evident in the Appellate court judgments we can identify the layers involved in constructing child sexual abuse. They reveal how women are spoken about and spoken for, how their voices are heard through scripts that are written for them (through statements and legal representation). In other words, following Smart, I will focus on the way the subject is discursively constructed:

‘This entails a significant shift in perception away from the idea that people exist in an a priori state, waiting for institutions to act upon them, towards thinking about subjects who are being continually constituted and who also constitute themselves through language/discourse’.

(Smart, 1995: 8)

There is no doubt that this is effective, but all reality is not within discourses, at least not explicitly. For example, it is hard to abstract shame, the need to be loved, feeling worthless etc. from the discourses within the texts. However, from the voices of experience, the narratives, these emotions are more readily accessible. For feminists the point of all this theorising is the effort to find some way to change the norm of inequality that presently exists, to transform the conditions that enable and support this inequality. Harding says:

‘Feminist sciences and epistemologies should help to bring to consciousness less mystified understandings of women’s and men’s situations so that these understandings can energize and direct women and men to struggle on behalf of eliminating the subordination of women in all of its race, class, and cultural forms.’

(1990: 90)

This statement sounds familiar, a rallying-call that feminists respond to. However, Smart would turn the focus so that the ‘understandings’ would not necessarily be a unitary new truth. In her view it is important that we take into account the subjugated knowledges that are not unitary, but that tell different stories, produce both different knowledges and a range of resistances. However, I want to be careful about this, because while I agree that all women cannot be categorised as one, that all experience is

individual as well, nevertheless there is one site (the state and its agencies) where power is concentrated and exercised and therefore resistance must have a collective element if it is to be effective. To mobilize such resistance there has to be the acknowledgement that individual experience is also bound up in communal understanding. This is why we cannot let go of standpoint feminism at the expense of feminist resistance. Instead the deconstruction of the legal reasoning of the judiciary will also use elements of the radical outlook in its interpretation, so that categories of domination (such as patriarchy for example) can be identified and dealt with.

Feminist legal scholar Ngaire Naffine argues that feminist critique of law's claims to impartiality and of the way in which legal rhetoric reflects the dominant patriarchal social order, encapsulate the maleness of law. Nevertheless there remains an entrenched resistance to such critique within male dominated institutions, and this is particularly evident in the conservative domain of law. Yet Finley argues that 'feminism is one of the most important movements in legal scholarship today, and one of the most potentially transformative, because it challenges the definitions, assumptions, ideals and epistemological notions of a universal, objective rationality that underlie our legal system' (Finley 1988).

2.9 Subaltern: Law as a System of Colonisation

In spite of the critical intervention of the feminist theorists it is obvious that there is still something missing – the voice of the abused child is frequently absent from the legal process that is under review. It is my contention that paying more attention to victims' voices has the potential to transform the legal construction of child sexual abuse by incorporating a more subject-focused principle of justice into the workings of the judicial system. Crucially, giving the survivor of abuse voice allows them to appear

in their totality as human beings. They cease to be defined purely by their victimhood and can demonstrate their resistance and resilience in the face of abuse and its aftermath.

The incentive for much social research, including this study, has been the idea that ordinary people, minorities and/or oppressed groups are supported in their coming to voice. In this study, I do not rely solely on the voices as they come through in the Appellate Court judgements. Rather, I examine the victims' stories as they have been recounted *in their own right*. Drawing out subjectivity, according to Weber, is a primary goal in sociology. He says: '[Sociology] is a science which attempts the interpretive understanding of social action....In 'action' is included all human behaviour when and in so far as the acting individual attaches a subjective meaning to it' (1947:88). Despite Weber's aspirations, however, subjectivity is not always favoured in sociological research. The reason for this, Katz (1988) contends, is that subjectivity contains an element of emotion that contradicts the rational-actor world view which is the foundation of much sociological research². This cognitive bias in sociology has resulted in research bifurcating into competing perspectives rather than enabling an integration of a person's stream of experience (Denzin, 1989:121). I argue that the subjective experience of adult survivors of child sexual abuse- incorporating both the emotional and cognitive elements of that experience- must be articulated in the public sphere.

This desire to articulate voice is not new. Indeed, Jean Baudrillard contends that 'the masses are the leitmotif of every discourse, they are the obsession of every social project which claims to make the oppressed speak' (1983: 48-49). The post-colonial theoretical perspective provides me with a particularly apt angle for developing a

² For a comprehensive discussion on the history of sociology's 'expulsion' of emotions and how it arrived at an almost exclusive emphasis of cognition as the basis of social action, see Barbalet, J.M. 1998: chapter 1. *Emotion, Social Theory and Social Structure: A Macro sociological Approach*. Cambridge University Press.

framework of analysis that can affirm the voice of the adult survivor of abuse. It seems to me that a parallel can be drawn between the kind of sexual colonisation to which adult survivors of child sexual abuse were subjected, and the broader processes of political domination that produce colonial subjectivities (Bhabha). My aim is to restore agency to the colonised (here, the victims of abuse). Subaltern theory may enable us to move toward a deeper understanding of the way in which the voice of the child/adult victim/survivor is heard in the Appeal Courts and in the broader society. I will demonstrate that when voices are heard within a powerful social arena - such as the legal setting - they are heard in a particular way. They are always already positioned in unequal relations; colonial discourse positions the colonial subject as childlike, as unknowing, and as unable to speak for themselves. The court interpolates them as uncivilised, in the sense that they are not capable of operating within the legal domain and therefore are outside the circle of legal and judicial knowledge. Majkut notes that while postcolonial theory claims that the subaltern has no authentic voice but must speak within the imperial narrative, the other 'stillborn' dialogue is the failure to listen. Locating blame for the silent voice is at issue here. He argues that 'it is not that the subaltern is silent in the face of the narrative of the imperial project (Law) or can only speak within the narrative and language of the imperial master...but that *those who benefit from its reach* have not listened carefully' (*emphasis inserted*: Majkut 2003:8) The law as is constructed is not a suitable forum to deal with the problem of child sexual abuse. It does not allow for active listening because it is systemically structured around rational-legal norms.

It must be acknowledged, however, that the law does not always fail to listen and there are many instances in which the rights of oppressed and exploited groups have been affirmed and extended through recourse to the judicial system. Furthermore, there

is also evidence of ‘speaking back’ in the introduction of victim-impact statements, in the mediated television documentaries about clerical and institutional sexual abuse and in auto/biographical literature. In the analysis of the ‘subaltern’ narratives of adult survivors of child sexual abuse undertaken here, a phenomenology of listening will help to guard against the hopelessness that sometimes accompanies post-colonial theories by creating an audience of active listeners. It is my argument that such an approach- where survivors’ lived experiences are heard, are taken seriously and believed- opens up a theoretical space that can do justice to that experience.

The focus on the discourses of the adult survivors of child sexual abuse allows us to trace how these individuals, through their personal narratives and through their transformations from children —> adults —> legal savants, are able to liberate themselves from the scientific and legal truth standards claimed by law and make new connections between knowledge and power. This in turn demands a reframing of the logico-scientific discourse that exists within the courtroom (van Krieken 2001). Subjectivity is constructed through this telling, using various constituents in the production: factors of shame and silence, appropriations of labels of identity, whether that is victim, survivor, liar or hystericist. In the telling of the stories the subject realises the possibility of transformation. The development of the consciousness of the subaltern and their understanding of their position and solidarity with others in a similar position is central to subaltern theory. First, the victims of child sexual abuse must speak truth to power. Only then can they begin to challenge the framework of power.

Finally, we need to consider the difficulties created for the victim by the particular constructions of them by a variety of institutional or expert discourses. Albert Memmi in his book ‘The Colonizer and The Colonized’ (1965) maintains that ‘the existence of the colonizer requires that an image of the colonized be suggested’. Here I

argue that legal knowledge is not necessarily imperial and that 'native' narratives have the power to answer back. The sexually assaulted victim is discursively defined in the legal cases as 'child' and therefore innocent, in need of protection and as actually protected. Conversely, the same 'child' can be defined within the courtroom as either unlikely to suffer or that the suffering is exaggerated and therefore as imagined and imaginary, or that they will emerge from the suffering unaffected because of youthful resilience. Legal personnel use the notion of 'the child as unreliable' as a defence mechanism but direct that charge at the adult survivor of child sexual abuse. The crime may have been perpetrated on a child, but the adult survivor comes to court with a different status. As currently constituted, the legal system cannot acknowledge the strength of the victim, but rather institutionalises victimhood. The arena of the courtroom affords little opportunity for the expression of subjectivity, for acknowledging resistances on the part of the survivor, for affirming his or her experiences. Those who come to court have access to law but not necessarily to justice.

This review of the relevant literature on the relationship between child sexual abuse, the development of social and legal knowledge about the problem and the critique of legal reasoning – in general and in this particular area – facilitates the development of a theoretical foundation upon which the research will be based. Crucially it points out the importance of a feminist perspective, a discursive methodology and the inclusion of the voice of the subjugated. In particular, the inclusion of a subaltern perspective provides great promise for a transformative project. In the next Chapter the theoretical framework adapted for the current study will be elaborated upon.

Chapter 3: Knowledge, power, gender and voice in the legal arena: towards a conceptual framework.

This Chapter develops the conceptual tools necessary to critically analyse the engagement of the Appellate Courts with child sexual abuse over a number of years. In particular it sets out to analyse the role of knowledge, power, gender and voice in that legal arena. While principally the framework developed here relies on the critical legal studies approach (a politics of law informed by a sociological perspective), it builds and supplements this approach. Crafting a theoretical framework from a critical perspective provides the tools which allow me explore and explain the legal appropriation of the issue of child sexual abuse and the status of the voice of the victim within the legal system. The voice of the victim, I will argue, gets lost in the legal translation.

The first element of the conceptual framework is a Foucauldian understanding of knowledge and the issue here is the relations between power and discourse. I look at the part that discipline plays, firstly as a factor in constructing so-called scientific knowledge and secondly as a strategy to develop subjectivity. The second element of the framework is derived from the feminist perspective, which uncovers the taken-for-granted traditional male understanding and construction of knowledge in judicial cases. Finally, I borrow from subaltern studies to develop the victim's perspective arguing that knowledge about abuse is often channelled by 'outsiders', not by those who have directly experienced the harm. The experience of child sexual abuse is translated into legal language and interpreted by the judiciary and by other experts. In that process, it is uncoupled from the direct, lived experience of the victim. The testimonies of victims construed *outside* the legal realm, make voice possible. Incorporating the subaltern

consciousness into the conceptual framework allows for the inclusion of those voices in the analysis.

3.1 Developing a critical perspective

Karl Marx identified the discrepancy between the ideology of a society and the social reality of that same society, an insight that has informed the work of a wide range of scholars (e.g. Spivak 1984, Eagleton 1988, MacKinnon 1982). Critique, in the Marxian sense, means 'being wholly distrustful of the rules of conduct with which society, as presently constituted, provides each of its members' (Horkheimer 1982:207). It leads us to recognise the significance of ideology as part of social structure, a fact that is crucial in the study of the role of law in society. Ideology, in this sense, means the way beliefs are socially constructed and the way these 'ideas' provide the key institutions and values of the society with an appearance of naturalness and inevitability. It is not claimed that there is only one ideology present within a society, or that this ideology is without challenge but that ideology per se is an unavoidable aspect of social interaction. Critical social theory is premised on the social construction of the individual's thoughts and beliefs and needs through ideology and through social rules and norms. Thus, the individual's power to make decisions is constrained before s/he even begins to choose (Berger and Luckmann 1966). Horkheimer, a founding member of the Frankfurt School, argues that through historical analysis a critical perspective can draw on experience to grasp the problems in society. He warns of the difficulty we confront when we try to critically examine the social environment we inhabit and take for granted (Horkheimer 1982: 213). To be critical means to be grounded in struggle, to run counter to prevailing thought, (ibid. 1982: 218). A critical perspective is crucial to

this study, since it seeks to confront the ideology embedded in legal institutions and legal practices.

Critical Legal Studies is based on the notion of law as an ideological discourse shaped by power relations, and in effect this school operates as a sociological politics of law (Tomlins 2007: 45). This perspective challenges the way law legitimates the unequal distribution of power in society and the notion that law is neutral, objective and value-free. A critical perspective goes beyond positivistic and empiricist approaches by drawing on a wide body of social theories, recognising that research and knowledge *are* political and by imagining what a just society *could* be, but is not at present. It is not just about analysing society but about transforming it. From a critical standpoint, it is possible to question the rationalist proposition that pure abstract reasoning can ground knowledge; that knowledge can be purely objective and that there is something 'out there' outside of human action. Rather, the researcher is consciously part of the society she or he studies and, in turn, makes that society through interpretation. This conscious analysis is liberating because it breaks the uncritical bond between the social structure and the individual agent, creating the possibility of change.

Critical Legal Studies has engaged in a series of challenges beginning with a critique of liberal understandings of law, where law is pronounced as separate and autonomous from other forms of social control, to the reform of legal doctrine and the discursive power of the legal intellectuals, usually expressed in text. According to the American sociologist Talcott Parsons, law provides a normative function in society in the way it abstracts or separates itself from other agencies of social control and therefore remains independent from economic and political interests (Parsons 1966: 37). The dominant and persistent idea of liberal law is that the very structure and rules of the institution produce objective and predictable decisions. As Hunt notes 'it is the

persistence of these themes which so dominated the terms of debate that has become increasingly oppressive in the sense that it has colonized the intellectual and political space of discussion about the relationship between law, state and society' (Hunt 1994: 4). Critical legal studies contend that this idea is inherently flawed. Specifically there is a concern with the relationship between legal ideology and legal consciousness – understood as shared beliefs and assumptions that frame how people understand law – in how law is practised and how law is experienced. A commonsensical understanding of law is two-fold: firstly, that it must be obeyed, and secondly, that the system and the rules are just and that those who administer the legal system are beyond moral criticism. Coming from a sociological rather than a legal perspective and reading law as a social practice, the critical approach contests this reification of law and argues that law cannot be separate from social structures, processes and interaction.

By underscoring the social rather than the individual nature of crimes and looking for the political element in (a) the way particular crimes are criminalised, (b) the legal experience of victimisation and (c) valuing the view from below (Carrington and Hogg 2002: 35), the critical approach contributes to and extends sociological knowledge of the law. The strengths of this approach lie in the way it takes a socio-political approach; it does so by recognising the centrality of policy in legal thought. This identifies the part played by legislation - which reflects the social context of the time - and the way it can deconstruct the complex relationship between regulation and self-regulation. The critical approach has further strengths to offer when it does not confine itself to policy but seeks to elucidate law's relationship with society in other than instrumental ways. Finally, but crucially, the critical approach draws out the factor of power in legal adjudication by an examination of the contexts of interpretation and by questioning the judicial interpreters' authority to speak.

Critical legal theory provides the tools I need to explore and explain the Appellate Court's construction of child sexual abuse. It provides lines of enquiry that challenge the rhetoric of neutrality and objectivity from the judiciary and that help examine the role that rhetoric plays in legitimating legal discourses of child sexual abuse. For this reason it is vital that the critical perspective draws out the discourses that serve to de-politicise the abuse of children. Further, the critical perspective enables us to problematise the elements of power/knowledge in the way the legal institution deals with the issue. On the other hand, critical legal theory also establishes the importance of the role of law in transforming social life by drawing out discourses that acknowledge the importance of communication and that recognise the validity of the knowledge/s it had hitherto ignored.

3.2 Foucault and the critical appraisal of the law

Foucault's work, while a highly distinct genre within sociology, provides an important vehicle for constructing a critical appraisal of law. Firstly, he views law as an expression of state power given the manner in which it demands obedience and also punishment for disrespect to its sense of sovereignty. This sense of law as separate and above the general social domain ties in with Luhmann's formulation of law as an autopoietic system. This means a system of communication that is 'self-observing, self-producing and self-reproducing' (Luhmann 1992). Legal institutions operate in and through judicial reasoning. That reasoning process must be interrogated to find out whose interests are ultimately served in legal proceedings around the issue of child sexual abuse. The empirical analysis of the appellate court decisions (presented in Chapters 6-9 below) provides a terrain in which to explore the form of knowledge

constructed by law and how law is involved in the production of knowledge in relation to the broader society (Valverde 2003).

Foucault says that he

‘has been concerned with the how of power....to relate its mechanisms to two points of reference.....the rules of right that provide a formal delimitation of power.....to the effects of truth that this power produces and transmits, and which in their turn reproduce this power. Hence we have a triangle: power, right, truth’.

(Foucault 1980: 93)

Foucault's notion of power/knowledge challenges assumptions that ideology can be demystified and, hence, that absolute truth can be attained. He insists that truth is never ‘outside power or lacking in power’. Foucault explains power by invoking differing concepts: the juridico-discursive model which characterises power as the word of the sovereign wherein a law is laid down and obeyed:

‘Power acts by laying down the rule.....it speaks and that is the rule. The pure form of power resides in the function of the legislator; and its mode of action with regard to sex is of a juridico-discursive character’.

(Foucault 1978: 83)

In this model there are the assumptions that power is possessed, that it operates from the top down (law, economy and state) and that power is repressive. In Foucault’s own model he argues that power is exercised rather than possessed; that power is as productive as much as it represses and that power operates from the bottom up, is spread throughout relationships.

Foucault, therefore, acknowledges the negative aspects of power, but he is concerned that we should focus on what forms of power are at work, so that we can isolate the source, the effects and the productive nature of power. This directs us towards an examination of the judicial discourses to identify the strategies and processes that constrain the presence, the voice and the stock of knowledge of the victims of the abuse. According to Foucault, power's relation to knowledge is never

separable, because within each society there is a 'regime of truth' with its own particular mechanisms for producing truth. For Foucault:

...truth isn't outside power, or lacking in power Truth is a thing of this world: it is produced only by virtue of multiple forms of constraint. **And it induces regular effects of power.** Each society has its regimes of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as rule; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.'

(1980: 131) emphasis added

Law is governed by rules and interpretations and involves politics, economics and ethics. Using Foucault's argument it follows that the legal regime is ideally situated to produce knowledge and claim it to be true. From a Foucauldian perspective the objective of my analysis is to challenge the legal truths that are produced by the judiciary in its published texts.

Foucault developed the concept of power, from one where power was purely conflictual with negative attributes to one where power operates in multifarious ways and means and in a diversity of arenas. It can be found in customs, rituals, in space, in forms that are not involved in coercion. He moves the concept of power from the macro form that manifests itself in for instance, military might to 'small powers' that are everywhere. By doing this he is able to conceive positive elements alongside negative ones, and allow for the possibility of the dissemination of power to individuals. This notion of individual agency is often missing from the pure critical perspective. However some areas in society - law being one such area - are highly resistant to the disaggregation of power. Law remains a bastion of rule, with centralised and hierarchical authority and defined by seemingly impenetrable boundaries. These boundaries are composed of meticulous details, of regulations and discourses that work to exclude the infiltration of micro-powers..

Foucault's analysis of law concludes that sovereign law is central to state rule and the sovereign nature obscures the presence of disciplines. By sovereign law he means that legal power today has remained in the form it took when committing a crime was an action against the person of the ruler (king). The fundamental element on which law was founded was imperial 'right' and according to Foucault this same notion still applies today. But modernity has disrupted the unitary form of political power of monarchical times and modern law, he says, does not take account of such change.

Smart agrees with him:

'Much of Foucault's genealogy de-centres law as the prime historical agent or mode of control. Rather he focuses on newly emergent forms of regulation and surveillance and constructs for us a vision of disciplinary society in which law's place diminishes with the growth of more diverse forms of discipline. But it seems to be 'against' law that the new mechanisms of power develop'.

(Smart 1989: 14)

Thus, Smart sees Foucault's account of law as outside of other disciplines and in a way, as the type of power that is pervasive, that works from the top down. Smart's concern is how to position resistance to the power of law. She does not believe that attempts to reform the law, i.e. legal doctrine, will be fruitful. She says:

'The feminist movement.... is too easily 'seduced' by law and even where it is critical of law it too often attempts to use law pragmatically in the hope that new law or more law might be better than the old law....

She argues that the most effective strategies for reform will be non-legal, for -

'While some law reforms may indeed benefit some women, it is certain that all law reforms empower law'.

(1989: 160).

For Foucault, there is no one centre of rebellion or resistance. Instead there are multiple points 'distributed in an irregular way in time and space' (Sheridan: 1980:192) and these points will be located within systems of knowledge including and external to law itself.

3.3 *The Discipline Factor*

In rejecting the idea that power functions only through ‘Thou shalt not’s’ or forms of restrictive commandments and laws, Foucault brings to our attention the complex network of disciplinary systems and prescriptive technologies through which power operates in the modern era, particularly since the normalising disciplines of medicine, education, and psychology have gained ascendancy.

Foucault explains how the techniques of discipline that arose within society, particularly in the eighteenth century, contained the material form of power. It was the aspect of surveillance that directed society into categorising Knowledge. Keeping records, monitoring and inspecting, all contribute to putting boundaries around knowledge. This reliance on record keeping is crucial to judicial procedures and truth production. This conceptualisation is useful when it comes to looking at issues of ‘repressed’, ‘suppressed’ and ‘false’ memories. Where victims memories are acknowledged will they be accepted as true only if detailed records of counselling, hypnosis amongst others are produced? In the same way we will examine the proposal that record-keeping may be used as a means of discerning truth; that truth is contingent on the legal rules, which claims supremacy in a hierarchy of knowledge. Discipline further impacts on knowledge by detailing and limiting ‘norms’ within different areas of life (a good prisoner, or family man etc.). Thus, morality within how to behave, what is right and wrong becomes time and case specific. This regulation of social life is at the foundation of legal knowledge in modern societies.

The interaction between different disciplines is very important. Foucault recognised that the facets of modernity (prioritising the notion of scientific explanations) explained the shift towards separating knowledge and power into various disciplines. In the Appellate Courts legal knowledge is constructed through cross-

disciplinary interaction and disciplinary involvement. Through a system of disciplinary interaction specialised knowledges are shared so that a framework of thought develops around a particular issue and around those who are constituted within this issue. The paradigm of knowledge (Kuhn 1970) may be heavily influenced by one or other discipline. Knowledge about child sexual abuse was initially derived from social workers but later appropriated by psychology (Jackson 1999) and in turn it has been taken up in the media. In Foucault's terms, whether it is incest or any sexual relations between adults and children, the issue becomes focused on constructing the child as sexual (specifically virginal -1988: 276) and the adult as deviant. Between the disciplines of psychiatry and social welfare and the regulation of law this is what occurs. This study will examine the proposal that law's power has been subsumed by disciplinary power as Foucault argued (Hunt and Wickham 1994). If he is right, then the focus of research must shift to locate the real discursive power behind the construction of abuse. I suspect, however, that law has resisted challenges to its power and has been able to appropriate or exclude disciplinary knowledge at will.

There is another application of the concept of discipline appropriate to the critical analysis of the Appellate Courts' construction of child sexual abuse and that is disciplining of the individual and the resistance this provokes. For Foucault, the strategies of self-discipline involve whole tranches of specialists. These include medical (doctors that confirm), psychological (medicalise and counsel), religious (confessions) and the media (helping to narrate and give voice but also to shape the knowledge). Together they provide the knowledge of child sexual abuse. By connecting self-discipline to the concept of self-government we are neatly linked to government exercised through law. In turn this explains the processes through which discipline/s themselves have become the new forms of government that Foucault 'discovered'.

Foucault insists that power is dispersed throughout the social world; that the individual constitutes part of her/his own subjectivity and that within this reality individuals experience themselves, particularly in the form of confession and in the subject of sexuality and of sex. Sexuality, he argues, is not something that power represses but is itself a conduit of power, particularly in the growing discourses surrounding it. Sex became a problem of truth, a matter of knowledge. It was separated from morality into a disciplinary field – ‘a confessional science’ – and crucially the element of power within confession belonged to the listener of these confessions. This was because ‘the work of producing the truth was obliged to pass through this relationship if it was to be scientifically validated’ (Foucault 1978: 66). The significance of this lies in helping to get ‘in between’ the discourses of the court system to see where the judiciary assigns responsibility, where the system inheres a notion of norms that are accepted by all the actors, how it plays true within the episteme of scientific knowledge.

3.4 Techniques of Domination

Foucault goes about his analyses of ‘self’ by looking at the way ‘things are done’, essentially employing a critical perspective. His method strips away abstract concepts; it shows reality in process and exposes unacknowledged forces. Three elements central to this analysis – truth, morality and power - are elements involved in self-government and surface readily in the realm of law (Hunt and Wickham 1994: 24).

Truth is probably the most significant technique of domination according to Foucault. Focusing on his understanding of techniques of domination allows us to find the ways in which the subject is constituted as an object of knowledge (objectivisation) and then the way in which individuals come to understand themselves as subjects

(subjectivisation). The scientific method of realising truth lies in particular practices, such as dividing or isolating the subject under scrutiny; thereby providing a subject who is capable of manipulation. Another means is by employing a system of classification which produces an object worthy of study and finally the process of subjectification through which the individual involves himself or herself in producing a subject. This self-subjectification does happen internally but has to be mediated by an external figure (usually a scientist or a figure of authority), who facilitates the process by providing the necessary knowledge. Law, as a discipline of knowledge, is often considered as exceptional in producing truth. By its methods of operation – cross-examination, procedures, use of scientific knowledge etc. - it produces a truth with the dimension of authority that simultaneously excludes questioning and criticism. Law, in fact, declares itself as the source and guarantor of truth and this is inscribed in its power to sanction individuals by imposing penance. ‘It is truth that makes the laws, that produces the true discourse which, at least partially, decides, transmits and itself extends upon the effect of power’ (Foucault 1980: 94). Judicial practices were constituted at a particular time for a particular purpose. These practices are continually modified to define the way individuals are judged, and the way reparation is made to society in terms of compensation or punishment. Ultimately, such practices are one of the principal means by which society defines a distinctive form of knowledge.

Foucault’s uncovering of the ‘truth’ leads us to a framework for assessing how truth is employed as a factor of knowledge in the Appellate Courts. This research proposes to identify the standpoint from which crime is decided as crime, whether that originates from the victim, the perpetrator, the state or the legal practitioner. The filtration processes employed to determine the reality of crime will be examined to understand the relationship between perception and truth. These include the decisions

of the Director of Public Prosecutions (DPP), the exclusion of certain evidence, the training of the Gardai, the way certain issues are sidelined and others given priority, the stubborn resistance to change and so on.

Foucault also draws our attention to the role of ethics. The moral framework within which the contemporary notion of the ethical self is situated and which governs sexual activity involves relationship and knowledge. Relationship recognises the ‘other’ as part of the physical activity and knowledge is implicated in the consideration of the consequences of the activity. Thus, despite the propensity of the individual to gratification (a trait inherent in the individualist nature of modern society), we can say that the sexual self is linked to the political and ethical self. The difference between morals and ethics is simply that the former is the set of values and rules imposed by society and the latter is the real behaviour of the individual in relation to such rules. Ethical practice, according to Foucault, is a technique of the self.

The exercise of self-restraint is governed not by laws but by voluntary self-discipline of the social self. This notion of the ethical self has been challenged in modern society. The rise of liberal individualism directly affects the balancing of the relationship between the individual and society. The body of knowledge that places law as the final and the legitimate arbiter of morality and of ethical practice - such as liberty and rights and relationships – must also be considered. Common-sense knowledge might propose that law is merely one voice in this arbitration, that the doing of what is ‘right’ is decided by a diverse set of knowledges. If this is the case, however, then law loses its legitimacy and hence its power.

If Foucault is right then law is just one of several disciplines involved in the analyses of child sexual abuse and it plays, not the overarching role ascribed to it by other theorists (e.g. Habermas), but a strategic one whereby it interacts with other

disciplines and also strives to keep its own level of authority. It is this ‘strategic’ quality of the law that will be explored in this thesis. Once we identify the law as strategic in the construction of child sexual abuse, we can further use this approach to uncover its strategic interaction with other disciplines in dealing with child sexual abuse.

3.5 The feminist challenge to traditional legal knowledge

A Foucauldian approach to disciplining knowledges fails to take account of gender which is, in my view, critical to understanding child sexual abuse. A feminist approach presumes a particular perspective which declares that ‘the nature of reality in Western society is unequal and hierarchical’ (Skeggs 1994: 77). This inequality between men and women is particularly relevant to the study of sexual violence. In criminological research sexual violence is a specific problem because, unlike other crimes, the perpetrators of this violence are, most often, men who are known to their victims. In other words, the offence is not committed by strangers and therefore this crime is decidedly relational. Feminist research has uncovered this contradiction (Stanko 1994: 96). It also provides a framework for problematising the discourses about women and victims in the legal and criminological processes. Feminists specifically contribute to our knowledge by asking questions as who can be ‘knower’s’ and what sorts of experience can count as justification of knowledge claims? Succinctly stated:

‘Feminists need not claim a universal, ahistorical validity for their analyses or claim that women have an exclusive window on truth. Many feminists recognize this and encourage a plurality of perspectives. Feminist claims derive their justificatory force from their capacity to illuminate existing social relations, to show the weaknesses in alternative explanations and to debunk opposing views. Feminist analyses confront the world by providing concrete reasons in specific contexts for the superiority of their views. These claims to superiority

are not derived from some privileged standpoint of the feminist knower, but from the strength of rational argument, and the ability to demonstrate point by point the deficiency of alternative positions' (Bart 1998).

This is particularly relevant to my exploration of the voices of victims *outside* the Appellate Courts.

A critical approach widely accepts that objective truth (neutral though dissociated from the subject) is practically impossible given structural power imbalances. The context and experience of gendered power was seen to have shaped truth. Feminists draw out this logic to assert that the truths of western (and most likely universal) law have emerged from a male interpretation of reality; 'women are compared to the unstated norm of men' (Minow 1987: 13). That male interpretation was considered as universally true was derived from the historical understanding of women's inferiority and the structural inscription of gender inequality in human relations. Feminists go back to Aristotle's argument that 'the relation of male to female is naturally that of the superior to the inferior – the ruling to the ruled' (Miller from Aristotle – Politics, 1 5 1254b1-32). This categorisation of difference between men and women as human beings is extended into how they are capable of 'knowing' differently. The positing of woman's knowing as in the senses, which are ascribed to the body only, divorces the connection between body and mind, so that all of these differences are organised hierarchically. Rooney (1991) quotes from Philo to show how strong and clear messages about the superiority of men over women set the tone for centuries:

‘The male is more complete, more dominant than the female, closer akin to causal activity, for the female is incomplete and in subjection and belongs to the category of the passive rather than the active. So too with the two ingredients which constitute our life-principle, the rational and the irrational; the rational which belongs to mind and reason is of the masculine gender, the irrational, the province of sense, is of the feminine. Mind belongs to a genus wholly superior to sense as man is to woman.’³(Rooney 1991)

There is nothing subtle about this and Gatens argues that this binary method of organising society, and as represented in the structures of our language, is not politically innocent, but is motivated by power, (1991:93) Genevieve Lloyd demonstrated how, in the seventeenth century, reason associated with maleness was conceived as a frame of mind appropriate to an adult, masculine way of understanding and dealing with the world. Increasingly, in eighteenth-century thought, women were regarded as inhabiting a separate world of thought and feeling. This world is set in opposition to male rationality and sometimes is even regarded as morally superior, but crucially is confined to the private domestic sphere and hence acquired a special relationship with childhood (Lloyd 1993: 38-57). It is important to understand the significance of the enlightenment for the development of the dichotomy between reason and emotion. The process by which reason was split from emotion occurred in a crucial sense with the development of modernity. Modern empirical science as the exemplar of knowledge developed the idea of a strict separation between ‘reason’ as the logical cognitive faculty of the mind, (which gives rise to knowledge), and ‘emotion’ which is derived from the senses. In consequence emotion, along with the passions, was associated with the realm of irrationality, from which knowledge could never accrue. It follows from this that because modern law *is* based on objective reasoning, it must decry emotion.

³ Rooney, quoting Lloyd (1984, 27). This passage comes from Philo, Special Laws, bk. 1, sec. 37, in F. Colson and G. Whitaker, Philo, Loeb Classical Library (London: Heinemann), 1929, vol. 7, p. 215.

By casting emotion outside the realm of knowledge we do not take account of the whole concept of knowledge and what it comprises. If, on the one hand, we understand knowledge as a social practice deeply embedded in a particular culture then what we know and how we come to know it is bound up with the context in which we live our lives. If, on the other hand we posit knowledge as something ‘out there’ waiting to be grasped, we denote it a bounded and static phenomenon that can be individually discovered. The path of knowledge has entailed a process whereby layer upon layer of binary oppositions are constructed: man/woman, reason/sense, mind/body, public/private, adult/child, scientific/moral, and as Prokhovnik notes there is

‘a...stubborn persistence of three kinds of traces in our culture’s approach to theorizing, namely a prepostmodern view of reason as abstract and universal, a reductive biological view of emotion, and a pre-constructionist determinist view of both reason and emotion’.

(Prokhovnik 1999: 52)

Alison Jagger makes the point that ‘the reconstruction of knowledge is inseparable from the reconstruction of ourselves’ (Jagger 1989). In other words, knowledge is created while we live our lives and construct our identities. The issue for this research is the way in which a gendered identity has been built into and is central to these dichotomies. The political implications of the constructed differences has been to privilege the male point of view in public arenas, such as state, law and the economy and to disregard the experience of women. According to this logic women, while residing in the ‘natural’ zone, act on instinct rather than reason and, while they may act morally they do so unknowingly, they are incapable of constructing moral principles. Children, in the same category as women, cannot be considered as a knowing subject and their experiential knowledge is totally discounted. All of this has major implications for the way child sexual abuse is dealt with by the courts. It means that because the

authority assigned to legal reasoning is inscribed within these binaries, the concept of gender-neutral justice must be challenged.

Feminist legal theorists and feminist criminologists have drawn attention to the masculinist nature of criminal justice (Taylor 2004; Baer 1999; Bartlett 1999; Bell 1993; Smart 1991; Kelly 1988; Minow 1987; Estrich 1986; to name a select few). The subject of criminal law on whom constructions of criminality, responsibility, culpability, defences and mitigations are predicated is the 'reasonable man'. Even if, in these politically correct days, the term 'reasonable person' is substituted for the more traditional 'reasonable man', such change in terminology has not generally been accompanied by change in the way law thinks. The subjectivity at the core of criminal justice is male. It is, moreover, a white, middle-class male subjectivity that is produced and reproduced through the discourse and the practice of criminal law (Lloyd 1984; Naffine 1992). Legal theorists were concerned that an entire body of knowledge was excluded from the Courts as 'emotion told a story that had not previously been told or acknowledged, by the legal system' (Abrams 2005). Why does this matter? The importance of realigning emotion with reason lies in how it might offer an avenue for active listening to women and children, which is not currently available within the parameters of the legal system. Estrich provides one of the most compelling instances of how the distinction between emotion and 'reason', is handled by the courts. After a 'typical' rape, i.e. one that is understood by all men, she says:

'I learned, much later, that I had 'really' been raped. Unlike, say, the woman who claimed she'd been raped by a man she actually knew, and was with voluntarily. Unlike, say, women who are 'asking for it,' and get what they deserve. I would listen as seemingly intelligent people explained these distinctions to me, and marvel; later I read about them in books, court opinions, and empirical studies. It is bad enough to be a 'real' rape victim. How terrible to be-what to call it-a 'not real' rape victim''

(Estrich 1986: 1088)

The starting point for an interaction between abused victims and law begins with men's understanding of reality. We must examine judicial proceedings to ascertain whose understanding of what happens between a perpetrator and a victim of crime is privileged. Estrich again informs us that:

‘No one had ever told me that if you're raped, you should not shut your eyes and cry for fear that this really is happening. You should keep your eyes open focusing on this man who is raping you so you can identify him when you survive.’

(Estrich 1986: 1087)

Excluded from legal understanding is the emotion that accompanies the act of rape or of sexual abuse in general. In particular, feminist research has shown that a male understanding of sex as an act of power correlates to unwanted sex as an act of force. This may not be always the case; it is possible that the abuser may use other means to get their way, such as grooming the young victim or lying to them. Another issue that must be addressed are the measures that victims use to resist. Is it likely that silence is a more effective and likely method of resistance than physical force, particularly because a child is physically and/or emotionally vulnerable in the relationship? These are important questions which require attention.

3.6 Power and resistance in legal discourse

Foucault invariably locates his knowledge through an examination of the sites of production – the scholarly disciplines and the professions – and goes immediately to the discourses involved; *‘It is in discourse that power and knowledge are linked’* (Foucault, 1978:100). He is at pains to note that we are not to look at discourse in an oppositional way – ‘accepted discourse and excluded discourse’ or dominant/dominated discourses. This point will come into play when examining the legal discourses; the power relationships within the system are manifestly unequal. However, my objective

is to look at the multiplicity of discourses, engaging in various strategies, to see what *forms of power* are at work. This analysis therefore will look at how abuse is spoken of. It will look to when truth, knowledge and ethics combine to create resistances. Foucault's approach to power as integral to resistance (1976: 95) frames my investigative questions regarding the reasoning at play. I seek to explore the relationship between rational expression and emotion and to find out if the child is well served or excluded through the presence and absence of voice in the appeals. Foucault's approach uncovers an explanation for the protection of and contest within professional knowledges.

Foucault says that he

'has been concerned with the how of power....to relate its mechanisms to two points of reference.....the rules of right that provide a formal delimitation of power.....to the effects of truth that this power produces and transmits, and which in their turn reproduce this power. Hence we have a triangle: power, right, truth'.

(Foucault 1980: 93)

Crucially, however, the part played by discourse is central, in that 'it sets up what it is that is argued over and fought about' (Hunt and Wickham, 1994:9). One has to be careful in using the term 'discourse' in work of this nature for its ubiquitous use is such that it has multiple meanings. Whereas ideology is a top-down practice Foucault's critical reflection demonstrates the many ways power, dominance and inequality are expressed, enacted and reproduced in discourse, both in its structure and its contents. But what exactly does this mean? Discourse, as we might expect involves the use of language and how the social world is experienced through language. While there is general agreement that discourse is 'all forms of spoken interaction, formal or informal, and written texts of all kinds' (Potter & Wetherall 1987:7), and that discourse analysis is the study of how 'talk and texts are used to perform actions' (ibid.), the focus of discourse analysts, in sociological terms at least, is on the socio-political processes that

are enacted through discourse. Their aim is to document the way particular discursive practices are employed for particular purposes. The spotlight therefore is generally on a public domain, where social relationships involve issues of power, identity and social change (Fairclough 1992). Public spheres such as the courts of law are the places where people communicate and interact about issues that concern themselves individually but also society in a broader sense. The part played by discourse in these spaces produces and maintains relationships of power, inequality and political ideology (Fairclough 1989). It does this through restricting access to these communicative events (particularly relevant in child sexual abuse cases) and in a more subtle way through the promotion of a self-interested discourse on the circle within which it operates. Legal discourses are inexorably political because of the close relationship between the law and government, in spite of an insistence on their separateness. Power is related to both of these domains – the discourse itself and the restricted practices of access within which it operates. Foucault’s famous maxim of power/knowledge produces a knowledge domain that can be measured by its exclusive nature.

‘The more discourse genres, contexts, participants, audiences, scope and text characteristics they (may) actively control or influence, the more powerful social groups, institutions or elites are. Similarly, lack of power is also measured by its lack of active or controlled access to discourse’.

(Van Dijk 1993: 256)

Other theorists, such as Halliday, also connect language to social processes and say that our uses of language are inseparable from the social functions and the social contexts of actions and relationships in which language plays its part. Language is then viewed as a system of resources, which belong to a particular group (Halliday: 1994). This system produces a set of possible kinds of meanings that can be made; we can then examine which kinds of meanings actually get made in the course of which human activities and by which participants in the legal process. For example if the judiciary

confine themselves to legal language when writing opinions what is the implication for a 'common' knowledge about abuse? Those writing their experiences of abuse never use legal terminology. If we read the meanings in these texts as the realisation of social processes, it will be possible to see them as functioning ideologically and politically in relation to their contexts. Ultimately however we need to think of these texts as 'embodied, located in space/time, tied into institutional and community practices and knowledges, dialoguing with other textual practices, mediating power relations and the relations of ruling' (Lemke 1995).

The best method for locating the power of law, then, is in the arena of discourse. Smart locates law's resistance to change in its power to define and disqualify the truth of events. When this issue is brought into the legal arena adults define sexual intercourse with children in terms of 'paternal rights' and 'family privacy.' Law can colonise medical and psychological definitions of sexual abuse according to its own interpretations. The power of definition is reinforced by the way this topic is virtually banned from general social discourse because of its 'difficult' or 'unpleasant' nature. Crucially Rush (1980) in her book *The Best Kept Secret* develops the point that the notion of incest and child sexual abuse is rhetorically abhorred. When the assailant is a known or close family member the shame and disbelief is so extreme that the family colludes with patriarchal power and silences the victim. The taboo is on the voice of the child, not on the actions of the abuser. If the only established language around the issue of abuse is the legal language then that is the framework that will command and retain the power to claim the truth about abuse.

Judicial opinions provide an authoritative forum through which to challenge the dominant discursive representations around abuse and the objective will be to see in what way they engage with this task. Legal discourse has socialising consequences

(Stygall 1994). A judge's words to describe a particular act or a particular person cannot be separated from the underlying events. Language in a legal setting gives meaning to those events and creates certain realities and identities. More specifically, the language the justice system uses in regard to sexual violence affects the victim's identity (Naranch 1997). For example when the judge claims that the witness 'imagined' things s/he positions the subject as unreliable and unsafe. Other disciplinary narratives, such as those of the media and psychology, and the social sciences, are influenced by legal analysis. They may travel through different genres but they construct assumptions about children that may overwhelm individual experience.

Resistance in the form of 'subversive stories...which defy and politically transform' (Ewick and Silbey 1995: 217), is one option. Storytelling pervades the legal process (Brooks and Gerwitz 1996) and in this study we shall hear many stories about the experiences of abused children. Hearing judicial opinions which tell us the how and why of the judicial interpretation and adjudication of these court tales is an important contribution to our understanding of the issue. These legal stories, however, simultaneously call attention to the absence of the child's voice.

3.7 *The subaltern voice*

Equipping ourselves with the critical conceptual tools to analyse the issue of power, identity and voice is a key objective of this chapter and so additionally we introduce the concept of the subaltern. The first usage of the term 'subaltern' in theoretical literature appears in Gramsci's paper, 'On the Margins of History: history of the subaltern social group' (1934). The Oxford English Dictionary presents the adjectival sense of the word as 'of lower status' (OED: 2008). Subaltern Studies has become a school of Indian post colonial history theorising, but in overall terms it is a

collective theory for those dominated and exploited groups lacking class-consciousness. The application of this concept to this study is useful because it allows us to ‘unearth, investigate and describe the contribution made by the people on their own, independently of the elite and to establish a subaltern or peasant consciousness’ (Siauddin Sardar and Borin Van Loon 2005: 79-81). As applied here in this case, it will help uncover and investigate the contribution made by victims *outside* the legal system. Furthermore, it will introduce and assess the usefulness of victim narratives in the formation of consciousness. At issue here is that the ‘small voice’ is heard,

‘If the small voice (of history) gets a hearing at all...it will only do so by disrupting the telling in the dominant version... breaking up its storyline and making a mess of its plot’

(*Guha, 1996:12*)

The task then is to listen to the small voices of legal and social Irish history. It is particularly apt that we follow this injunction because the voice also belongs to ‘small’ people, that is, children, albeit retrospectively. By grounding our analysis in postcolonial theory we will be able to see who is speaking, who is listening and crucially, to what end. This will work in the way it extends the essential feminist project by highlighting what has been missing from victim-centred politics – i.e. the ‘power-knowledge complexes that materially constituted the self, quite specifically from a post colonial location’ (Kapur 2005: 106) which in this case is within the walls of the legal domain. With these directions in mind the subaltern project is to hear the voice of the individual who has been abused. The dilemma, if there is one, is how to position this individual – not as an essential victim, not as a universal survivor – but instead as bearing witness through the telling of his or her own story. The postcolonial subaltern focuses on the agency of the ‘other’.

Emerging from postcolonial theory, the concept of the subaltern refers to the voiceless, a concept with particular relevance for abused children. Spivak (1988) asked famously ‘Can the subaltern speak?’, and in asking this she forces our attention to those disempowered through colonisation. Although originally rooted in political and geographical colonisation the concept is ultimately bound up in issues of power and powerlessness. Here I will use it to support the analysis of the sexually abused children as they are constructed legally, using discourse and voice as the central theoretical components. How can we hear voices of victims in an archive that is dominated by voices of the elite, the judges, barristers, social workers and psychologists? In Foucault’s later work he emphasises resistance and subversive power to a great extent, urging us to uncover ‘local, discontinuous, disqualified, illegitimate knowledges’ (1980: 83). Feminists have advocated an analysis of the power dimension in constructing identity. Both of these feed into and, almost inevitably, lead us towards the concept of the subaltern voice. Postcolonial theory shares points of reference with both Foucauldian and feminist theories but it focuses more intensely on the distortion of voice. The subaltern voice which cannot speak and cannot be heard is useful for understanding the positioning of the victims in the case of child sexual abuse. It also allows us to analyse the ‘privileged’ voice. According to Guha (1996) there lies a double tension between the ‘blaring voice’ on record and the silences caused by the erasure of the ordinary, inferior, subordinate subject of history (here read the voiceless child).

In the following analysis we will listen carefully to the stories that are told and ask what does the discourse of ‘other’ (victim, child etc.) give rise to? Does it reproduce patriarchal values – found in key words used by the law, keywords that act as defining elements and that retain particular significance for a group of people (Home

2003:298)? The keywords of precedent, delay, corroboration and domination recur in the legal narrative and frame the processes of marginalisation and silencing that occur. Through their hegemonic and rhetorical weight they offer prisms through which the colonial (and post-colonial) objectives can be seen. They offer shifting and alternative meaning deployed for different, sometimes hidden objectives by different interests. These keywords, with their shifting interpretations, sustain a legal discourse that silences the child victim's voice, and defend against the disruptive possibilities that the subaltern subject brings to law.

Postcolonial or subaltern theory represents an attempt to give a voice to the oppressed, to facilitate a consciousness of their situation. Spivak then argued that these were oppressed groups, not subalterns; Subalterns, she argues, are subaltern because they cannot find a voice. The subaltern subject-the adult survivor of child sexual abuse-who speaks through written testimonies challenges hegemonic legal discourse. They engage in a discursive struggle to establish an identity that transcends legal assimilation. The children who *cannot* speak in this way, occupy the subaltern space suggested by Spivak. On the margins, they still do not have the awareness, the language or the voice to exercise agency. However they are connected to those who have preceded them, who have commenced the process of creating a space which they can inhabit when they are ready to do so.

Lodged within the judicial opinions are fragments of narratives from the lives of the victims, traces of their voices. The legal truths of abuse materialise from the stories of a ruling authority and 'owe their existence from the ruling class's need for security and control' (Pandey 2000: 282). They are preserved for public explanation as the authoritative account of abuse. However, the glimpse of the victim is fractured because these are accounts that are now told through clearly marked fields of power. This is

why we must go outside these texts and study the victims' narratives. The exposition of those authentic accounts of the self brings the adult survivor of child sexual abuse back into the frame of reference without the inevitable 'destruction by translation'.

'Subversive stories are narratives that employ the connection between the particular and the general by locating persons and events within the encompassing web of social organization.' Ewick and Silbey (1995: 223).

As the goal of Subaltern Theory is to make space to listen to the voice of the 'other' through their own words, then first we must determine who is the 'other'? The subject of subaltern is already defined in and through its subjection and through its constitution as a relational rather than an autonomous subject. It can be said that all social beings inherently exist in relation to others but the subaltern subject is *defined* as a relational subject. So is this the case with the abused child? Can the child resist or must the adult resist for and on behalf of the child? The problem that is to be addressed is important for this work. Are the victims who authored their books still the 'abused child'? In what way is the voice we hear a subaltern voice – an 'other'?

The concept of the subaltern allows us look to how subjects and subjectivity is generated. Subjectivity describes our sense of being in the world and subject formation is a continual process of becoming. According to O'Loughlin, subjectivity is constituted by three interrelated processes: (1) intrapsychic factors within each child; (2) effects of participation in groups on the kinds of identification and disidentifications' a child adopts; and (3) effects of the discursive practices of society on the kinds of subjectivity a particular child performs (2001: 49). However the road to subjectivity is not simple or unobstructed. Many children tell their stories at the time their abuse occurs but why are their accounts not listened to, refuted or refused? Is it likely that when external discourses surrounding these accounts change, their voices will be heard, thereby enabling the formation of a certain subjectivity of 'abuse victim'

and the identification of their agency? This is what Spivak suggests in her account of the subaltern and his or her speech; she argues that most individuals are prevented from being the subject in their own terms (Spivak 1988).

Thus far we have argued that within the legal domain the subaltern cannot speak, can only become a subject when they submit to the dominant ideology, ‘a prior and authoritative set of practices that precedes and conditions the moment of this action of speech’ (Butler 1993 226-8). Along with rule bound legal discourses, these conditions also comprise prevalent feminist and psychological discourses which insist that the responsibility for rape and child sexual abuse should be firmly restricted to the perpetrators – that neither blame nor shame should be used as a tool for silencing the narrations of the subject (be they victim or survivor). As these external discourses shift it seems they must assimilate parts of the subaltern narratives, in particular, and crucially, those parts they can cope with, which leave us still with fragmented knowledge.

That victims of abuse are constructed by differing dominant powers ‘exemplifies the determinant power of discourse in subject formation’ (Kimura 2008:16). Does being legally affirmed give the subject a hierarchically valued status, one that is denied to those who do not achieve this vindication? It is likely that the ideology of ‘truth’ attached to law will provide the foundation for status and thus strengthen the formation of the survivor subject. This would mean that those who remain outside the legal domain will be confined to a position of victimhood. Subaltern theory has the components within it to allow us to find out if victims can access power through personal narratives. If this is possible then, over time, an element of ‘prevalent discourse’ will comprise aspects of the ‘survivor’ stories, acting as a gateway for a ‘subaltern consciousness’.

Ultimately subaltern theory connects with the Sociology of knowledge in the way it challenges the assumption that the ‘starting point of knowledge is always and already the same’ (Kapur 2005: 5). It raises the question of a different starting point for children, who are not aware of any other starting point, legal or otherwise, than their own. Although Kapur is writing about Indian women and their exclusion from the universal liberal project, this can be equally applied to children and the legal system. It is the victim of abuse who can first be critical of the claims of neutrality and justice of the law – for their knowledge is exactly that. They have experienced violation of the body; this analysis shall investigate their claims that this is often followed by violation of the self from the legal system through silencing and exclusion. For this reason specifically, the inclusion of the voice of the ‘sexual subaltern’ in a voice outside the legal system (in the form of biographical narratives) frees them from the mechanisms by which law constructs and silences them. In her ‘Postscript’ to *Law, Crime and Sexuality*, Smart urges us to ‘never forget that women discursively construct themselves (because) if we do forget this, we risk disempowering ‘women’ and over-inflating the power of the more organised’ (Smart 1995: 231). Hence, this research focuses both on the discursive construction of the legal subject (of child sexual abuse) as well as on the authentic voice of the subaltern subject.

Drawing from Foucault, feminism and from subaltern studies, I have developed a theoretical framework to interpret the legal and personal discourses through which adult survivors of child sexual abuse are constructed. A critical perspective demands an explanation for what is deficient about the current legal construction of child sexual abuse and it does this by challenging assumptions about the status quo. It seeks answers for the reasons why so few prosecutions and convictions are processed through the courts and, crucially, the role played by the legal system in the dearth of disclosures.

This entails analysing the roles of the actors involved, the actions they take and the discourses through which they constitute their practices. The essence of critical enquiry, however, is to point toward the prospect of transformation. The theoretical approach adapted offers the possibility of deconstructing the power relations embedded in discourse. Further, it offers a pathway for overcoming the voicelessness of the adult survivor of child sexual abuse.

Chapter 4: Methodological approach

This thesis is concerned with the issue of knowledge, how a particular issue comes to be known within society. Specifically it deals with how the issue of child sexual abuse is legally constructed. This Chapter lays out the tools that will be used to analyse child sexual abuse discourses as a historically constituting process. I argue that Foucault's work provides a suitable toolkit through his analytical methodologies of archaeology and genealogy. These can be used to examine how discursive practices are historically constituted, gain legitimacy, are reproduced and disseminated. The feminist project seeks to expose the patriarchal bias that permeates legal knowledge and that is communicated in judicial opinion. To do this they advocate a close analysis of the discursive detail in relation to its context; the context here is appealing prosecutions for and convictions of the sexual abuse of children.

It is axiomatic to this research that the words of those in power are taken as 'self-evident truths' and the words of those not in power are dismissed as irrelevant, inappropriate, or without substance (van Dijk 2000). The voice of the victims and the survivors of child sexual abuse can only be accessed in legal texts through the medium of the powerful. Even when representing themselves in their own narratives their voices are mediated through a particular mode-of-production and therefore are vulnerable. My methodology, therefore, will focus intently on language and discourse.

The legal institution was chosen as an area of investigation because it provides access to a particular set of viewpoints and positions from which people speak. Within these we can examine the discourses that construct power and powerlessness in voice and silence and crucially, interrogate claims to truth. A significant aspect in these texts is the relationship between discourse and changing knowledge and they provide

excellent material for illustration and possible future development. Consistent with discourse analysis, the focus is not on the underlying actions (here, acts of child sexual abuse) as much as on how the judiciary constructs child sexual abuse in socially and publicly available ways. The personal narratives analysed here have a different focus and intent than formal legal judgements. Their inclusion provides for comparative analysis, and allows me to access the voices of the abused in a direct way outside of courtroom protocols and procedures. In summary, this thesis engages a methodology of discourse analysis of legal and personal texts pertaining to the issue of child sexual abuse. Analysis of the legal texts enables the development of an explanation of the way in which legal knowledge is derived from and interacts with historic, contemporary, public and private knowledges. From the personal narratives, we garner autobiographical viewpoints that are often absent from legal discourses, and which have the potential to challenge and disrupt the institutional closure of knowledge on this issue.

4.1 Discourse Analysis as Method

Given the power of the written and spoken word, discourse analysis is necessary for describing, analysing and interpreting social relations reflected in text (Luke 1997). Discourse analysis in research - in sociology, psychology, history and literature - has proliferated and takes many forms. There are different understandings of what we mean by 'discourse analysis' and much debate as to the merits of each (Fairclough 2003). Some approaches emphasise linguistic features of texts and others focus on the historical and social context of texts. Fairclough draws on theories and techniques from different disciplines to bring these different approaches together, arguing that

interdisciplinary or even trans-disciplinary' research will produce knowledge which is critical.

'It is critical first in that it seeks to discern connections between language and other elements in social life that are often opaque. These include how language figures within social relations of power and domination; how language works ideologically; the negotiation of personal and social identities.... Second it is critical in the sense that it is committed to progressive social change; it has an emancipatory knowledge interest (Habermas: 1971)'.

(Fairclough 2001: 230).

Following this, the choice of this form of method was dictated by the combined aspects of:

1. the research question,
2. the theoretical perspective,
3. the site/s of analysis,
4. the transformative political intent of the researcher.

Critical Discourse Analysis is concerned with studying and analysing written texts and spoken words to reveal the discursive sources of power, dominance, inequality, and bias and how these sources are initiated, maintained, reproduced, and transformed within specific social, economic, political, and historical contexts (Van Dijk 1988). It tries to illuminate ways in which the dominant forces in a society construct versions of reality that favor their interests. By unmasking such practices, CDA research aims to support the victims of such oppression and encourage them to resist and transform their lives (Foucault 2000).

The starting point for a critical discourse analysis is social practice. Language is just one aspect of this and thus we now talk about 'discursive practices' when we wish to avoid a language/practice duality. While discourse is about language, to extract language from its context of 'structure and event, knowledge and practice, system and process,' is to deny the unity between language and society (Grodin and Kreiswirth

1997). The social context comprises distinct settings where discourse occurs (home, church, school, court), each with a set of conventions that determine rights and obligations—what each is allowed and expected to do. Simply put, the text becomes more than just words-on-a-page—it discloses how those words are used in a particular social context (Huckin 1997). Discursive *practice* refers to rules and norms; it refers to the spoken and unspoken rules and conventions that govern how individuals learn to think, act, and speak in the social relationships that occur in their lives. Gee (1996) clarifies that discursive practices involve ways of being in the world that signify specific and recognisable social identities (such as judges, children, offenders and victims).

Critical discourse analysis involves concepts that are essentially social in character. Within these concepts is the assumption that:

- Discourse is communication and relational, not individual in character. By this I mean, discourse is a social phenomenon, it structures relationships between individuals and groups. As the issue of power is implicit in social relationships we will heed Habermas's statement that: *'language is also a medium of domination and social force. It serves to legitimise relations of organised power'* (Habermas 1968: 259). The data 'object' in this research appears to be 'individual' in the sense that it is written as a finished text, but in fact it is highly relational because it communicates a specific discourse that endures.
- Discourse doesn't just 'happen', it is purposefully produced. This is especially true for the discourse within the texts under analysis here. Just as communicating individuals produce meanings and value through their language, this also applies to institutions. In precise terms, leading social institutions, such as the law, produce, both consciously and unconsciously, a systematised

meaning that contributes to the hegemonic discourse. The remit of this research is to expose how this is accomplished.

- Discourse structures have a direct relationship with social structures in a functional sense. We take social structure to mean that ‘there exists in the social world itself and not only within symbolic systems (such as language) objective structures independent of consciousness and will of agents, which are capable of guiding and constraining their practices of representation’ (Bourdieu, 1983: 14).

An example of this sort of structure is patriarchy, another is post colonialism.

While each of these structures has particular and separate social functions, discourse analysis will show how they share a similar patterned discursive structure.

‘A discourse is not a static, idealized, or totalized unity of words and significances, but a dynamic field of interests, engagements, tensions, conflicts, and contradictions. This field in turn reflects the organization of society and its institutions and the roles and power structures inherent therein’.

(Wodak et al.: 1989)

4.2 Description of narrative texts

There are essentially two sets of data - legal texts and autobiographical texts which I analyse, juxtaposing the two in ways which highlight the difference in constructions of their knowledge and discourse. The data consists of five auto/biographies – and 191 legal judgements. Each set of narratives contribute to the social knowledge of child sexual abuse.

Although it has been argued that ‘narratives have the capacity to reveal truths about the social world that are flattened or silenced by an insistence on more traditional methods of social science and legal scholarship’, (Ewick and Silbey 1995: 199) the decision to choose these particular stories was twofold. Firstly, it was a concern for consistency of method. In juxtaposing two sets of data it is necessary to have a

comparative element and in this case they share the same method of analysis. In using a discursive analysis of these texts the emphasis shifts particularly to the *function*, the communicative work it accomplishes (Labov 1972). Secondly, as the abuse was experienced outside the legal setting, the legal texts emanate from an outside source and thus they provide an incomplete version of events.

The texts chosen for inclusion were chosen because they represent a cross section of narrative types, by this I mean they are organised in differing ways and with different objectives. Of course, narratives are also present in the stories that emerge from within the legal proceedings. There is a young woman who is threatened with sexual assault from a father who has abused her for most of her life; another young girl who must be escorted by psychiatrists to the court, so fragile is her psyche after severe abuse; a young boy, now a husband and father, who walks tentatively and tenderly through life because his broken self never feels secure. These were young, sometimes very young, children, with no expectation of harm being done unto them, when their lives became severely affected by the actions of other people. However, the narratives that I include in this section are *not* derived from a court setting. Instead they are specifically written in a context controlled by the authors, where the motivations for speaking spring from their own reflective concerns.

The details of the auto/biographical narratives are:

I. Altar Boy, a Story of Life after Abuse

Andrew Madden's story *Altar Boy*, a story of life after abuse, is written in the first person 'I' mode and is born out of experience, the narrative and the self inseparable. The book is sequentially organised, beginning before the accounts of abuse, setting up the context. The account does not prepare the reader with an abstract,

although the references on the front and back cover leave you in no doubt about the contents. It uses insignificant detail as a method not just of convincing the reader of accuracy but to bring the reader into the presence of the characters so that they can experience the reality of abuse *'The priests of the parish seemed to be from a different world. They were all old – at least older than my father. Their black suits, long black coats and collars made them stand out from everyone else I knew.....even Terry (sacristan) tiptoed through the sacristy when the priests were around'* (p.2). The minute details emphasise the ordinariness of the life – only possible because this life comprised normal everyday unremarkable experiences and thus the reality of what occurs gives credence to the normality of abuse. Every particularised story provides both the author and the listener with small slivers of self-understanding and sharing the normality of *'helping with the washing up', 'cleaning out the shed of dirty jam-jars'*, seduces the reader into a sharing of the abuse and its effects. Life is punctuated by short chapters, being an altar boy, in love with the 'idea' of priesthood, frozen reactions to abuse, attempts to move on, disclosure and being ignored, and then a life of recrimination, confusion, anger, self-abuse (through drink and drugs) and explorations of sexual identity. Finally the last few chapters deal with the agentic man, determined to engage with the structures surrounding abuse, religious and legal and political. The book ends with the words: *'Although I still carry many of the effects of child abuse I no longer consider myself a victim. I've done something about it. I've turned it around'*. This theme of rejecting the 'victim' label is very strong in all these narratives.

2. The God Squad

'The God Squad' written by Paddy Doyle is an account of institutional abuse, chosen by me to represent the cases which involved children who were abused by their

teachers in school, although they do not involve the industrial schools in which Paddy Doyle was 'incarcerated'. Once again it is a chronological account of his childhood, setting up context and allowing the reader to partner him along the road of memory. It is a deeply disturbing account of cruelty and abuse and takes any reader, who has not experienced the same conditions, into a world that is wholly unfamiliar. In fact, one could say a world that is hardly knowable. Nevertheless because this book is part of 'victim/survivor' canon it shares a commonality with other stories and in doing so the level of abuse is equalised, the degrees of violence and the circumstances in which it occurred is retracted and minimalised.

3. Stolen Childhood

'Stolen Childhood', the next book, is organised differently. The book and its origins are introduced by an editor who facilitates the process. The book is prefaced by the story about the process of its creation, it follows the schema described above, but it is punctuated by a series of short stories, rather than one. This method of organisation allows the reader to note patterns and diversities and in turn to recognise that within the differences the normality of abuse shines through. The stories are told in first-person mode and this removal of the screen of mediation performs the function of increasing the credibility of the accounts. This anthology creates an environment in which the survivor does not have to prove her case, but can focus on sharing her pain and suffering with her sisters. The simple acceptance of the reality of abuse, of not having to prove it as those in the court process have to, allows the reader a freedom to listen openly. The survivor is not a subject to be studied. Instead, s/he is one in a multitude of voices raised to affirm the suffering. Thematically related, the stories establish common experience without ever having collaborated, and through this repetition 'of sorts' we,

as readers, learn the norm of abuse in Ireland. The strongest shared element of these stories is that of resolution; each story finishing with a transformation from victim to survivor, albeit using different processes. Some of the victims enter into public (even political) arenas, following the feminist tradition of making the ‘personal political’. Some remain private. Some confront their abuser but others do not, resolving their transformation in a purely individualistic process.

4. Sophia’s Story

‘Sophia’s Story’ is different again to the above accounts, in that this book is written by a journalist about and on behalf of a victim of severe physical and sexual abuse. In 1995, Sophia McColgan’s father was sentenced to prison for the serial rape and abuse of his children over many years. He had first raped Sophia when she was only six and it took Sophia fifteen years to escape from his repeated rapes and assaults. As news of his appalling treatment of his family came to light the public wanted questions answered; how did he get away with it for so long? Why did no-one come to the families aid?. It had taken immense courage on the part of Sophia and her family to bring the murky, hidden world of family child abuse to the public gaze. The story was already in the public domain through journalistic accounts of the trial of Joseph McColgan the perpetrator of the abuse and through the case brought by Sophia McColgan against the North Western Health Board for neglect and finally through the citation for Sophia McColgan when she was made Irish Person of the Year in 1998. This book is the 2004 edition of the book that was first published in 1998 and the preface immediately notes the effect or non-effect of the publicity that emerged from these activities. This book is different; it is embedded in political and structural arguments. It highlights a problematic characterisation in law, analyses the factors responsible and proposes a new

conceptualisation with implications for social and legal policy. McKay's account of Sophia's story provides an emotional quality that brings cultural context into the legal domain. Unlike Madden's story this account of abuse is not lived at 'normal' family life, yet the internal consistency of the recounting of events, mixing them with letters, minutes of meetings, medical data, can persuade me to believe what should be unbelievable. The main aim of this story is to locate the individual 'private' experience of childhood sexual abuse within the larger 'public' domain of a patriarchal society.

5. 'In Their Own Words: Coping with Rape and Sexual Abuse'

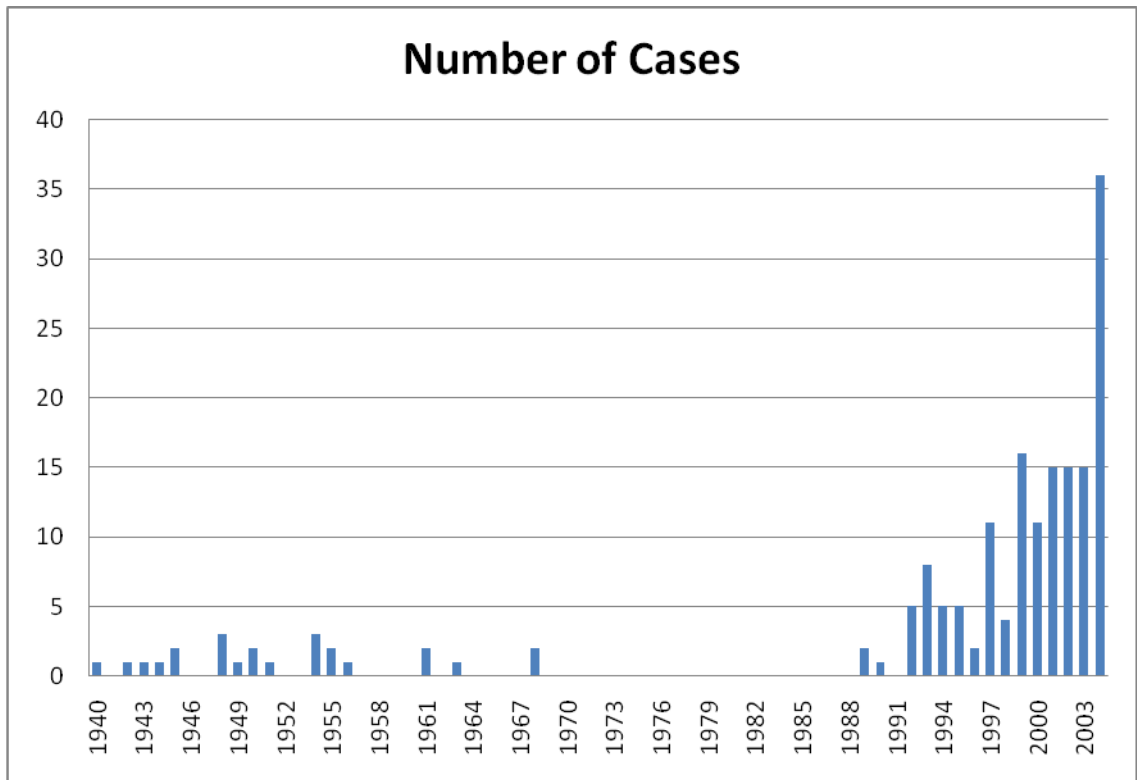
The final book in this selection sets out to provide a broad based perspective on survivors' experiences. It is broad in the sense that it includes accounts from counsellors, legal personnel, media contributors, politicians, counsellors, a psychologist and a medical doctor. As well as survivors stories it supplies accounts from ethnic groups, a member of the religious fraternity and finally art work and poetry. The point of departure for this book is the understanding that all experiences of abuse are unique, yet there are also common threads. Interesting here is the idea of promoting the knowledge that there are multiple victim identities and in the process empowering individuals to escape from a colonisation of their experiences.

The books have been selected as broadly representative of their particular genre. The number of texts to be analysed was limited by the need to keep the project manageable.

4.3 Description of legal texts

Legal texts are those of the Appellate Court and this data set includes cases that were considered on Appeal. There were 191 reported decisions of the Court; they include 44 judgements from the Supreme Court, 73 from the High Court and 70 from the Court of Criminal Appeal, in all more than 3,000 pages of legal opinion. Three cases are mentioned that were not the subject of an appeal, but were reported because the judicial opinion was considered important for future cases. A further three cases were the subject of decisions from the Office of the Irish Information Commissioner, which were also relevant to the discussion. Not included in this data were cases that concerned issues of child custody. These are cases where the relationship between parents had broken down and allegations of sexual abuse played a part in the confrontation between both parties. As the focus of the discourse was not the sexual abuse, but the custody of the child, I chose not to complicate the analysis by including these cases. It must be acknowledged however that the issue of child sexual abuse is present in other areas of law as well as those of the Appellate Courts. The point of departure for the selection of texts was the judgements made by the Appellate Court in cases dealing with the sexual abuse of children. They are derived from the years between 1930 up to and including 2004. The length of opinion varies from a single page to sixty-three pages.

The legal data set includes cases that were considered on Appeal. There were 191 cases in total.



1	1940
1	1942
1	1943
1	1944
2	1945
3	1948
1	1949
2	1950
1	1951
3	1954
2	1955
1	1956
2	1961
1	1963
2	1968
2	1989
1	1990
5	1992
8	1993
5	1994
5	1995
2	1996
11	1997
4	1998
16	1999
11	2000
15	2001
15	2002
15	2003
36	2004

Figure 1: Number of Cases per Year

As can be seen in the above chart, appeals about legal issues disappeared for over twenty years and the renewal and fast escalation of cases began in the mid 1990's and reached new heights in the final year of this study. This can be explained by the shift in the power of the church and the rise of the role of the media in Irish society. It was further complemented by the development of individual agency, whereby adults were prepared to deal with problems they experienced in childhood, resulting in a rapid increase in the reporting of childhood abuse.

The data includes all reported cases, not a random sample. Since 1930 virtually every decision of the Courts of Appeal relating to child sexual abuse is reported in there. By including the full data set there is an increased likelihood that the full array of multiple realities will be exposed and that more extreme or deviant cases will neither

be suppressed nor highlighted. This means that external validity concerns can be eliminated and empirical inclusiveness is preserved. The patterns that emerge from this analysis can, therefore, be taken as reflecting the overall performance of the Irish Court over a period of time. This study covers a period of time rather than a particular point in time. The oldest case occurs in 1932, and the most recent one in 2004, and so changes over time can be analysed.

The Appellate Court provides a classic example of the voice of law as it has been developed over time by the judiciary. Critical discourse analysis makes visible the ways in which institutions and their laws act upon us and shape us and is particularly useful for its critical powers, enabling a form of critique and resistance which is essentially accomplished by asking the question ‘How?’ How does the legal system exercise its authority to name or construct abuse? How do individuals understand their abuse? How are relationships exercised in the interaction between the two? Drawing on Foucault’s understanding of the properties of discourse ‘as practices that systematically form the objects of which they speak’ (Foucault 1971: 49) this study seeks to expose the discursive practices of the Appellate Court.

4.4 Data gathering and analysis

Once I had established the significance of legal knowledge to the social understanding of child sexual abuse I resolved to conduct legal research and began, in Foucauldian fashion, with the historical roots of this particular domain of knowledge. I adapted a reflexive approach to the process of data gathering and analysis.

It was possible to access every journal in the periodicals that publish reports of cases in the Irish system. These were the *Irish Law Reports Monthly*, *Irish Law Times Reports*, *Irish Jurist Reports*, *Irish Law Journal* and *Irish Special Reports*. Only a small

proportion of cases decided by the courts are reported and the cases that are reported are selected by the court report editors not by the courts. To be reported a case must:

- Raise a point of legal significance
- Modify an existing principle of law and/or settle a doubtful question of law
- May include questions of interpretation of statutes and important cases illustrating new applications of accepted principles (Authorstream.com)

Unreported cases, on the other hand, are considered unreported if not published in a law report series even if they are published on the web i.e. made available to the public. Law Report decisions are checked by a judge before publication. It is noted that the choice for publication emanates from practicing members of the legal profession and then subsequently used more frequently for referencing. The knowledge contained within is thus given an authoritative status and then infinitely reproduced.

A degree of confusion attended the initial attempts at data collection. The methodological techniques and advances that are familiar to researchers trained in the specialised legal field were unfamiliar to this researcher trained, as I was, in the broader discipline of sociology. Initially, the method used could be described as ‘snowballing’, in that when one case was mentioned as precedent I followed it up and so on. However, as my knowledge of citations and reporting grew I became aware of the methods for naming cases. In the instance of child sexual abuse cases it became the rule not to mention the name of the appellant in consideration of the fact that a child was involved, and this would protect the identity of the victim. This fact was pivotal in allowing me a way into the discovery of the cases, that is, any case that had initials rather than names in the title was the subject of scrutiny and appropriate inclusion in this study. When I realised that many cases were quoted by the judiciary and used as precedent in their judgements, but had not been published (unreported) I went on to find these cases in

books in the Law Library at Trinity College. With little knowledge of the particulars of the library catalogue system for such reports I found to my dismay that every case was in bound ledgers with a somewhat haphazard system of indexing. Once again, each and every ledger had to be examined for cases. Unlike the commercial product of a published legal journal, the unreported cases were a record of all cases. They comprised a transcript typed by a legal secretary, amended as necessary by the presiding judge and then photocopied and included in the ledger. Some cases appeared in the wrong time sequence, by month or even year, and this meant that each and every ledger had to be rigorously scrutinised. All cases were photocopied in preparation for analysis. The location of, and access to, data was limited to academic research until the latter part of the century, unless the cases were reported by the media.

The layout of the data changed over time, (see below for examples). The earlier cases were published in specific Law Journals that were directed towards legal personnel but could be also viewed by the general public. At the top of the report, as outlined below (See Appendix 2 for copies), items of interest and the legal Act that was invoked for judgement were summarised for easy reference.

I.R.]THE IRISH REPORTS.

**THE PEOPLE (AT THE SUIT OF THE
ATTORNEY-GENERAL)**

**Criminal Law –charge of unlawful carnal knowledge
of girl under 15 year - Evidence of prosecutrix—
Absence of corroboration— Judge's charge—
Necessity for warning the jury—criminal Law
Amendment Act, 1935. (No. 6 of 1935), s. 1, sub-s. 1.**

**Where, on a charge of unlawful carnal knowledge of a girl under 15 years of age, there is no corroboration of the evidence of the prosecutrix, the attention of the jury should be directed by the Judge to the absence of corroboration and a warning should be given them of the necessity of exercising great care in weighing her evidence. The degree and gravity of the warning should depend upon the particular circumstances of the case ; but in every case, when an adequate warning has been given, the jury should be told that they are entitled to act on the evidence of the prosecutrix if they are satisfied beyond all reasonable doubt that it is truthful,
So held by the Supreme Court on appeal from the Court of Criminal Appeal.**

Reports since 1990 have more detailed information of record. While they declare the outcome at the outset, they do not summarise the case and therefore do not facilitate fast access when searching for a category, such as delay or corroboration. The style that is favoured at present (since 1990) first lists the Court, then the names of the judiciary and then a unique identifier to locate the case within electronic and/or physical databases. The name of the defendant, who is designated as Appellant/Applicant and then the Director of Public Prosecutions who is designated as Defendant/Respondent, (each of these terms can be changed depending on the role of each within the case). A single judge is then identified as being in charge of writing the majority opinion and the concurring or opposing opinion of the other judges is noted.

Judgment Title: W -v- DPP

Neutral Citation: [2004] IESC 48

Supreme Court Record Number: 106/02

High Court Record Number: 1999 50 JR

Date of Delivery: 28/07/2004

Court: Supreme Court

Judgments by	Link to Judgment	Result	Concurring	Dissenting
Murray C.J.	link	Appeal dismissed - affirm High Court Order	Fennelly J., McCracken J.	

Outcome: Dismiss

Finally, access to the data has increased with the advent of digital technology. There is an increased availability of reports, which can now be accessed through legal database systems. The British and Irish Legal Information Institute ‘provides access to the most comprehensive set of British and Irish primary legal materials that are available for free and in one place on the internet’ (BAILII <http://www.bailii.org/>). For the purposes of this research I used the BAILII database and through the use of various strings of search terms such as ‘child’, ‘sexual’, ‘abuse’, ‘paedophile’ etc. I was able to find many of the cases from 1997 onwards and these increased with each passing year.

Many analyses of qualitative data begin with the identification of key themes and patterns. Data analysis involves an ongoing, iterative process of reading and rereading the appellate opinions to draw out categories of meaning (Glaser and Strauss 1967). Essentially the process of coding the data allows us to organise our data into manageable units of analysis. ‘Codes’ are tags or labels, used for assigning units of meaning to the descriptive or inferential information compiled during a study’ (Miles and Huberman 1994:56). Each case is interpreted both individually and comparatively with other cases and then connected to broader social concerns. The method that worked best in this research was an initial intensive reading of the cases in order to get a sense or a ‘feel’ for the data. Statements and phrases which recurred or which fitted with pre-defined categories were identified and marked. It was here that I had to take care to guard against, or at least identify and minimise, the influence of my personal ideas and attitudes. To do this end I determined to identify and suspend my ‘assumptions, beliefs, culture, attitudes, values, perspectives, and knowledge about the phenomenon under study to ‘see’ and ‘hear’ the experience of another’ – a process also known as bracketing (Mariano 1995: 467). The analysis of the documents from the courts moved beyond simple indexing of participants and results onto broader themes.

By reading and re-reading, and attaching codes (by colour) to specific themes it was possible to construct a conceptual scheme that suited the data. These themes included locating how abuse was spoken of, what ideologies and political issues were represented, how different actors are constructed and how knowledge is hierarchised. Such findings enabled me to identify salient patterns of meaning ascribed from the discourse analysis.

The themes identified were then examined within the context of the entire case. This was to ensure that any distortions from the categorising and breaking up of the data would be minimised. I used Excel spreadsheet technology (see Appendix 3) to help categorise and code the large amount of quantitative data; this provided another perspective on the cases individually and comparatively. The analysis of the quantitative data enabled me to create categories of classification that are grounded in the data. The use of data cross-classification schemes can generate insights that lead to further exploration of new typologies or new meanings (Marshall and Rossman 1999).

Narratives or stories have become the subject matter of socio-legal research in the last two decades as they provide a space for the voice of the victims, a space that was previously denied or repressed. Personal testimonies in the form of memoirs or autobiographies provide a broader social perspective on child sexual abuse than that available through more narrowly legal narratives and texts. It can be argued that *'narratives have the capacity to reveal truths about the social world that are flattened or silenced by an insistence on more traditional methods of social science and legal scholarship'* (Ewick and Silbey 1995: 199). Narrative also has the transformative potential to reveal truth and unsettle power. For at least one hundred years the absence of the narrator's voice allowed the continuance, not only of abuse, but of the

institutional support for it. The notion that truth and knowledge are socially and politically produced throws the idea of objectively derived truth into high (and negative) relief and the genuineness and presence of the narrative voice makes inroads into – disrupts – the hegemony of legal knowledge. The combination of revealing truth and disrupting the superior claim of legal objectivity gives narratives validity in social enquiry. However, it will be shown that narrative also has the ability to sustain power, to support the status quo, and legal narratives particularly so. ‘Narratives are social acts performed within specific contexts that organise their meanings and consequences’ (Ewick and Silbey 1995: 205). They are told for a variety of reasons and are constrained by both rules of performance and norms of content which enables them to be understood by their audience. Thus the narratives that we encounter from the appellate texts are constructed in a manner that is appropriate to the courtroom whereas those from the biography and autobiography would be considered by those same courts ‘as filled with irrelevancies and inappropriate information’ (Conley & O’Barr 1990: 58). Why have these stories been told in the way they have? Stories are told ‘to entertain or persuade, to exonerate or indict, to enlighten or instruct’ (Ewick and Silbey, 1995:208). Goffman argues that when identity and status is threatened narratives are produced to construct identities that position the social status of the authors to their satisfaction.

These narratives represent a series of publications emanating from the victims’ perspective. Dorothy Smith argues that social scientific methodologies that start from text-mediated discourse produce subjects as objects. Yet, she claims:

‘Texts, text mediation, textuality, are central. The text is the bridge between the actual and the discursive. It is a material object that brings into actual contexts of reading a fixed form of meaning that can be and may be read in many other settings by many other people at the same time or at other times. It creates something like an escape hatch out of

the actual and is foundational to any possibility of abstraction of whatever kind..... (these) can be read as a set of procedures for writing the social into texts, and hence for exploiting the power of the textual to analyze and isolate dimensions of organization that are fully embedded in the actualities of living. Of course that writing, that text, its reading, is always ongoing and in the actual’.

(Smith 1992: 91).

As a method of inquiry I see these narratives in this way, as situating real lives in the social setting of a relationship of power and within that frame of creating a space for investigation. I believe following Whitford, that:

‘.....all knowledge of the world is rooted in the knowledge-production processes engaged in by enquiring and experiencing and therefore knowing subjects. Autobiographical writing centres the knowing subject and makes the basis of its knowledge-claims available for analytic scrutiny. Of course these are accounts, historiographies, and not the past of a life itself; and of course they should be evaluated in such terms. But to recognize this does not entail rejecting the form or denying its very real interests and attractions, and most certainly, nor should it, entail dismissing its ability to provide analytically sharp, albeit experientially derived, theory.

(Whitford 1994: 416)

4.5 Application of Method to Appellate Texts

In the sense that they involve discursive structures, the texts that stem from Appellate decisions are the domain of discourse, that is, they share a common language, norms and assumptions and are therefore available for analysis. Unlike a general social discourse, however, the knowledge they contain is dependent on the ‘special’ knowledge of the (legal) community of producers. This discourse/knowledge relationship is the object of this methodological component. The context and use of this relationship – developed through time, and custom and legal kinship – lies within the text and is central to the true meaning. The practice of such knowledge/discourse is carried out through the interpretation of law.

The central arguments here are (1) that although rationality is proposed as the base for legal decisions, this method results in the placing of a boundary or limit on the potential in law and this analysis seeks to expose this limit; (2) that interpretation involves choice - and choices in interpretation imply subjectivity and (3) that the need for interpretation arises from the social practices of the common law, binding the practices inextricably to authority and power. With this explanation in mind this thesis views the data comprising legal texts as a positive activity in making meaning – they specifically are not a passive reflection of meaning already made. They are, of course, formal structured texts of the law and their authors' function is to declare the law and justify the reasoning that has led to the decisions that have been made. This involves a connection between the interpretation of legal texts (practice) and being a member of the legal community (social). Written law texts from the Appellate Courts are distinctive in that they derive from a particular category of this community – i.e. the judiciary. Although within the texts we will hear many voices, the texts themselves involve a specialised discourse that is owned by members of the legal community but alien to the broader society. In other words, they are meaningful in a technical sense only to the legal personnel who have a mastery of the lexicon of law and an understanding of legal reasoning. Their form complies with many other aspects of specialised discourse, such as the overall format or text-schema (although comments on this later), the style and also the rhetoric, including its typical metaphors and argumentation patterns. The language itself contains archaic terms derived from a long history of Western law, but with the aid of a good legal dictionary it is possible for the layperson to negotiate the texts to some degree. Fundamentally, however it must be acknowledged that the roots of legal knowledge are located in relationships of power which are dominated by legal personnel and from which victims are largely excluded.

Finally applying discourse analysis to these appellate decisions has particular benefits for achieving the goal of the research. In challenging the unequal relationships of power between judicial practices and silenced victims, the legal texts reduce the risk of potential bias from other, outside, sources. Further, the fact that Appellate texts are finished products and that the data set is complete means a fixed set of meanings can be elicited. Finally, the data set can easily be re-viewed and verified by third parties.

4.6 Limitations

As with all research the present study has its limitations. First, discourse analysis as a method cannot claim absolute answers to any specific social problem because it depends on the interpretation of the researcher. In its favour, however close reading of public record texts does provide a real opportunity to gain insight into the social construction of the victim/survivor of child abuse, from both the legal personnel and survivor's perspectives.

Second, the sample only consists of appellate decisions, all of which depend on a process within the legal system for their existence. This means that we do not examine the cases which the DPP decided not to bring to court, the number of cases that avoided trial on the basis of a guilty plea and the cases which were tried but never appealed. We cannot judge the difference this makes to the process, whether the cases in the data are better, worse or different in any way. The point here, however, is that an examination of trial transcripts would not necessarily yield an elaboration of the judicial opinion. It would be interesting, however, to have a data base for the reasons that the DPP does not prosecute as this would provide another important layer of understanding. Conversely, the appellate opinions are excellent material for showing the way the judiciary construct

the situation and the players and the reasoning process they adopt relative to the narratives of the victims.

This research is exploratory, descriptive and explanatory in its design. Foucault points out the dominating effect of discourses established over time by citing the difficulty a researcher may have in producing analysis that does not incorporate the same discourse that s/he is studying. Dorothy Smith is also concerned:

‘Social scientific inquiry ordinarily begins from a standpoint in a text-mediated discourse or organization; it operates to claim a piece of the actual for the relations of ruling of which that discourse or organization is part; it proceeds from a concept or theory expressing those relations and it operates selectively in assembling observations of the world that are ordered discursively’

(Smith 1992: 91)

When confronted with almost two hundred legal opinions, some containing over sixty pages my aim was to lay bare the discursive processes within these texts. Apart from evaluating the quality of the reasoning I wanted to be able to identify the dimensions of power, domination and patriarchal containment within the discourse. Following Foucault the aim here then was to understand the ways that this legal discourse transmutes itself into numerous practices that control the subject; to uncover how the ideological function of discourse operates. In doing so, the analysis has the potential to give voice to the silenced and to contribute towards the sociology of knowledge.

Chapter 5: *Personal Narrative as a source of knowledge*

The purpose of this research is to understand the relationship between the Irish legal system and the problem of child sexual abuse. A feature most notable within that system is the absence of the voice of the victim/survivor of abuse, except where it concerns the victim impact statement. This statement, however, is constrained within the dominant discourse of law, i.e. it must observe strict court-defined conventions. As we have noted doctrine and dominance go hand in hand and Foucault insists that escape is only possible through resistance that is meaningful. We should not fall into the trap of endlessly reproducing the dominant discourse (1969: 168). This can be achieved outside the domains of the court, in the form of literary narrative, where those who have experienced abuse have the power to control the form and content of the stories they tell. Narratives, however, do not simply reproduce in words what is already known. More accurately, it can be said that meaning is created through the process of narrating and this, in turn, informs a new truth. It affords alternative understandings and ultimately has the potential to create new realities. It is important to emphasise that the data under review – stories of abuse – constitute a discursive event. As in any such event there will be standard arrangements in which there are speakers and listeners (writers and readers in this case), some of whom ‘are accorded the status of interpreters and others are constructed as ‘naïve transmitters of raw experience’’ (Alcoff and Gray 1993: 264). Understanding these factors means that we recognise that roles are assigned within this relationship; the writer is in control and has established authority. Other voices, such as perpetrators, authority figures, experts etc, may be absent, silenced or mediated. The relationship between the author and the reader, the sense of self and

subjectivity of the writer are all affected by this experience. Telling the story performs a function, often a multitude of functions, one of which is simply breaking the cultural silence that protects abuse. Stories get inserted into the web of discourse that surrounds abuse and disrupt the interconnecting elements that exist within it. If the stories are read, then, according to subaltern theory the author transfers from the status of subaltern to a more equitable power relationship within society. As a form of resistance within the orbit of the law it is only successful if it disrupts the legal version of truth by insisting on a ‘return of knowledge’:

‘What I mean by that phrase is this: it is a fact that we have repeatedly encountered, at a superficial level at least, in the course of most recent times, an entire thematic to the effect that it is not theory but life that matters, not knowledge but reality, not books but money etc. but it also seems to me that over and above, and arising out of this thematic, there is something else to which we are witness, and which we might describe as an insurrection of subjugated knowledges’

(Foucault 1980: 81)

Foucault links local subjugated knowledge with struggle – hostile encounters which even up to this day have been confined to the margins of knowledge. This chapter is just that – ‘*an attempt to emancipate historical knowledges from the subjection to a scientific hierarchy of knowledge and the effects intrinsic to their power*’ (Foucault 1980: 85). The purpose here is to give voice to those who have generated narrative accounts of their personal experience of abuse and its effects.

5.1 The victim narrative

Telling stories plays an important role in the shift from silence to recognition of the relatively powerless position of young children. The stories told by adults recall the sexually abusive behaviour to which they had been subjected when they were young and in doing so they reveal issues of power, shifts of knowledge over time and the

process of change. They also perform the function of instigating a new reality by their disclosures, shaping the worlds of both teller and listener.

Although there is a sense that the market is 'flooded' with victim narratives, this is not the case in Ireland.⁴ Most of the books deal with physical and emotional abuse that occurred within institutions. Shohat asserts that dominant groups need not preoccupy themselves too much with being adequately represented. There are so many different representations of dominant groups that negative images are seen as only part of the 'natural diversity' of people. However, 'representation of an underrepresented group is necessarily within the hermeneutics of domination, overcharged with allegorical significance' (p170). The mass media tends to take representations of the subaltern as symbolic, meaning that since representations of the children who are abused are few, the few available are thought to be representative of all abused children. It is important therefore to find and acknowledge the diversity that exists within the narratives and to recognise the extent to which this research is conditioned by questions of representation.

Said, in his study on colonial discourse, emphasises how the will to know and understand the non-western world in colonial discourse is inseparable from the will to power over that world. Similarly, Spivak's deconstruction of elite representations of the subaltern points out 'the danger of appropriating the other by assimilation' (Spivak 1988: 308). While applying this perspective to narrative accounts of victims of child sexual abuse the analysis will take into account Kali Tal's argument. She maintains that

⁴ See Paddy Doyle, *The God Squad: A Remarkable True Story* (London: Corgi Books, [1988] 1989); Margaret Matley, *Always in the Convent Shadow* (Dublin: Wolfhound Press, 1991); Patrick Touher, *Fear of the Collar: Artane Industrial School* (Dublin: The O'Brien Press, 1991) and *Free as a Bird: The Shadow of Artane* (Dublin: Gill & Macmillan, 1994); Pat Tierney, *The Moon On My Back: Autobiography* (Dublin: Seven Towers Publishing, 1993); Mary Phil Drennan, *You May Talk Now!* (Blarney, Co. Cork: On Stream Publications, 1994); and Bernadette Fahy, *Freedom of Angels: Surviving Goldenbridge Orphanage* (Dublin: The O'Brien Press, 1999).

while trauma survivors work to articulate their experiences out of a need to make them 'real' to the public, these stories can also become 'tools in the hands of those who shape public perceptions and national myth, *'creating tensions between the survivor's desire for change and the state's and others' interests in 'preserving the status quo'* (1996).

Childhood sexual abuse narratives, whether of incest, extra-familial or institutional in origin, became the 'master-narrative'⁵ of victimhood from the 1980's on, particularly within feminism (Abrams 1994: 44). Initially the whole topic of CSA was taboo, where victims were afraid of not being believed or worse, of being blamed for the sexual interaction. However, perhaps in part due to new social movements, child sexual abuse is high now on the media radar. It has become the plot device of television police dramas and soap operas. Whether this is positive or not depends on the portrayal of the characters within the accounts and the meaning inherent in the message. Attention is frequently directed to the victim and the degree of suffering s/he experienced, rather than the political direction of dominance and power exerted by the perpetrators (Armstrong 1996). The psychological effect produced by abuse has been more interesting to the media than the more structural story of its pervasiveness within the culture. Victims who narrate their experience of abuse and its effects cannot escape this social context. Their discourses reflect the influence of the reality they inhabit while, at the same time, contribute to the general public knowledge around them.

⁵ 'Within the narrative field, "master" narratives tie together multiple discourses of lesser reach. Master narratives serve as organizing principles. They provide lines of logic for whole systems of thought; constitute global understandings and maintain mentalities. A master narrative confers legitimacy on minor narratives that branch from and depend on it. Minor narratives, in turn, elaborate and support the master narrative. We tend to assume the truth of master narratives because their many connections make them seem obvious, fundamental and complete, without alternative. Altering a master narrative has far-reaching effects'. <http://www.bridgetochange.com/handbook/chapterthree.shtml>

The texts chosen for inclusion represent a cross section of narrative types. They are not fictional creations like the dramas and soap operas already mentioned, but are produced as ‘fact’ and as discourses of experience. The five texts include:

Altar Boy, a Story of Life after Abuse, by Andrew Madden

The God Squad, by Paddy Doyle

Stolen Childhood, edited by Iseult O’Doherty

Sophia’s Story’ by Susan McKay

In Their Own Words: Coping with Rape and Sexual Abuse, by Jackie Hayden

I argue that we should value experiential accounts of child sexual abuse as against objective legal accounts. I question the equation of voice with authority and silence with victimisation. Stories have huge potential to become a part of the discussion of legal problems and by so doing to inject new knowledge into the legal system. They test accepted traditional scientific knowledge which often flattens or silences this rich source of experiential knowledge. Stories challenge the authority of truth that is promoted by law while, at the same time, they have the ability to critique the social relations they speak about.

5.2 Identity and the disclosure of emotion in the narratives

The authors of these stories tell us repeatedly why they have disclosed their experiences in the form of narrative. Three reasons advanced are: empowerment, understanding who they are and facilitation of change for others. This combination of social, psychological and political objectives gives these stories a pattern that is repeated over and over. Bruner clearly states that ‘we constantly construct and reconstruct a self to meet the needs of the situations we encounter, and we do so with

the guidance of our memories of the past and our hopes and fears of the future' (Bruner 2003: 211). Thus many of these stories have a similar feel to them because all those who experienced abuse are taking a similar journey towards understanding who they were and determining who they will be.

At our core lies a master narrative about who we are, our identity. Telling stories does not just help us to make sense of ourselves and the world, or even just give shape to our experiences, but is one of the primary means through which we constitute and reconstitute our very selves; as Andrews puts it, 'our stories are a cornerstone of our identity' (2000:198). Human agents use narrative not only to describe experience, but to give shape to that experience; narrative creates us at the same time as we create it. Public knowledge about victims of sexual abuse was initially constructed in terms of the law so these narratives were assumed to be agentic in disrupting that construction and resisting the legally assigned identity.

When Sophia McColgan decided to tell her story, through the mediation of a prominent journalist, she had already been through two court cases which had been graphically reported in the daily newspapers. Her biographer explained that the authoritative control over personal narratives is critical: *'Telling your story in court usually means being cross-examined in a hostile manner, and is not really a telling of your story in the way you would like to tell it. After the case a victim can get the chance to tell aspects of the story that did not arise in court'* (Susan McKay in Hayden: 2003:89).

A sociological concept of emotion maintains that emotions and emotional display are governed by 'feeling rules' which guide appropriate feelings in a given situation (Hochschild 1979). Implicit in the existence of rules is the notion of deviance. If feeling rules are gendered as Hochschild claims, then so also is the experience of

deviance. Women have generally been deemed—even if largely as a result of gender stratification—more emotional, subjective, and relational than men. Feminist theorists contend that the separation of passion and reason serves not only to divide thought and feeling but to elevate the element of control – control over passion and action and feeling – which in turn permits a patriarchal control of social life (See Chapter 3). By ‘patriarchal control’ I mean a situation where men control the broad outlines of social life; where men see control as ‘central to their sense of self, well-being, worth and safety’ to the extent that their reality becomes one of the controllers and the controlled. (Johnson: 2005). The argument is that reason has been assigned to the dominant political and social group (i.e. white males) and Jagger (1989) contends that the ideological function of such allocation is to bolster the epistemic authority of the currently powerful and to discredit the knowledge of the subordinate groups. Because rationality is linked with providing access to the objective structure of reality, it quickly gained a higher value in western epistemology. Deslandes suggests, however, that emotions may be helpful, rather than inimical to the construction of knowledge.

‘Acknowledging emotion in its constructive capacity as a means to comprehend the world, is to come to terms with emotion’s ability to grasp the empirical data of sensible experience’

(Deslandes 2004: 10)

Thus, it can be said that there is a symbiotic relationship between emotion and rationality. Within these stories of abuse there is an attempt to bridge the false division between the two realms. For these narrators, human cognition is driven by inseparable constituents - rational thinking that underlies our emotions and emotions that drive our thinking.

Presenting themselves as complex beings, these victims’ identities are constructed as individuals who are capable of rational as well as emotional behaviour, of vulnerability and of strength, of naivety and of knowledge. They show how the

division between objective thinking and emotional feeling can exist within the one individual. For example 'Brendan' notes:

'I believe a paedophile needs counselling. Jail or confinement is not the answer. He'll eventually come out as the same paedophile as when he went in. Psychotherapy is the answer, and bringing out the truth. That's me being objective. But if I take a different stance, or look at it in a different emotional state, I'd say he should be castrated. That's me speaking from anger.' (Brendan's Story: 38/9)

In this instance the victim is conscious of his agency; his ability to occupy the rational and emotional elements of self and still retain an integrative identity. Unlike the reality of the court where decisions are constructed in the single domain of objectivity, the victim sees no problem with this duality. Furthermore, when faced with other stories of abuse these victims can distinguish between issues of sameness and difference and still retain a sense of victimhood, whereas the courts build their knowledge on creating categories where difference describes falsity.

'In the television programme 'Suing the Pope' the victims told a story that was dark, horrific and painful. I was full of admiration for the boy who told how Sean Fortune had come upon him and raped him from behind. But I can't relate to that darkness. It made my story sound ridiculous. In a truly bizarre way, Norman was the biggest buzz and source of fun that ever came into my life. If you talk to any of his other victims they'll agree. He was such a character, so eccentric. He was so charismatic and absolutely stark, raving mad. Yet, if he tried to do to my son what he did to me I'd nail his testicles to the floor!' (Fergus's Story: 79)

Constructing this identity of 'normal yet individual' can function in one of two ways; it can be taken as an act of resistance, an agentic moment, -

'...even in a society like Ireland where from top to bottom there is very little privacy and a lot of nosiness, everything is interlinked and interwoven. Nothing is in your face. People will tell you you're a grand chap, but when your back's turned they'll say you're a complete bastard! So you're understandably wary of dropping a bombshell in such a society.....' (Fergus: 81)...

or it can be seen as an appeasement, seeking readmission into 'normal' society:

'There were other members of the family I had to think about and there was all that stuff about bringing disgrace to the family and so on.

Carrying that secret probably put more pressure on me. I had to find ways of not going to the house where my uncle lived, especially for occasions like birthdays or Christmas when I would normally be expected to visit.’ (Belinda’s Story: p.14)

Taken in the context of lived experience the trajectories of these victims provide us with representations of rational people, choosing actions with knowledge of the consequences. In these narratives the victims occupy the roles of strategic thinkers, of individuals who are capable of reconstructing damaged lives, of individuals who struggle with psychological issues etc. The point here is that the narrator cannot be confined to a single frame; this is simply because they embody multiple identities. It may be dangerous to depict women as victims because limited examples of a stereotypical passive victim can have the effect of removing agency, reproducing powerlessness and ignoring the political element of the ‘norm’ of abuse. Yet my argument is that these adult survivors of child sexual abuse are victims, just not the unequivocal victims constituted through the legal system, (Stevenson 2000). The legal construction of the victim of child sexual abuse has informed social and institutional knowledge to the extent that they do not know how to deal with the problem:

‘I had had enough of the abuse and felt I had to do something about it. At first, nobody was really interested, because I didn’t fit into any available category. Because I’d often ran off but then gone back to the house when the latest row was over, I couldn’t be classed as homeless by the social services. I didn’t have a drink problem and I wasn’t pregnant or on drugs, which would probably have qualified me for help and made people more willing to listen’ (Bernadette’s Story: p.20)

It is stories such as these that show why legal representations of victims are limited and repressive. These narratives that show that emotion does not preclude rationality also demonstrate how the colonisation of the rational voice of victims by the court is strongly resisted:

'Eventually I did go to the cops, and that isn't exactly a trip to Disneyland. You've got to be accurate in telling the details of the abuse. You've got to be hard too, because if it goes to trial, you might have a defence barrister who'll put you under intensive cross-examination. You can't sit there blubbing 'I want my Mammy'. (Fergus's Story: 83)

These stories function as a means of asserting the reasonable character of the narrators, who are portrayed as rational, while simultaneously their antagonists are characterised by their deviant behaviour. By portraying the antagonists' deviant behaviour and inviting the readers to confirm their moral indignation by accepting the story, narrators construct a normative standard of adequate behaviour. They are interactive means with which to achieve common judgements and affective evaluations about the deviant misbehaviour of absent persons (Günthner: 1997:212).

First person narratives are especially powerful in helping people develop empathy for members of excluded groups. The reader must confront the fact that the emotional punch line of the story involves a specific person with whom s/he is interacting. The feminist argument, (that emotion is imbued with power dimensions and emotional writings are often seen as less rational and mature than other writing, and therefore hardly meriting much critical interest), is shored up by the supreme value that is placed on the 'objective' decisions of the judiciary, especially those in the higher courts. The achievement of victims of child sexual abuse in generating these narratives challenges the notion that order, understanding and knowledge can only be found in the limited 'rational' discourse of law. Furthermore, they introduce awareness of the capacity of others for suffering; they connect the complexity of the experience of victims to the understanding of those who abuse and those who judge such abuse.

Penal law and, in particular, criminal law are imbued with emotions. Offenders, who express shame for their actions, and victims, who articulate their anger and disgust, are represented in the cases heard in court. At the same time, victims as well as

offenders evoke sympathy in the listeners and observers. In spite of this it is difficult to point to a tradition of analysing emotions in court proceedings. Yet, Norbert Elias argues: 'Every investigation that considers only the consciousness of men, their 'reason' or 'ideas', while disregarding the structure of drives, the direction and form of human affects and passions, can from the outset be of only limited value' (Elias 1940: 486). Despite the fact that the criminal justice system is the very institution in society that is designed to deal with the most intense emotions and emotional conflicts, legal authority relies on a discourse of rational objectivity. For most children who experience abuse and who do not report it until adulthood, delay in disclosure is caused by the twin emotions of fear and shame. This research notes the shift within the courts that reflects the 'increasingly emotionalized cultures of late modern societies' (Karstedt 2002: 304). The judges are concerned, however, to divorce the emotional response of victims from the legal frameworks which are already in place. By this I mean, while they acknowledge the way feelings of shame and fear can direct the decisions victims take in not reporting their abuse, they insist that rules of law determine legal actions and reactions. The problem, for victims, is that rules are frequently constructed from a patriarchal mindset.

Two emotions feature strongly in these stories – anger and shame. The feelings of anger are concerned with the damage abuse has effected and particularly with perceptions about the way the broader society colluded with or ignored the reality of abuse. In spite of this, according to Sessar (1992), research consistently shows that victims mostly want to have their damaged selves restored by justice, and that they are rarely vengeful in their demands for punishment for the offender (quoted in Karstedt 2002). Reasons for the absence of expressions of anger could be that they are not given space to express it, but it could also be a strategy for the prosecution because:

..... it is difficult for the public to put up with an 'angry woman' for long. This anger is not 'pretty' and does not always fit with the image of the 'good' victim.

(Lamb 1999: 139)

When Belinda told her mother about the abuse perpetrated by her uncle her mother was reserved in her reaction. Belinda remembers ...

'I hadn't a great relationship with my mother in my late teens. Somehow I felt it was her fault; that more should have been done about my uncle after I told her, and I unfairly took my frustration and anger out on her. I wasn't a very pleasant person back then. (Belinda's Story: p14)

This reflexive narrative shows how constructions of female victims as having traditional feminine characteristics (gentle and passive) are powerful and it is against such identities that victims seek to justify their behaviour.

Feminists argue that identity is understood in dichotomous terms, i.e. that females are seen as absolutely 'other' to males in their subjectivity. An example of the way constructions of male and female difference works to subordinate women is the way men are allowed to acknowledge and express certain emotions such as anger and rage. Feminists will argue, therefore, that because women's power is significantly lower than men's the gender division will require women to suppress anger, an emotion that belongs to men. If anger is expressed then these victims are seen as emotionally deviant and may even be punished for doing so. Yet, victims are angry and a possible means toward empowerment is to express this anger is through the form of public narrations of their experiences:

'My abuse started when I was about three....when it started it was just my father who abused me, but he regularly encouraged others, including extended family members.....' (Ursula's story, p137)

In this story the young married woman reviews her experience and the social context in which it took place. In spite of contacting the Gardai and social workers no support was

given. The victim is capable of assessing the social reality that surrounded the successful perpetration of her abuse

'The main reason for the reluctance of anyone to do anything about the abuse was because my father was and is a rich and powerful man. I was afraid of him and I still am. I probably also felt then that nothing could or would be done by the authorities to bring him to justice or to make him stop' – (Ursula, p138)

After supportive counselling this individual realised that telling the story in public, through public institutions, could be one method of resolving her anger.

'With the help and support of the (Rape counselling) Centre I complained again to the Gardai after the most recent time I was raped by my father. It felt good having the confidence to do that. Making a statement to the Gardai doesn't make it easier, but it makes it clearer in your own mind that you have a right to report the abuse and to expect justice from the legal process. ...Unfortunately the investigation collapsed because of a lack of forensic evidence.....I wanted to pursue the case because I want justice,I suffered for other people's pleasures and I was treated like a rag doll or a toy..... ' (Ursula, p139)

Wendy was even more explicit about her feelings of anger and how they serve her as a means of coming to terms with her experience. She says:

'I've had people say to me that they sympathise with my experiences; that they were awful and so on, but that I should just get on with my life and put the memories behind me. I've examined that notion very carefully and concluded that its complete rubbish.....The release of anger is an important part of the healing process, as is the release of hurt... (Wendy's story: P 143)

Yet even in these stories when women mention the words 'anger' or 'angry' they are more comfortable if this emotion is expressed through a surrogate. When Karen disclosed her abuse to her father his initial reaction was very calm. She notes:

'At the time I also felt frustrated, and to a degree angry, at my father's quiet, calm logical approach. I think I wanted him to be angry for me, which is illogical on my part....I was aware of feeling that I wanted him to be angry at the abuser, angry that someone had hurt me in that way. I think I needed confirmation that what that person had done to me was wrong. I think I felt that if my father got angry at him it would have given me that confirmation' (Karen's Story p180).

- The argument that women should control their anger, that it is unfeminine and therefore inappropriate, underwrites a strategy of silencing. Anger can be

empowering, it can promote internal liberation and strategic action against oppression. It can facilitate communication that might be impossible without anger (Cox, Stabb and Bruckner: 1999).

To deny women the right to express anger, is to deny a part of their humanity. Robert Bly, criticises 'feminist men' for their passivity and labelling them 'soft males' (Bly 1991: 61) because he recognises the loss of power when 'strong' emotions are not available. The internalisation of this stereotype effectively obstructs women from taking advantage of the strength such emotions can offer. They remain constrained by expected gender norms.

Male victims of sexual abuse do not have this problem because it is deemed acceptable for males to express anger. When Colm O'Gorman was interviewed about his seemingly calm reactions to church authorities' refusal to admit responsibility for their collusion in allowing the perpetration of abuse by individual priests he said:

'In reality I was gripping the table with anger. I can still remember the rage I felt. That rage increased as the two people from the Dublin Archdiocese seemed to want to minimise the horror of what we'd seen on our screens' (Hayden p.162).

Another victim "Peter" - exclaimed: 'There are times I feel I could kill him' when speaking about the man who was released from prison without any previous warning to his victims, 'despite a Garda victims' charter which stipulated that gardai would do so'. (Irish Times 2005). The emotion of anger belongs to men. To socialise women into their role as caregivers and to help them adapt to their lower power status, women are encouraged to display 'soft' emotions, such as sadness, guilt, warmth; feelings that express their role. They are also more likely to be persuaded to express feelings of hurt and fear and anxiety. On the other hand, to fit into their given roles as providers and

holders of power, men are allowed to develop and express aggression and to suppress feelings of vulnerability. Significantly, according to Brody:

‘Although women may feel more entitled to their anger than men, they may actually feel less free to express it, since expressing negative emotions may make women less safe. As a higher status group, men have greater access to resources and have the potential to harm women. Women may only allow themselves to express their negative feelings, such as anger and envy, in intimate relationships, in which they feel safer. This may be why we are especially likely to see women’s anger in marital conflicts. Expressing distress instead of anger may be a strategy used by women to minimize potential interpersonal hurt and harm while attempting to change an unsatisfying interpersonal relationship’.

(Brody 1999:223)

Thus, women are disempowered by their difficulty in expressing their anger. Feminist studies in linguistics show that even the same language used by men and women is interpreted differently: men who assert themselves and their authority and anger are seen as strong and articulate, while women who say the same are seen as screaming ‘bitches’ (Cameron 1992). The argument I have advanced suggests that there is a gendered differential expression of anger in adult composed narrative accounts of child sexual abuse, one that supports men but disadvantages women.

The issue of shame is also central to child sexual abuse. It is noted by the courts, accepted and unchallenged, but never analysed. In the case of *B v DPP*⁶, wherein a father abused his three daughters over a number of years, it was noted that the three daughters, victims of ‘horrific’ abuse, complained of ...

‘....coercion through force, fear and shame, each says that she was subjected to acts of sexual-gratification on the part of the father accompanied by threats of violence in the event of resistance or disclosure’. (*B v DPP: p174*)

Without explanation or analysis the lack of attention to the notion of shame is not likely to change unless it is addressed and understood. This knowledge is much more accessible in the narrative accounts under analysis in this chapter.

⁶ *B v DPP* [1995–1997] 1194 No. 161 J.R.; SC No. 35 of 1996,3.I.R. 140–205

Thomas Scheff argues that the only means of theorising emotions is to particularise them because in their generalisation they evoke a vague concept rather than a tangible factor that is accessible for theorisation.

‘Our knowledge about emotions held in common allows us to communicate with each other on this topic and restrains flights of fancy. Although the different emotions may have several underlying similarities what is more obvious is the great differences in origins, appearance, and trajectories. It is for this reason that general statements about emotions in the abstract have so little meaning. Some of what Durkheim, Mead, and Parsons said about emotions might appear plausible when applied to one emotion, say anger or fear, but not to most of the others. The sources, appearance, and consequences of anger and fear are so different as to forbid lumping them together. Treating all emotions together under a single heading amounts to a kind of dismissal’.

(Scheff: 2000: 84)

From this statement it makes sense to me to situate shame in a framework of culture and of relationships of power, following Elias (in his work on the civilizing process and the development of the concept of self as an individual who is always in relation with others) and Foucault (who views the self more as a subject of a disciplinary society). Both of these theorists propose locating shame in the social process rather than in a purely psychological or biological frame. In order to do this both researched distinct historical periods and through this were able to generate a broad understanding of the place and role of shame in society. In feudal societies people acted out their emotions through physical acts. When the state reserved the right of violence and retribution to itself, and even finally relinquished violence for psychological control (Foucault), social order reverted to a highly co-ordinated, interdependent social order that was not controlled by external factors such as overt violence, but by internal personal control. (Pattison 2000:133). The civilising process was accompanied by the rise and development of the individual who came to be seen as having consciousness, human rights, and so on. The locus of social control increasingly moved from external coercion to internal discipline, control or repression.

As we have noted Foucault argues that, in the event of sharp historical breaks between political and social regimes it has been possible for new disciplinary practices to control the body; that 'truth' is an expression of these same practices of power. In other words we know ourselves through the process of a panoptic surveillance. He argues that discourse (and specifically discourses of sexuality) is central to the formation of this knowledge. In this we can find little to contest. But Foucault did not pay sufficient attention to the silent discourses – the ones where we 'know' but do not know how we know. Geraldine remembers:

'...I was about nine or ten. Physically I had started to develop very early so I had boobs by the age of ten and he started to feel them. He was about fifteen or sixteen. I often remember lying on my tummy out in the back garden and he'd come over and lie down beside me and he'd slip his hand in where it couldn't be seen. Of course I couldn't move or turn. Even though I wasn't sexually aware I didn't like the idea of people thinking that he was touching me.

She pauses as she searches for the right words.

I can't explain that, but I just felt uncomfortable. I felt that somebody might see. I think I was uncomfortable at the sense of sexuality about it'. (Stolen Childhood: 26)

After her brother raped her violently for the first time she writes:

'Then we heard somebody coming up the stairs and there was a huge kerfuffle to get away. I knew it was wrong and I had to jump up to make everything okay..... I could feel myself shrinking. I didn't know these words at the time and that's not an expression I would have used then but looking back on it that's the way I felt. I felt I was shrinking on the inside.

I knew not to tell anyone and I didn't.' (p29)

Shame is usually associated with guilt. Shame, in legal research, tends to be analysed in terms of the offender. For the purposes of this study however, it is important to state why shame is not the other face of guilt. Guilt is related to acts done whereas shame is relational. Children often feel that guilt because, in their lack of knowledge, they consider that somehow it was their actions which caused the abuse; the focus is on action, on what you could have done differently. Shame, on the other hand, is a feeling

(emotion) that someone will think negatively about you because you were assaulted. It involves a sense of self that is derived from others. Therefore, to speak of a socially unspeakable phenomenon, reflects on the individual. When I say shame is relational I mean that it is felt as shame of oneself before the other, i.e. it is how I see myself as others might see me. In this way I can shame myself, be ashamed of myself. To sense shame is to acknowledge that we have violated what might be considered appropriate behaviour for our gender, age and social situation.

This notion of context and relationality is explained much better by theorists who focus specifically on the emotion of shame. Cooley and later Mead and Goffman, in their theories of the Looking-Glass Self and Symbolic Interaction explained how we respond with shame and embarrassment when we see ourselves through the eyes of the other. These theories completely depend on the element of relationship. In his note on the text of the Court Society, Mennell highlights how interdependence is at the core of Elias' work – 'people's thoughts and emotions are embedded in bonds of social interdependence, and change in accordance with long-term changes in the overall structure of these bonds' (Elias 1939: ix)

Social survival and success were some of the elements that allowed Father Ivan Payne perpetrate abuse on boys in his care. In 1976 Andrew Madden was selected from a number of young altar boys to help Payne in his garden. The story is taken up by journalist Nadine O'Regan in an interview with Madden in The Sunday Business Post:

Andrew Madden was proud to have been selected as Father Ivan Payne's gardener. It was a position of responsibility and, as an altar boy in Cabra, Dublin, and proximity to members of the clergy was something Madden cherished. After he finished his duties that first Saturday, Payne invited him into the house to watch some television. Madden was delighted. He sat on the sofa and the priest sat next to him. He put his arm around

Madden's shoulders. He was uncomfortable, but how could he know what happened in other people's houses, what was normal?

He was just 12, and he thought everything a priest did was right and good. When Payne put his hand on Madden's trousers, right on his private parts, Madden didn't say anything. He just kept watching television like he hadn't noticed. He concentrated on the wrestling; he sipped his drink.

The following Saturday, he didn't want to sit on the sofa again, but he didn't know how to sit on the faraway armchair without appearing rude. So he sat on the sofa, and the same thing happened, except that it was worse this time. Payne opened Madden's trousers. He pushed his fingers inside. When Madden went home, he washed himself, scrubbing as hard as he could, but he still felt dirty and ashamed.

The abuse continued, but Madden didn't know how to tell anyone what was happening. And he couldn't think of a way to make it stop. How could he tell his mother that he wanted to abandon the part-time job he had been so proud to win? He had a vocation to become a priest and the church felt like his home. How could he jeopardise that home?

The answer was simple - he couldn't.

(O'Regan: 2003)

This narrative tells us so much about the way shame is embedded in the bonds of social structure and interaction. The sense of the child that he had been specially chosen; the lack of sense of self in his inability to sit in a different chair because it would acknowledge what had happened and finally the link he makes between his mother and the priest speaks volumes about the power relationships between church and women. Even a young child understood this. This was learnt through simple processes of socialisation such as when the priest called to the house the children were sent to make tea and were told '*you know what cups to use*' – obviously the best china reflected the honour the priest's visit conferred on the family. The knowledge that the priest was special, he was considered capable only of goodness and was powerful, was a given. Madden notes: '*after what he had done he could just pop into our house, and that frightened me. He was totally in control and I felt unable to do anything*'. (Madden: 18). Shame was produced in the awareness that he, Madden, would be seen as

undesirable in the eyes of his mother; the sexual act could not be laid at the door of the priest. Geraldine also understood the social consequences of disclosure:

'...I remember somebody in class saying this girl was seen kissing her brother the other day. The whole class's reaction was 'Yuck!' At that stage I just wanted the whole world to swallow me up. Because I thought, well, if they think that about her what are they going to say about me?' (Stolen Childhood: 29)

Acts of a sexual nature are considered private. Foucault, in his study of Roman society, notes that although sex is experienced as a natural and necessary activity, this attitude became tangled up in changing complexities within that society. At the core of this transformation Foucault found the principles of the 'care of the self'. He shows how the self is transformed into an object of knowledge so as to control, correct, purify and thus find salvation. Crucially he noted the link between this control and correct attitude and the spread of Christianity. Christianity's totally negative perception of sexuality was bound up with an even more radical redefinition of the self as an ethical project which placed the individual in a new power relationship with their god (and thus their church). This power is at the core of the shame experienced by young children in abusive relationships. The entrenched prohibition against publicly acknowledging anything sexual facilitated the power of those who could abuse, priests, teachers, fathers and brothers. Nadine O'Regan arranged to interview Madden in 2003. She describes how difficult it is to erase the nature of this taboo:

'We planned to meet to discuss the book in the tea-room of the Shelbourne Hotel, Dublin. But there are immediately problems. The table we have been given is squashed between two others filled with tea-sipping patrons. Madden looks nervous. The dilemma is obvious: how can he talk about the abuse he suffered within earshot of these other people?

We repair to the bar, where, over a sparkling water, Madden braces himself to deliver his story. Interviews are hard for him. When he discusses the molestations, he rarely uses words that evocatively depict what happened to him. He will say 'stuff' and 'this' and 'it', but he never

uses any more accurate terms. He can't use these words perhaps because he has lived them. But he understands how vital it is that he speaks about the subject'

(O'Regan 2003).

Shame is intricately and irrevocably bound up with power, as is fear and anger. Emotion is used to enforce power relations. Kaufman suggests that shame is rooted in the initial powerlessness arising from our total dependence on another for survival (Kaufman 1992). Within this dependence is our understanding of the truth of the reality we are living. This understanding is directly linked to the knowledge that is given by those who hold the power in these relationships and who exercise this power in order to pursue and maintain their position and harmful activities. When they encounter the emotions that arise as a result of their actions and threats, particularly those of shame and fear, they recognise where their power lies; this knowledge increases their power, Foucault, 1977: 27-28).

Within these unequal relationships the knowledge that is produced through the exercise of power is twofold. For those who exercise the power it allows them to feel secure for they learn the effects of their power; for those upon whom the power was exercised they know they must be silent and suffer. Power presents and is exercised in many ways, sometimes very subtly. Molly was abused by a very young priest on a sabbatical (enforced because he was caught with pornographic material) who was taken in by her family who were unaware of the circumstances. They were inclined to rescue 'lame ducks' and gave him a place in the family home, helping out in their business. Molly's overriding feeling, when she finally acknowledged her abuse was one of powerlessness. Because the abuse was always carried out in silence, she, in turn, could find no words to tell her mother and father.

'Another image is of him in my bedroom touching me, always in silence.....that feeling of revulsion. It was like a silent scream. I used to look back and think why didn't I tell Mammy and Daddy?' They were

great parents. But I looked back at photographs and realised that I was only a child and I didn't know what to do with the feeling of awkwardness. There was that silence, the blanket of silence. I don't remember any words spoken.' (Molly: 79)

Power lay in the silence, not in physical violence. Understanding this is important, especially in the context of court cases, where abuse is only acceptable when it concurs with the constructed image of overt physical and sexual violence, such as that in Sophia's Story or the father in the infamous 'B'⁷ case. Many judges declare the type of abuse experienced by Molly as 'at the lower end of the scale' yet Molly contemplated suicide and breaking up her marriage. New psychotherapeutic research investigates the context in which abuse occurs and takes the story from there, rather than from the aftermath. Thus, those who are able to hold on to, rather than dissociate from the knowledge of their trauma may be able to develop an integrated, and therefore healthier, sense of themselves. All this knowledge of children's' interaction with their abuser, their social surroundings, the evocation of shame and of silence, must be harnessed so that it may inform the judicial knowledge about the dynamics of abuse. When the Prosecutor on behalf of Sophia McColgan addressed the court about the effects of abuse he argued that:

'On the question of how all this affected Sophia, I think the coward in me would like to tell your Lordship that you could just go to the end of the scale and mark this down as a little bit worse because then we would not have to consider what was done and what the effect of it was. I don't think that form of hiding is open to me' (Sophia's Story 2004: 5)

Trying to adjudicate on the 'harm' of abuse is deemed to be extremely complex and the issue of shame is part of that complexity. Psycho social theorists do explain shame but this explanation does not incorporate the extent to which structural issues are also involved. Harry Ferguson notes how:

'The sequestration of child protection, with its attendant secrecy and careful concealment of information, played into the very dynamics which

⁷ B v DPP [1995-1997] 1194 No. 161 J.R.; SC No. 35 of 1996,3.I.R. 140-205

kept the problem of sexual offences hidden, compounding the entrapment of victims, both in their silence and literally in the domestic domain, and the public and professionals accommodated to the problem (Summit, 1988).

(Ferguson 2000: 104)

He argues that while continuous visits from social workers was a source of shame, these same visits indoctrinated the professionals with a sense of the need to protect children and this, over time, would result in a 'powerful cultural and professional ideal' (ibid. p105). Shame was naturally associated with the sense of failure, i.e. that a judgement had been made by an institution of authority. In contemporary society the meaning of 'social welfare' is changing. New knowledge is forming about the role of social workers, of the interconnection between them and health agencies, police and the courts. This new knowledge is informed by a strong emphasis on 'rights' of the child rather than on protection from their parents or carers. Availing of rights lessens the element of shame and in turn increases agency (Ferguson 2004: 141). This is another element that has potential to break the barrier of silence.

Conscious identity construction is an active measure of control that is undertaken by the victims in these stories and in the process of disclosure generally. So, how conscious is the construction? It cannot be said that the stories are manipulative in the sense that there is a hidden agenda. In fact it is explicitly stated that the aim of these stories ostensibly is to educate the public, to 'reposition the story from the individual psyche to the social sphere where it rightfully belongs' (Alcoff and Gray 1993), but also to support others in their struggle against imposed silence:

'It has been really wonderful the way the story of this family has helped hundreds of others trapped in dysfunctional families to feel that escape is possible from the very worst of situations' (Sophia's Story 2004:x)

And from Madden:

'Every person I've spoken to, who has been sexually abused as a child, is delighted about this book. For many of them I haven't just told my own story, but, to some extent, theirs as well'.

(Madden 2004: 195)

It must be remembered that the very secret that these individuals harbour has a potentially very destructive power. Being a 'champion' can also be a burden that is not sought but must be endured. This concern for others who have been or might be abused is also evident right through the cases under review:

'The events which lead the complainant to make the complaint were the twin realisations that the (perpetrator) applicant was acting as a babysitter for his son's daughter aged two years in circumstances where the complainant feared for the safety of this child and in circumstances where she considered that the applicant had already breached the boundaries of propriety of sexual contact with her as an under aged girl and within the family. He was also employed as a school bus driver'.

(Chambers v. D.P.P. [2004] IEHC 138)

'.....the complainant states that she came to 'the inevitable conclusion' that she had to bring forward her complaints for two reasons. Firstly, that the applicant destroyed 30 years of her life and must now take responsibility for doing so. Secondly, she feared that silence on her part might mean that some other person's child might be at risk of abuse from the applicant'.

(M. (E.) v. D.P.P. [2004] IEHC 341)

'I would never be able to forgive myself if he ever did anything to J, or any other child like what he did to me. If he ever did I would feel responsible for not doing something about it. It has been a nightmare for me and the nightmare is nearly over.'

(M. (P.) v. Malone [2002] IESC 46)

This form of championing transforms the victim not just into a survivor, but into a 'good' person. In doing so it strengthens the construction of the perpetrator as dangerous, that the evil is still present, is dangerous and is ongoing. The stories

therefore have a two-fold effect in that they redeem past behaviour of the victim as they resist the depictions of perpetrators as ‘ordinary decent men’.

Stories have huge individual significance, and while this is not their sole function, they play a large role in resolving problems for psyches that have been damaged during their formation. Thus issues of constructing, reconstructing and owning one’s identity is central to the purpose of telling stories. Social and political issues are also part of the objective and it is important that this is seen particularly in relation to law. When experiential knowledge is expressed and given space to be heard it exposes the gaps that are missing in these legal cases. The law misses the victims’ voice, it does not rate emotions such as anger and shame and how these emotions direct action. More than anything it shows how the experience of sexual abuse cannot be confined to a single knowledge. How people experience it depends on matters of socially constructed identity and social relationships and this fact is difficult to confine in the strict limits of knowledge used by the courts.

5.3 Towards resistance

Storytelling is a means of resisting the power of the logico-scientific methods employed in law and politics and other powerful institutional discourses (Ewick & Silbey 1995:199). The institution chosen by the victims is the media where victims and survivors of abuse appropriate power through storytelling in a way that eludes them in court. The Victim Impact Statement was introduced as a measure that would capture their suffering, but that itself became bound by rules and codes in such a way that power remains with the court. Books about child abuse also have rules and codes, imposed by publishers and marketing departments. Publishers will not publish a book they cannot sell and books about incest are unlikely to be bestsellers if they only appeal

to a narrow group of readers. Books, therefore, have to incorporate other elements. For example *Sophia's Story* and *Altar Boy* were able to draw on their newsworthy past as both stories involved very public trials. Similarly *Stolen Childhood* used material relating to a notable television documentary. Stories of rape and abuse will hardly appeal to men, and indeed a defining characteristic of incest and abuse is that no one wants to talk about it or hear about it. This is acknowledged on the back cover of *Stolen Childhood*:

'As the extent of childhood sexual abuse unfolds, we have been forced to look at the dark underside of our society. We recoil from each revelation with shock and disgust and then turn away and forget'. (O'Doherty: 1998)

Editors understand that when held up as a mirror to our culture, the issue of child sexual abuse is terrifying and so the readers of *Altar Boy* are assured '*despite its subject matter, (it) is not a depressing read*' (Madden 2005). Therefore these stories must offer something other than the fact of abuse and they must appeal to other elements. Publishers know that trauma (other people's trauma) sells - human stories, full of the stuff pathos is made of: fear, anger, pain, love and struggle. The paperback edition of Andrew Madden's *Altar Boy* describes his story as '*It's a tough story but it is also a story of hope.....redemption.....searing*'. This is echoed in the other books – '*the horrors they have come through ...compassionate without being sentimental.....*' Emotion sells. So does resistance. It is the spirit of resistance that has the most potential to subvert the acceptance of abuse (which explains why resistance is most likely to be countered).

Victims deploy their narratives to challenge the normalising truths of the patriarchal society in which the abuse occurs. Once we understand how we are constituted in discourse – as a child, woman, victim, survivor - we can find multiple points of resistance. Moving away from this essential being (powerless) with a

knowable core and theorised as the ‘decentered subject’ it explains how these victims can be survivors, how the adult still considers the child within and how freedom and knowledge can coexist with imprisonment to experience. Madden (2005) explains that *‘Although I still carry many of the effects of child abuse I no longer consider myself a victim. I’ve done something about it. I’ve turned it around’*. He recognises that he can occupy both identities and, indeed, how important this is for him. Further, as Ursula details, although the psychological effects are resistant to change even though the physical body matures: *‘I was afraid of him and I still am’*. (Ursula’s Story) knowing this increases the power of the individual. Most explicit however is Sophia, who gained a substantial measure of freedom that exists side by side with imprisonment to experience:

‘I will never, ever be able to forget the pain,’ Sophia said. ‘That is the sad thing. I cannot change history. I cannot undo all the things that my father did to me, and to my family. Sometimes I walk by the river and I watch the wind rippling the water. I’m alone and I face the bleak reality of what happened to me. I had to fight for my freedom. I used to put myself down I achieved what I set out to achieve. I love life. I have met wonderful people. I am looking forward, and there is a strong light at the end of the road’

(Sophia’s Story: 198)

In Foucault’s view, it is only through this process, this attempt to negotiate how power works on us as subjects, that we become fully known to ourselves. Through the ultimate recognition of itself as a subject, capable of thought and action, the individual then is able to participate in a complex regimen of self-regulation that further contributes to the notion of one’s own subjectivity as fixed and submissive, or that is capable of resistance.

This liberating theory affords victims a sense of agency; it enables them to understand who they are, to carry out changes within themselves and crucially to resist the normalising discourses that operated from without. A measure of resistance involves

the decision to construct the identity of ‘survivor’ rather than that of ‘victim’. Victims are seen as passive ‘acted upon’ individuals whereas the term survivor has different connotations. Survivor can be interpreted as ‘somebody who remains alive despite being exposed to life-threatening danger’ or ‘somebody who shows a great will to live or a great determination to overcome difficulties and carry on’ (Encarta Dictionary: English (North America)). This term elevates the individual from an ‘ordinary’ citizen to someone special, someone who deserves notice.

‘But now I see that I was remarkable. I was inspired’.

(Sophia’ Story: 198)

It evokes action, somebody who has resisted, whether in quiet withdrawal, in terms of longevity or even in terms of being ‘actively passive’. Remember, silence was a crucial part of the experience for many victims and for some it was the means to surviving the psychological shock.

The silencing effect of the pain and shame inflicted by sexual abuse is sometimes so great that the actual reality of the abuse is hidden deep in the recesses of mind. This is almost a form of protection, a means of survival, because to remember may be overwhelming. But the very silence that protects initially finally becomes unbearable, literally. This ambiguous relationship with silence is the key to the process of resistance. Voice is the antithesis of silence and while we have argued that ‘telling’ is a form of empowerment, young children may find the solution to their powerlessness and trauma is to engage in silence, until they are ready.

‘However, it is clear that she consistently complained about the sexual abuse to her mother from an early age but she was not believed by her mother. Indeed she reports that her mother behaved in a punitive and rejecting manner when she did complain to her about her older brother’s sexual abuse of her. She reported that she consistently and persistently made complaints about her brother throughout her childhood but these were rejected by her mother. When not believed by her mother in early

childhood she elected not to talk at all and this elective mutism can be associated with the emotional sequelae of abuse'

(C. (N) v. DPP 2000, IEHC 153)

Writing and publishing personal accounts of abuse actively resists such 'mutism'. It resists subalternism too, because it enables the voice to speak and be heard. Silence that is chosen (rather than imposed) can be viewed as a form of resistance to social expectations and demands.

However silence was frequently imposed to keep the victims from telling about the abuse. Even when Sophia McColgan had left her father's house she was threatened by his actions. She explains how she attended mass one Saturday evening and to her horror her father appeared: *'I froze. He marched my mother in front of him up the aisle to the front. It was his way of warning me that if I tried anything, she would get hurt.'* (p129). Threats come in many forms; shame as well as fear will suffice: *'He threatened to tell her mother that she was a prostitute and to throw her out of the house'*. (DPP v J.G. [1999]) The point is that silence is often a matter of survival and silence often becomes the threat of survival. Negotiating and understanding the implications of silence over time becomes a knowledge that survivors learn and use in their strategies of resistance.

Speaking about sexual abuse is an act in which the victim returns to the scenes of the destruction of their ego to reclaim their autonomy. It is the story that helps to reconstitute identity. While it is a classic resistance strategy in its efforts to achieve 'normal' identity status, it also may risk a process of assimilation that, in the end, silences. In this way survivor narratives function as testimonies of resistance to the silence but they can also be viewed as part of the silencing process, a way to use the victims' voice to submit to the norm of abuse. Although the stories are conceived as part of the larger struggle for self-determination among oppressed and silent groups

(Davies 1995: 4) Spivak would argue that it is the very process of speaking that renders this community from their subaltern identity. Perhaps their voice in court is, after all, louder. Foucault argues that this confessional mode of expression, where the speaker discloses his/her experience to an expert mediator, who then reinterprets those experiences back using the dominant discourse's codes of 'normality' (Foucault 1978: 67), is a process of reinscribing the victim into dominant structures of subjectivity. 'The agency of domination does not reside in the one who speaks, but in the one who listens and says nothing (ibid.62). For these confessional narratives, the 'expert' is now the ordinary citizen readers. Because they have been trained by media shows and journalistic accounts, these experts now partake in constituting the hegemonic knowledge about abuse. It is the expert who 'polices the statements' for signs of sin or pathology (Foucault 1978:18), interpreting the story according to the dominant cultural codes. It is the expert who will determine whether the confessor victim can have absolution (ibid. 61-62). As the explicit goal of the process of confession is always the normalisation of the speaking subject and thus the elimination of any transgressive potential, the very act of 'confessing' to the abuse simultaneously extracts a sort of surrender, a submission. Stories such as these are merely another form of confession and Foucault could have predicted them, relating them to ever more practices of social domination. As it transforms the identity characteristics of the victim from passive victim to autonomous agent, in effect it is an act of reinserting them into normality, into the society of the reader. But the reader, or indeed the listener, does not necessarily want to hear about abuse. They do not always want to bear the burden of resistance.

Molly remembers:

"I remember at this time telling a girl what had happened to me and she just couldn't take it at all. I had to learn that not everybody can deal with hearing about abuse. I've learnt the hard way. There were two

people I told who couldn't handle it. If that happens you're left there with your guts on the floor and somebody just steps over them, it's a very hard feeling.' (Stolen Childhood: p93)

Like the successful consciousness raising strategies of early feminists, published autobiographies may be viewed as an opportunity to assign epistemological authority to those who had actually experienced the abuse. But feminists argue that the reason that narratives lack the transformative quality necessary for political action can be explained by the shift of emphasis from the structural factors surrounding abuse to the therapeutic element, the shift from the political to the personal, from 'the personal is political' to 'the personal is all'. (Armstrong 2000 in Itzen) Within the court setting the victim narratives are mediated through psychological experts, which medicalises and correlatively de-politicises the issue of sexual abuse. Within the autobiographical narratives the story can also be deeply personal, without engaging with wider political and structural issues.

In Geraldine's story (O'Doherty 1998:13-42) the victim goes to great lengths to describe her painful and frightening experiences. But by divorcing the individual story from the social context and structures wherein the problem originates, by particularising the story to the individual, the autobiographies lack a political context. The taken for granted world within which sexual abuse of children takes place is largely left unquestioned. Power lies in what is silenced, what is left unsaid and un-interrogated. , In many of these stories everyday assumptions go unchallenged, resulting in further submission to the hegemonic order of knowledge.

Sophie's story is consciously different and this is because it is written by a journalist who is politically motivated, is conscious of the gender dimensions of power and the structural relations in which the abuse took place. This means that this

particular story has the capacity to subvert. For instance, in many of the readers' reviews of the book, invited by the booksellers, individual members of the public indicate an understanding of abuse within its political and structural contexts:

I read Sophia's Story in one sitting!

This is the harrowing story of physical, sexual and mental abuse that Sophia and her brothers and sisters endured in Ireland in the 70's & 80's, the fact that Gerry, Sophia's brother had run away numerous times and told doctors, teachers, social workers and anyone who would listen about the terrible abuse his father did to his children on a daily basis was ignored or not dealt with is unbelievable, even in Ireland in the time period this occurred I cannot believe that social workers, doctors etc. were completely out of their depth in helping Sophia and her family.

Sophia's mother was also a victim of her tyrant husband; she had begged various officials to take her children in care as they were being beaten so badly, the local priest told her it was better to keep the family together!

This is a must read, ignorance of child abuse must stop and books like Sophia's Story are raising awareness, I highly recommend this book. (Amazon Books)

★★★★★ BRILLIANT , 5 Jun 2006 , Christiana F Johnson, Cornwall A review from Sophia's Story (paperback)

Sophia's Story realised the potential claimed by feminists in that it informed general public knowledge about abuse. Further it contributed to a shift in legal knowledge, in that it was a case cited in the argument for removing the Statute of Limitations:

(Senator O'Meara): 'We now know the power of the church, the State, and authoritarian parents has been used to physically and sexually abuse children and to allow it to continue and, effectively, to protect those who have been responsible, while victims continued to suffer in silence and were not believed. They simply had nowhere to go.

Reply from Minister for Justice, Equality and Law Reform (Mr. O'Donoghue): This Bill seeks to give victims an extension of the right which currently exists to take legal action on the basis that it is not tolerable that people should effectively be debarred once they have reached the age of 21 from taking such legal action. The Bill has its roots in the Sophia McColgan case'.

Senator O'Meara referred to the Sophia McColgan case which was appalling but which also proved to be a milestone because of the courage this young woman showed in bringing matters into the open. Ms McColgan, who was in her twenties at the time, suffered because of the Statute of Limitations but she still had the courage to take on the health boards, who defended the case vigorously. If I recall the facts correctly, the GP in question also defended his position vigorously. However, through might and main Ms McColgan was victorious. It indicates that

the Judiciary recognises that this problem exists and that it is prepared to make decisions it would not have made several years ago.

(Seanad Eireann: 2000)

Foucault argues that confessional discourses of sexuality and sexual abuse constitute a practice in which power and pleasure accrue to the listener, spectator, therapist, judge, jury member, etc. Rather than freeing sexual abuse survivors, confession draws them into another sexually exploitive power relationship. Thus, reviews like the one below ‘enthalls’, emotes and empathises but never confronts the problem:

A tough book to read, no doubt. The abuse and terror that these people have survived is beyond belief. The story is enthralling and you yearn to be able to help and makes things right for the small children they once were.

Sophia, her mother, her brother Gerry and sister Michelle suffered rape, torture and disbelieving psychological abuse at the hands of their father. They told the guards, social workers, doctors, nurses, neighbours, anyone who would listen and nobody did anything

They endured hell and worse and i wanted to cheer at Sophia’s and her brother and sister’s courage and bravery throughout.

A must-read if only to show that in the face of horrendous evil, heroes emerge.

(Source: Harrowing and inspiring, August 27, 2007 by Marianne (Galway, Ireland).

When other agencies fail abuse victims, it is the media that can play an important strategic role in disclosure. Time and again, both within the court cases and the autobiographical narratives, victims claim that media portrayals of abuse and abusers triggered their own disclosure:

‘...I was reading The Sunday Tribune at the time the Father Brendan Smyth case was getting huge publicity. I saw his face and I would love if they burnt that footage they have of him on the television because it’s so menacing. Naturally for me it brought back the feelings of abuse ...Then I just lost it. When I read that article it was as if a cork flew out of a bottle...’

(Stolen Childhood, Molly: 91)

The ‘X’ case, (see below for court detail) came to light in 1992 and this was followed by the Kilkenny Incest case when on the 1st March 1993, a forty-eight year old County

Kilkenny father was sentenced to seven years in jail, after pleading guilty to six charges of rape, incest and assault covering a period from 1976 to 1991. This case was given constant media attention in 1993 initially because of the severity of the sentence given for the abuse, then for the plight of the victim and the inability of the various health professionals to help her or recognise the abuse. After this some ‘notorious’ cases involving priests⁸ swimming coaches⁹ and care homes¹⁰ received massive media exposure. Revelation after revelation detailed horrific abuses and crucially, the determination of those in power to deal with the individuals in their organisations. The intense public interest in these scandals and the anger that resounded on the airwaves breached the boundaries of silence about the topic of abuse and encouraged victims to tell their stories. The media were sensitive to the enormous interest generated by these stories. Because they could focus on both individual stories and on public institutions they had material from both private and public domains. Television documentaries (esp. Raftery 1999), radio talk shows, and newspapers all contributed to highlighting the problem. In the discussions that ensued a language developed, that enabled individual victims to avail of a building sense of outrage and sympathy. Thus, it was the mass media that provided the impetus for many disclosures.

In *The Limits of Autobiography*, Gilmore argues that such stories do not satisfy the legal and scientific demands for a ‘truth’, that the connections between knowledge and power do not reach the standards that compel the story into a courtroom. A feminist empathetic knowledge is not sufficient, in part because it subverts identities:

‘Consider that first-person accounts of trauma by women, for example, are likely to be doubted, not only when they bring forward accounts of sexual trauma but also because their self representation already is at odds

⁸ Father Brendan Smyth and Fathers Ivan Payne and Sean Fortune

⁹ Derry O’Rourke and George Gibney

¹⁰ Madonna and Trudder House under the aegis of Eastern Health Board

with the account the representative man would produce. A first-person account of trauma represents an intervention in, even interruption of, a whole meaning making apparatus that threatens to shut it down at every turn.'

(Gilmore 2001:23)

Because the media is driven by the economic requirement to sell more stories it needs to encourage a 'sensationalist' type of narrative. The topic of child sexual abuse is difficult to hear and there is a palpable relief to discover that there is a different 'dark side' to confessions. It is hardly surprising then that the media turns to the issue of 'false memory syndrome' because it reaffirms a more tolerable truth. Media reporting of child abuse reflects what has been described as a 'moral panic' (Jenkins 1998). However the issue of false memory is seldom to the fore in Irish newspapers. Instead victims are eulogised as 'brave', 'determined' etc. and the sensational element is directed at those in power.

The autobiographical narratives reviewed here demonstrate the relationship between narrative and power by showing how the victims overcome their relative powerlessness enabling them to reconstruct a sense of self that resists gendered ideologies. Through the negative representation of home, of parents and of men, they destabilise the general taken for granted assumptions about communal and social norms. However, not all the narratives transcend oppression. Some serve to reproduce hegemonic constructions of men, women and children and so fall into the very trap about which Foucault warned.

5.4 Conclusion

To assert a sociology that begins with people's experience is an attempt to reorganise knowledge so that forms of organisation and real conditions of existence become more clear. This chapter set out to evaluate the power of survivor stories, to consider whether

they subvert or submit to the hegemonic discourses that are 'out there'. The opportunity to escape the bounds of this knowledge lies in the production of narratives of the self. Feminists have argued that these narratives give legitimacy and empowerment to these adult survivors of child sexual abuse. Over time, however, the content and reception of such stories have been interrogated. This has revealed a colonisation by hegemonic discourses, which minimises the role of the personal narrative in the hierarchy of knowledge. I will argue however that Subaltern experience occupies two different but related spaces. I would position those who have written books, or made victim impact statements in the courts as representative of the oppressed. However, they have succeeded in creating a space for the voiceless child. They have also produced a narrative form that creates a wider readership and that has the potential to inform other knowledge systems such as the media and the legal system.

Ultimately the power of narrative is to give space for the voice of victims of abuse, a space that is not provided within the legal system. As such it subverts the exclusionary domain of power that exists within the courts. Notwithstanding the therapeutic importance of autobiographical narratives, in sociological terms their importance crucially lies in their ability to clarify the connections between the particular and general, the individual and the structure. They help to explain the normalisation of child sexual abuse in our society. When a story, such as *Sophia's Story* for example, explicates the network of authority that supports and maintains such abuse, then the sociological potential is realised. The hegemonic constructions of men, women and children that saturate law, government, and the church are deeply resistant to incorporating new forms of knowledge. These autobiographical accounts fill a gap in the web of knowledge and at least potentially can subvert gender domination. On the

other hand, they may contribute to the patriarchal constructions of family and gender by particularising accounts while neglecting structural connections. Accounts that are constructed within a framework that is sensitive to the political and structural context of abuse have much greater emancipatory potential.

Chapter 6: The principle of corroboration in the processing of child sexual abuse cases

6.1 Introduction

The purpose of this chapter (and the two subsequent chapters) is to interrogate legal reasoning on the issue of child sexual abuse. I argue that a feature of legal defence stratagems is that they have developed in a way that ensures the continued subordination of women and children. The conventions observed in the processing of cases through the courts frequently have the (unintended) effect of reproducing and reinforcing a patriarchal system. The latter is at least in part constituted through enduring myths about the dangers of believing hysterical, fantasising and dangerous women.

As knowledge about the issue of adult/child sexual relations has entered into the public domain through increased criminal prosecutions, the judiciary and the legal system have had to evolve, develop and negotiate their understanding and management of the problem. Consequently appeals about court judgements are often made to a higher authority (the Court of Criminal Appeal, the High Court and the Supreme Court) for a review of decisions made in the lower courts of Republic of Ireland. At issue is the reasoning employed for the decisions of the judiciary in the criminal court and the subsequent affirmation or correction by the Appellate Court.

Through the process of interpretive decisions the Appellate Court acts as the gatekeeper of legal knowledge. But legal rules merely provide a means to legal argument which in turn enables choice. I contend that law operates from a patriarchal standpoint and it follows that choices will reflect this perspective. Masculine rationality

is privileged and as a consequence, forms of, for instance, feminine emotional knowledge may be discounted or rendered invisible.

Foucault explains how the traditional understanding of the relationship between the production of knowledge and power has been masked and legitimated by the concept of objectivity, which has been central to mainstream Western epistemology. Feminist and other critiques of the objectivity of knowledge have exposed this relationship, revealing that objectivity in its conventional sense is not logically possible, and that knowledge is political and contextual. Knowledge is therefore located in the particular cultural, linguistic, institutional and political contexts of the knower.

The individual judges' authority to adjudicate is constrained to the extent that the institution is imbued with patriarchal values which inform and are informed by political, economic and social policy. Law is not simply a body of 'neutral rules': its doctrine has been developed to reflect particular interests and understanding of the social world in which we live. These, it is argued, are based on a male paradigm that ignores or devalues experiences and ways of thinking associated with women, so that 'neutrality' and 'objectivity' in fact means the subjective perception of men (Bryson 2003:198).

Catherine MacKinnon, a feminist writer on the relationship between law and women, argues that Law is male in every way (1987: 208). Her critique on the subjugation of women through male-focused law translates into similar philosophies exposing the subjugation of 'others', including children. Her analysis explains how the experience of all 'others' have been silenced out of the legal system, because those creating the system do not feel these experiences. Accordingly, by framing victims of both sexes in the notion of 'other', there is a strong gender aspect to this work. Combining the category of women with that of children allows the courts to apply

myths and knowledges about women to these children, regardless of sex. I will argue that a feature of legal defence stratagems is their deployment to ensure the continued subordination of women and children. Through the continued insistence on strong warning to the jury about the issue of *corroboration*, the myths about the dangers of believing hysterical, fantasising and dangerous women (or children) are subtly reproduced and continue to underline legal reasoning in society.

6.2 The enduring problem of child abuse

The problem of child sexual abuse is not something new, and the legal questions it raises have been long documented. Yet it is often perceived to be a ‘new’ field of inquiry with which the judiciary are unfamiliar. For instance, in **1921** The Reverend R.S. Devane, S.J. was concerned about ‘The Legal Protection of Young Girls’ and he quoted three medical women, speaking on behalf of **1,500** others, who gave evidence to the English Committee on Sexual Offences. The consequences of sexually abusing young girls were fully outlined:

‘To awaken or excite the dormant passions of a child by such means prematurely is to confound its sense of right and wrong, and to give it a false view of human and social relationships and duties which it is very difficult to correct later. The physical and mental balance is often upset and healthy development hindered. Not only unfortunate impressions, but severe neurosis may persist in later life as a consequence of such experiences.’

The effects of ‘premature sexual activity’ were clearly known in the professional Irish society from as early as the late 19th century. The consequences which flowed from child sexual abuse had also been documented:

‘A child or young person should be protected against these risks. Preliminary acts of indecency are very common, and lead numbers of girls to a life of uncontrolled prostitution, and to great misery, **before they are of years of discretion really to defend themselves** from the false representations and allurements of those who tamper with them.’

(Devane; Irish Ecclesiastical Record January-June 1931:2. Emphasis added.)

Further, it was acknowledged that acts of indecency were very common and that children may only be able to defend themselves at a later stage in life. This knowledge was expressed in unambiguous terms. The Carrigan Report on the incidence of sexual crime which has already been referred to in Chapter 2 above, considered whether change was necessary to the Criminal Law Amendment Acts of 1880 and 1885. The impetus for this was the legislative changes to these Acts in England, Scotland and the North in the previous decade, which meant that the law against sexual offences in Ireland was more lenient than the other jurisdictions. The Irish legal system was still in its infancy and closely monitored such changes. The Carrigan Committee found:

‘That there was an alarming amount of sexual crime increasing yearly, a feature of which was the large number of cases of criminal interference with girls and children from 16 years downwards, including many cases of children under 10 years;

That the police estimated that not 15 per cent, of such cases were prosecuted, because of

(1) the anxiety of parents to keep them secret in the interests of their children, the victims of such outrages, which overcame the desire to punish the offenders ;

(2) the reluctance of parents to subject their children to the ordeal of appearing before a public Court to be examined and cross-examined ;

(3) the, actual and technical embarrassments in the way of a successful prosecution of such offenders owing to (a) the difficulty of proof, from the private nature of the offence, usually depending on the evidence of a single witness, the child; (b) the existing law, or the rule of practice in such cases, requiring corroboration, or requiring the Judge to warn the Jury of the danger of convicting the accused upon the uncorroborated evidence of the witness;’

(in *Kennedy 2000*)

The Carrigan Report stressed the ways in which prevailing judicial processes resulted in children sometimes being treated as accomplices in a crime:

‘The latter assumption must tend to defeat the object of the statute, for the jury is most likely to acquit the accused if the Judge must warn the jury that the juvenile witness, with whom a sexual offence is alleged to have been privately committed by the accused, is an accomplice, whose uncorroborated evidence it would be dangerous to accept. We are satisfied the operation of this, is responsible for grave miscarriages, of Justice.’

The report criticised protracted procedures which put ‘a strain upon the child, under which not infrequently she or he breaks down, and the prosecution fails or must be abandoned *‘indeed it may be believed that the frequency of assaults on young children is to some degree attributable to the impunity on which culprits may reckon under this protection’ (ibid).*

Given this pre-existing legal knowledge of the problem of child sexual abuse, assertions by the judiciary that knowledge about this issue is new, that psychologists and social scientists are only now ‘discovering’ the truth, seem somewhat disingenuous. It suggests that the judiciary along with other power brokers in Irish society preferred if at all possible not to dwell on the problem of abuse, nor to acknowledge its pervasiveness. The Carrigan Committee in the 1930s recognised this ‘will to silence’ and the difficulties in getting the legislature and the Courts to move forward on the issue:

We are of opinion that the problem before us requires legislative treatment on the lines followed in our recommendations. These recommendations will be found to consist mostly of revisions of obsolete or obsolescent enactments, so as to adapt them to modern necessities arising from the changes in social life and habits since these statutes were passed. If some of our proposals may appear to be innovations or too drastic where we recommend reforms in the law or its administration, it is to be remembered that our function has been to provide remedies for an abnormal ailment and therefore the use of some new curative might be expected. We would add that the recommendations for which we are responsible are in the main supported by the views deliberately expressed by the witnesses examined before us, who, we feel assured, from their varied knowledge, training and experience represent the sound and healthy opinion of the public on the subjects under consideration’.

James Smith argues that the context of Ireland as an emerging nation, keen to establish a separate (and specifically a Catholic) identity from England meant that the knowledge of sexual crime was a threatening issue for this project. The claim that it was not ‘a suitable subject for public discussion’ was one method of containment. The other, he maintains, is the way such crimes were clothed in a discourse of sexual immorality, placing the blame on the young girls rather than on the male citizens. This argument sits well with Carolyn Conley’s research which documents a different judicial mind-set of the late 19th Century where

‘Irish judicial authorities generally recognised the rights of women as subjects, without regard to gender or their sexual morality..... In dealing with sexual assault, the area of the criminal law most obviously influenced by preconceptions on matter of gender, the Irish courts usually treated such crimes simply as crimes regardless of the circumstances, the social status of the accused or the reputation of the victim. The causes of this surprisingly progressive outlook among judges in the courts of a country often perceived as a backwater are not immediately obvious’

(Conley 1995: 801-18)

But perhaps it could be as Raymond Gillespie claims that ‘community cohesion maintained social control without resorting to the law’ (Gillespie 1991:51).

6.3 The requirement of corroboration

More than any other element within the law dealing with sexual abuse of women and children the issue of corroboration is embedded in traditional patriarchal knowledge. My analysis of the cases brought before the Appellate Court demonstrates how significantly the judiciary view the requirement of a corroboration warning, even though jurisprudence now argues that such a requirement might be eased in particular instances to do with child sexual abuse.

Historically the legal system was constructed to safeguard the rights of men. At the same time that the law respects men it is suspicious of women. This is explicitly explained by the Chief Justice:

Chief Justice: I can imagine that in the case of females and young boys ... evidence should be corroborated, but there is no authority in England or this country which says that in the case of a **grown man** the judge is bound to warn the jury that there is danger in convicting without corroboration.

(Quoting Rex v. Dossi 87 L.J. K.B. 1024 in (People v. Ward: ILT LXXVIII))
(Emphasis added)

In an adversarial system that reflects the patriarchal social order it is a matter of men versus..... everyone else. Criminal trials are undertaken on the basis that acts have been committed in breach of laws and regulations and that transgress social order. Crucially, I argue that latent within many of these laws are various practices and regulations that ensure that another social order is not disrupted- the order of patriarchal domination. While I acknowledge that amendments to legislation and the evolution of case law over time reflect social and cultural developments and bring the law up to date, it seems to me that the underlying structure and philosophy of the law remains remarkably consistent over time. The doctrine of 'precedence' means that law is grounded in the past, and is somewhat resistant to the incorporation of new knowledge. Implicit in the practice of relying on precedent is the notion that the courts have already

made sound decisions which can be depended upon. However, it could also be argued that over adherence to past judgements prevents the law from opening itself to new knowledges. Law, in other words, runs the risk of being over-institutionalised and therefore not capable of responding creatively to difficult issues such as child sexual abuse.

The adversarial system is built on the edifice of proof; it depends on evidence. It is in continuous mode of defence of the institution, which concerns patriarchal interests. Law allows little room for manoeuvre or flexibility. If a category or 'type' of case challenges pre-existing criteria when it is translated into legal knowledge, it frequently evokes a response that results in the exclusion of certain other knowledges. If Foucault is right and scientific disciplinary modes of power are the *modus operandi* of the modern world, then it seems that Law is impervious to this shift. Law remains firmly fixed in a traditional *modus operandi*.

In the adversarial court system that exists in Ireland a trial ultimately involves two competing parties, each proposing that truth resides on its side. The object of the exercise is to decide who should be believed, which is not the same as who is telling the truth. One of the most difficult types of case to prosecute is one involving sexual offences, not because it is intrinsically more difficult, but because of gender constructions. The central difficulty is the issue of the credibility of the victim, who is assumed to be female (although as we have noted this is not the case where children are involved). The Courts are uncomfortable with these situations, as the system is not structured in a way that enables it to resolve them. Knowledge of the leading characters in cases such as these is based on traditional myths about women, an understanding that has been constant in Western culture throughout history, (see above). Men's fear and

anxiety about women is expressed well by Helen Haste in the ambivalent depictions of them as ‘wife, waif, whore and witch’ (1997).

Victorian mythology, Haste noted, operates through the message that beyond the boundaries of rationality, there is chaos, which is one with sexuality. Female sexuality then is ‘commoditized, exploited and reviled’ (Smart 1990). Masculinity is equated with reason, control and mastery; femininity with the undermining of these. Therefore, female sexuality is dangerous. The abiding cultural problem is to find ways of diminishing that threat. In this patriarchal lore women are believed to be mentally unstable, to be scheming and deceptive, and to have an improper motivation for making claims of harm against men. For these reasons, they tend to be seen as untrustworthy witnesses. Because they have been characterised as sexually insatiable and indiscriminate, they are seen as deserving whatever harm they ‘provoke.’ Conversely assumptions about men's rational superiority encourage their being seen as believable witnesses. Complainants therefore are unable to fit ‘male’ system rules which have been devised in order to construct men in a particular way. For the legal teams the way to resolve this problem is simple – if the crime is corroborated. While it is acknowledged by many judges that the particular offence is most likely carried out in secret, nevertheless the fact that there is no corroboration gives space to the court to reproduce any of the above historical constructions of ‘Woman’.

Corroboration discourses examined in the Appellate cases generally subscribe to Foucault’s understanding of how discourse constructs the topic (of abuse), defines and produces the objects of our knowledge (victims and offenders) and governs the way with which this adversarial relationship can be meaningfully reasoned. The context of a ‘reasoning court’ is an ideal setting in which to understand how the discourses around corroboration are:

‘...ways of constituting knowledge, together with the social practices, forms of subjectivity and power relations which inhere in such knowledges and relations between them’.

(Weedon 1987: 108)

The focus of this part of the analysis is on the strategies used by the trial judge acting in the Appeal Court to manage the issue of corroboration. The method used for appealing decisions is to invoke precedent, and to choose one that is firmly grounded. It is important to note the occasions when precedent is set anew, as the grounds upon which it is set provides the framework against which all argument is framed.

In the first case under discussion the court is reminded that the components that make corroboration warnings necessary are the ‘nature of the offence’ and the age of the child - instantly constituting the relationship between sex and children as features that signal danger¹¹. The background of this case was as follows: Maura Coogan had just passed fourteen years of age and was living with her foster-mother. The foster mother’s brother had ‘carnal knowledge of her by force and against her will’. She told no one of the assault until the onset of pregnancy, followed by the birth of a child. Because the judge did not warn the jury about the difficulty inherent in ‘the age of the girl’ and ‘the nature of the offences’ the case was accepted for appeal. This means that within the store of legal rules and legal knowledge there is an accepted pre-understanding that young girls lie about sex. The appeal judge called upon and reiterated at length the Judgement of Hale which states: ‘...*this type of) accusation (is) easily to be made and harder to be defended by the party accused tho never so innocent*’¹².

Precedents are the grounds upon which most arguments are framed. While some precedents are derived from practice and recognised as the norm, the other type of

¹¹ AG v Williams [1940] I.R.199

¹² AG v Williams [1940] I.R. 199

precedent relies on argument and decision. Certain factors are taken into account in following or changing precedents and these include new understandings of issues. Precedents viewed over time, as in this research, serve both to establish trends but also to reflect trends in society.

6.4 *The Hale precedent and its patriarchal legacy*

Given that the seventeenth century Hale judgement is the precedent that is cited in the first and earliest case listed in the Appellate cases reviewed, (and also used in many of the subsequent cases) it is worth exploring how the problem is framed by him. By using Hale's admonitions as precedent the Courts rely on 'old' knowledge – 'it is well known.' A long standing authoritative position is equated with truth. At the same time, through this invocation of tradition, the legal system resists the challenge of new knowledge. The laws against sexual offences were developed over a period of 25 years, beginning with the *Offences against the Persons Act* in 1861, *The Criminal Law Amendment Act of 1881* and finally the *Criminal Law Amendment Act of 1885*. The legal construct of the female victim of sexual offences was derived from the broader social context of Victorian England and this representation is embedded in law as pointed out earlier. . By the time the Criminal Law Amendment Act of 1935 was formulated, Ireland had attained independence from British Rule. It was hard to discern whether Church or State was the ultimate legislator but it can be argued that common law, through judicial decision, was firmly guided by the Roman Catholic rule.

Following Foucault's admonition to contextualise statements it is noted that Hale's warning is comprehensible in light of the fact that, at the time of his judgement, criminal defendants lacked the presumption of innocence, the standard of proof of guilt beyond a reasonable doubt, and other fundamental trial rights that the modern criminal justice system guarantees. This shift in according rights alerts us to the reality that

change within the legal system is possible but while the system is capable of developing understanding about the rights of the accused there seems to be a reluctance to accord similar consideration to the rights of the complainants. Central to patriarchal theory is the notion of men's power over women and central to this argument is law's status as an instrument of this power. Therefore the fact that Hale still represents the legal position on women and sexual crimes, illustrates the institutional resistance within the law to rendering equal significance to all participants.

Hale's opinion is stated in his Pleas of the Crown, Vol. 1, p. 633: -

'The party ravished may give evidence, upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony'.

Note how Hale focuses on the complainant's credibility. By placing her in the centre of the frame he automatically lightens the weight of suspicion on the accused. This is how language works. Then -

'For instance: if the witness be of good fame, if she presently discovered the offence and made search for the offender, if the party accused fled for it; these and the like are concurring circumstances which give greater probability to her evidence'.

Here, Hale demands that the woman must have a good reputation; it is her character that is under review. Hale also allows that a complainant is more credible if the assailant 'fled for it', thus her reliability depends on his acknowledgement of wrongdoing. Hale made no space for the parents and the teachers and the authority figures who never 'fled for it'. It is fair to say that he was not talking about relationships between adults and children, but the courts still opt to choose this particular judgement as the authoritative precedent in trying cases of adult/child sexual relations. To continue:

‘If the complaint is made any considerable time after she had opportunity to complain; if the place where the act was alleged to be committed was where it was possible she might have been heard and she made no outcry;’

The discourse of legal precedents as evidenced by the Hale judgement assumes a male point of view. The law replicates the male dominated social ethos in families and the broader society. If the situation as outlined by Hale is not the reality, the ‘truth’ might be untenable. It would have to acknowledge that men do not feel the need to flee; they understand their actions as socially acceptable and their relationships as natural dominance. For instance, in the case of DPP v P.C.¹³ the complainant, aged fourteen years at the time of the assault, declared that the accused had met her outside her school, driven her home to his house and had intercourse with her in his bedroom. The defence appealed the jury conviction citing, amongst other things, the unlikely event that the man would have used his (busy) home on an ordinary weekday for the purpose of sexual intercourse, or that he would have driven her through the town in broad daylight. No account is taken for the possible arrogance, stupidity, deviousness or carelessness of the man. Instead this male reasoning declares the accusation is false, that the girl could not be believed.

Young children, just like adult women in cases of domestic violence, do not ‘outcry’, often they are afraid, or their knowledge of normalcy is provided by the abuser or they are inculcated into a collusion of secrecy and guilt. Hale’s admonitions disregard this reality and the threat implied still carries weight -

‘...these and the like circumstances carry a strong but not conclusive presumption that *her testimony is false or feigned*’ (emphasis added)

Feigning testimony is a danger that the courts must contemplate, but it appears rational that some enormous benefit must accrue to those complainants who scheme in such a

¹³ DPP v. P.C. [2002] CCA No. 114 of 2000, 2.I.R. 285–304

way. If no benefit can be cited, then the reasoning for the suspicion and caution that the courts exercise against these complainants must lie in the core belief of women as dangerous and manipulative. In a later passage Hale tells of two cases of malicious prosecution for rape, and adds:

‘I only mention these instances that we may be the more cautious upon trials of offences of this nature, wherein the Court and jury may with so much ease be imposed upon without great care and vigilance’

Of the 191 Appellate court cases judged between 1930 to 2004 that I reviewed, only one case (Nora Wall) was definitely acknowledged as false and another case carried suspicions of wrongdoing. Yet this one case serves as the justification for all the legal activity to protect men against malicious accusations by women. The penalty we pay for ensuring that not a single innocent man is convicted is that child abusers may have to go free.

Hale is further concerned that

‘ the heinousness of the offence many times transporting the Judge and jury with so much indignation that they are overhastily carried to the conviction of the person accused thereof by the confident testimony sometimes of false and malicious witnesses’

Using judicial reasoning to examine the emotive response to such cases is surely to be expected. The law, however, is very strict about separating emotion and reason.

‘The overwhelming maleness of law’s history lends credence to the assertion that legal reasoning is hostile to women’s ways of knowing’.

(Baer 1999:74)

This continually promotes a perceived dichotomy between male and female thinking/knowing. As bell hooks argues, dualistic thinking is also hierarchical thinking; Western metaphysical dualism, she writes, shares with all systems of oppression a *‘belief in notions of superior and inferior,’ a belief that provides the ideological foundation upon which notions of domination are constructed (1989:175/6).*

Traditionally men's claim to power rests on their superior rational faculties. Limiting women to the 'feeling' 'caring' and 'connected' side of social interaction while simultaneously 'outlawing' these characteristics is a strategy that positions women outside equal participation in the legal process. Note also, how Hale equates emotion with haste and reason with deliberation. Hale puts in place a legal hierarchy of reaction; rational recognition of dangerous women is superior to social opprobrium about the crime of child rape and sexual abuse.

Finally, Hale links 'confident' testimony to malicious complainants. Here he constructs the victim that is required by the courts, a perception of victimhood that will be understood within the legal arena. While survivors must be strong and competent and capable of exercising agency, being a victim implies passivity and helplessness and is generally cast in a negative frame. This fits traditional notions of women. Therefore, it is crucial to examine the discursive practices used by legal architects such as Hale, to show how women's and children's identities are constructed. Language does not merely represent an individual's identity; how we define individuals prescribes a particular set of behaviours, thoughts, and emotions (Eisikovits & Buchbinder 2000). Moreover, the articulation of these women's identities must be understood in its social, historical, political, and institutional contexts (Dobash & Dobash 1990). These complainants are not made into victims only by their victimisation but also by cultural understanding of what that word means in social practices and current gender, economic, and racial relations. How complaining witnesses comport themselves in court becomes a matter for negotiation between traditional patriarchal knowledge and emerging feminist understanding of the complexity of the issue.

In sum, Hale's doctrine in relation to corroboration holds that:

- Women are dangerous because, he argues, ‘the accusation is easily made’ and malicious
- There is a need to be extremely vigilant in ones’ dealings with women and
- The courts must be on their guard in their dealings with the legal enemy of rational thought – emotion. The judiciary make an active choice in the hierarchising of these knowledges.

I argue that these principles are the bedrock upon which patriarchal resistance is built. If these ‘myths’ are acknowledged as such by the judiciary, the entire reasoning about child sexual abuse would be turned on its head. Legal knowledge is built and concretised through time. When an individual judge makes a decision that is inconsistent with existing legal principles or with traditional legal logic the Appellate Court seeks to restore order. The spectre of an attack on this structure of knowledge - in the form of critique - provokes resistance. I will show how this resistance manifests itself in the reasoning process.

6.5 Confirming precedent and maintaining control

In the Williams’ case¹⁴ discussed above (which was heard in the early 20th century) the judge shores up his opinion by citing Hale and subsequent judgements from 1826 to 1922, to reinforce the notion of consistency of this opinion. He equates and transfers the problem of corroboration in cases of rape to the legal charges of ‘carnal knowledge of young girls below the age of consent’ and cases of ‘indecent assault on women and young boys’. This is a good example of the sovereign power of law. Law lays down its own rule – *‘it speaks and that is the rule’* (Foucault 1978:83). In spite of acknowledging that there is no rule or law regarding the necessity of corroboration, the judge’s identification of the young complainants as ‘dangerous’

¹⁴ AG v Williams [1940] I.R. 199

informs much of the subsequent reasoning. Reasoning, in a legal sense, mimics scientific methods in the way it categorises and classifies concepts. A consequence of labelling or categorising victims is that the focus of the knowledge is skewed in a particular direction, minimising or excluding other possibilities and choices.

A further consequence of creating categories is that law can make truth, in the sense that something is true by virtue of what it is not, by its relationship to a particular truth or its opposition to another. Let us take an example: In the case of *AG v Williams*, the defence counsel arranges corroborative evidence into three categories –

1. that required by law,
2. involving accomplices, and
3. involving sexual offences.

Each of these categories is specific in its direction, but instead of defining the difference in these categories the defence relate them to one another in their appeal:

*‘admittedly, the prosecutrix in a sexual offence is not to be regarded in the same light as that of an accomplice, but all the leading text-book writers are agreed that it is highly desirable that the trial Judge should point out to the jury the risk of acting upon the evidence of the alleged victim unless corroborated’*¹⁵

(AG v Williams [1940])

By qualifying the initial statement the defence effectively negates or dismisses the fact that the prosecutrix is **not** an accomplice. Drawing on accumulated traditional knowledge, the defence actively constructs anyone who claims victimisation of a sexual offence as an accomplice in the crime. Why does this matter? We could argue that the individuals involved in the case understand the procedural manoeuvres played out in the courtroom. They know lawyers use these tactics so that their client is well defended. The issue is more serious, however. Law proclaims truth. As Balkin puts it:

¹⁵ *AG v Williams* [1940] I.R. 199

‘Law has power over people’s imaginations and how they think about what is happening in social life. Law in this sense is more than a set of sanctions. It is a form of cultural software that shapes the way we think about and apprehend the world.’

(Balkin: 2003)

By making the victim an accomplice the law firstly invokes and then contributes to the myths surrounding sexual abuse. In this case the law re-presents Haste’s (1997) ‘whore’ as equal partner in criminal activity.

Of the 21 cases where corroboration formed part of the appeal, eleven were set before 1961. In the next three decades no cases were appealed on the issue of corroboration and from 1992 to 2003 only four of the many cases are appealed on the grounds of precedence. How can this be explained? Cases up to 1990 had informed judicial knowledge on how corroboration warnings should be made. Although there was no law as such, a code of practice evolved and, through the Appeal Courts argument and decisions, individual judges who wished to exercise their reasoned judgement were firmly and systematically controlled in the manner in which this was executed. Nevertheless, over time with growing social awareness and through feminist advocacy, the essence of the meaning behind the warning practice was recognised as unjust. This resulted in changes to legislation.

However, warnings about corroboration, similar to evidence about prior sexual history, [where feminists have successfully argued the point that there are no strongly established empirical links between a woman’s prior sexual history and a specific or even a general inclination to tell lies about sexual encounters (Connell and Wilson 1974)] have been largely ineffective. A review of the legislation resulted in the Criminal Law (Rape) Amendment Act, in 1990. Section 7 stated that:

(1) Subject to any enactment relating to the corroboration of evidence in criminal proceedings,,but for this section there would be a requirement that the jury be given a warning about the danger of convicting the person on the uncorroborated evidence of that other

person, **it shall be for the judge to decide in his discretion, having regard to all the evidence given, whether the jury should be given the warning;** and accordingly any rule of law or practice by virtue of which there is such a requirement as aforesaid is hereby abolished.

(2) If a judge decides, in his discretion, to give such a warning as aforesaid, **it shall not be necessary to use any particular form of words to do so**

(emphasis added)

On the issue of corroboration the most cited precedent is that of Hale. The fact that Hale remained so pertinent even as the approach to the corroboration doctrine changed, justifies Smart's comment that 'one of the main sites of resistance to any reconceptualisation of child sexual abuse which might actually change procedures came from the legal establishment' (Smart 2000: 63).

6.6 Appropriating tradition to resist change

Changing or creating new precedent has the potential to point the way to alternative or revised interpretation of the law. For this to occur, new information and knowledge must be so powerful that it is convincing. By 1990 feminist research on the prosecution of rape had outlined problems that arose during the prosecution of sexual offences. The discourse of gender inequality had begun to infiltrate the broader society to the extent that it could not be ignored by the legal system. The Legislation Review that resulted in the aforementioned Criminal Law Rape Amendment Act of 1990 determined to bring about a similar equality in law to that being advocated in the general society. Legislators and legal practitioners should operate from one and the same knowledge base; however, this is to misunderstand the separate realities occupied by the courts and the legislators. The reality instead is that two knowledges, operating in the same sphere, were now required to engage and adapt to each other. Appeals from a

corroborative point of view had almost dried up as the judges were socialised into conformity with the new legislative requirements. Although the amended legislation recognised the injustice of the philosophy behind the corroboration warning, the judiciary, by the same token was familiar with the arguments and expectations regarding this rule.

The Appeal Court had a choice in this situation. Precedent had been disrupted by new legislation. To cope with this change they could employ a method of ignoring [the new legislation] through reliance on legal reasoning, or they could recognise and adapt to it positively. In the cases reviewed, the response of the judiciary veered toward invoking precedence from a previous **century** to sustain contemporary judgments. They retrenched to the long-held position of woman as represented in Hale. For instance, in the case of *DPP v Brophy*¹⁶ [1992] the judges turned to cases from **1896** and **1905** to justify their decision regarding two of the grounds of appeal - the speed of the complaint (delay) and whether a complaint is, in itself, capable of being admitted as corroboration. By going back to the beginnings of court rulings on the issue of corroboration they summoned standards of tradition and time, investing their discourse with authority. Another example of this is the way the Appeal Court in 2003 in the case of *DPP v P.J.*[2003]¹⁷ quoted cases from 1940, 1955 and 1956. Time after time phrases such as ‘it has long been held’, ‘it is commonly known’ were used as a strategy to justify this backward-looking attitude. It is an excellent strategy of resistance to new knowledge. By harking back to traditional knowledge, ‘Law....when it most closely conforms to precedent, to ‘facts’, to legislative intent, it most closely enforces social male norms’ (*MacKinnon 1987: 248*).’

¹⁶ *DPP v Robert Brophy* [1992] CCA 1990 No. 114, I.L.R.M. 709-717

¹⁷ *DPP v P.J.* [2003] CCA No. 90 of 2001, 3.I.R 550-571

In the latter part of the 20th century Irish society had experienced rapid cultural change and Irish law, though conservative in nature, was a part of the web of knowledge that contributed to that change. That the judiciary should opt to ignore the new directives, or at best to apply them in such a conservative manner, is a clear demonstration of the patriarchal nature of the legal reasoning in the legal system.

Stanley Fish argues that

‘Legal autonomy should not be understood as a state of impossibly hermetic self-sufficiency, but as a state continually achieved and re-achieved as the law takes unto itself and makes its own (and in so doing alter the ‘own’ it is making) the material that history and chance put in its way’

(Fish 1994: 220).

And there is merit in this, but this seeks to signify that Law sits in a continual state of preparedness, open-minded and ready to accept or appropriate all this material. That the Hale doctrine should endure so long to withstand new knowledges points to the positioning of the Appellate Court as a relatively closed institutional system resistant to change.

6.7 The power of judicial discretion

The corroboration warning provides the judges with a sense of security. It ensures that all bases are covered regarding the danger of a false accusation. It disregards the inherent bias that such a requirement contains. In an oft cited case from the English courts (*R v Chance*) the prosecution remarked:

Where for example, if a woman was raped and then robbed in her own home, presumably a judge would be required to explain to the jury that it would be dangerous to convict the accused on the uncorroborated evidence of the victim in relation to her story of the sexual assault, but not dangerous as far as the robbery was concerned.

(R v Chance 87 Cr App R 398)

The court has options in the way it employs the laws that are in place. In *AG v E* [1945]¹⁸, the judge is reluctant to apply the law according to the decision of the jury, which was in favour of the victim. On a charge of indecent assault on a boy the jury returned a verdict of guilty. The evidence was uncorroborated and the jury indicated that, while they believed the young boy, his evidence was not ‘made very clear’ because he could not remember the exact date of the incident. The judge says:

‘If you come to the conclusion that you believe (the boy), you are entitled to act on his evidence standing alone, and convict the prisoner. In other words, it would be unsafe, but...the law allows the jury to convict’.

(AG v E [1945]: 69)

The appeal court decided that the jury was obviously not fully convinced and allowed the appeal, acting on the premise that the accused must be afforded the full protection of the law that is constructed in his own image.

Further, in a reporting of a charge made by a judge in a later case the Court registrar commented

‘In a charge, which was marked by conspicuous fairness, (the trial judge) indicated the weaknesses in the evidence and more than once referred to the danger of acting on the evidence of the prosecutrix in so far as it was uncorroborated. If in the charge any leaning towards one side or the other can be discovered it was in favour of the accused;

(AG v Powell [1945]: 307)¹⁹.

In careful reading of the judicial discourse there is a distinct sense of the care taken to assert fairness. Fairness implies objectivity, and this ideology is advanced through the rhetoric of balanced justice. Balanced reasoning, although formally insisted upon by the judges, is not practised in any meaningful way, i.e. presuming that the balance spoken about is between the two adversaries involved:

¹⁸ *AG v E* [1945], *Irish Jurist* 67–69

¹⁹ *AG v Powell* [1945], *I.R.* 305–307

‘while it is accepted on both sides that the learned trial judge’s charge to the jury was favourable to the accused....

(DPP v Brophy [1992] CCA. 717)²⁰.

In those cases where ‘the trial judge formed the view that the girl was a truthful witness’ he may be severely reprimanded for making this observation. In the case of Trayers²¹ the accused was charged with having had carnal knowledge of PMD, a girl between fifteen and seventeen years. While giving his directions to the jury the judge stated that *‘it is fairer to the accused man to direct you that it is a case you should approach on the basis of your not having corroboration of the girl’s evidence.’* However he also noted that the behaviour of the accused within the trial and the evidence of PMD’s brother could be construed as going ‘a long way towards corroboration’.

The appeal court noted -

The trial judge should have contented himself with the usual warning given to juries in cases where an accused man is charged with a sexual offence on the uncorroborated evidence of a young girl’.

(AG v John Trayers [1954] CCA: 114)

Flexibility is not permitted, control is tightly maintained. While this may be valid in considering law as a system of sanction and control, in the case of child sexual abuse – which is not a ‘precise’ crime – it disallows a mechanism for dealing more creatively with the complexities and subtleties of this crime.

The problem of corroboration locates itself in a framework of suspicion – that these young girls and boys are complicit in some way and that a warning to this effect is necessary - *‘the degree and gravity of warning should vary according to the degree and gravity of the complicity’* (AG v Williams [1945]: p.200)²². By introducing a matter of degree it is the warning per se that then becomes the focus of the Court. This practice of

²⁰ DPP v Robert Brophy [1992] CCA 1990 No. 114. I.L.R.M. 709-717

²¹ AG v John Trayers [1954] CCA. I.R. 110-115

²² AG v Williams [1940] I.R. 199

changing the focus of the problem is a critical defensive strategy of adaptation to new knowledges that begin to infiltrate the system.

The decision that no particular or specific form of wording is appropriate affirms individual judicial authority -

'I do not decide that the warning must be expressed in any particular terms.....that is a matter to be determined in the first instance by the trial Judge'

(AG v Williams [1945]: p.204)²³)

The knowledge space that is created by indeterminate language leaves room for challenge. The Chief Justice in the Williams case gives explicit control to the judge regarding the strength of the wording he should use. However this is for rhetorical purposes only because the trial judge is called to account when he exercises this discretion. The offender in this case, Michael Cradden, was found guilty:

'It is suggested that the effect of the language there used (in the Williams case) is to leave it entirely to the discretion of the judge what words he will use when giving the warning. When interpreting this passage, however, it has to be remembered that the Chief Justice when he uses the word, 'warning' is speaking of a warning of the danger of acting on uncorroborated testimony.'.....In our opinion, therefore, however it be phrased, the warning to be given should convey to a jury in unmistakable terms, the danger of acting upon the unconfirmed testimony of a prosecutrix if that testimony stands alone''.

(AG v Cradden [1955]: 138)²⁴

Judges can be curtailed and prevented from stepping outside the restrictive boundaries of traditional thinking. By and large legislative reforms have been implemented, but to little real effect. Although acknowledging that no formal corroboration warning is now required for the evidence of children or in cases of sexual abuse, *the courts actually insist that almost always a warning of some sort will be required.* More than a century of jurisprudence which regarded children as a suspect class of witness, (thus requiring independent confirmation) is not easily swept away by the legislative broom.

²³ AG v Williams [1940] I.R. 199

²⁴ AG v Michael Cradden [1955] CCA 1955 I.R. 130-141

Similarly as we shall see, requirements that a judge tell a jury there may be good reason for a delayed complaint have been held by the courts to require a balancing direction explaining that the delay nevertheless may have prejudiced the accused's defence. The law in this general area has become more and more complex. High Court decisions in cases like that of Cradden (above) have made it increasingly difficult for a trial judge to charge a jury without falling into appealable error. Strategies such as these are employed to ensure that though change is spoken of, change is introduced and change is desired by individual judges, the reality is that change is ultimately obstructed by the re-assertions of authority made in the Appeal Court. This consistent curtailment of individual 'liberal-minded' judges is achieved by a demand that narrow interpretation is adhered to; combining that with arguments that emphasise control steers the court into authoritarian mode. The outcome of obedience to authority depends on the quality of that authority and in the case of the Irish Legal system this means that decisions have a distinct patriarchal bias in their adjudication.

6.8 Judge, jury and the principle of corroboration

The logic and pleadings of corroboration issues depends in large part on the assumption that the jury will not understand, or will be misled by the prosecutrix and it is up to the legal teams to control the juries' decisions. Many appeals are taken on the basis that juries have not a legal understanding of corroboration, i.e. what constitutes corroboration. The common (layperson's) perception would be 'consistency in the narrative' simply because it makes sense, and in the contextual environment of the accusation. The legal definition of corroborative evidence is *'a piece of evidence that tends to support the girl's evidence on a material issue and which is inconsistent with*

the innocence of the accused' (AG v Michael Cradden [1955] CCA: 131)²⁵. In other words, the claim of the girl, on its own, is insufficient for legal acceptance. The significance here is that corroboration can only be supplied by *'testimony independent of the girl's own evidence'* (ibid. p133). The court is careful to restrict commonsense thinking, to conserve legal understanding. In the case of Moore where there was no corroboration, no witnesses to the actual act of copulation, the Judge told the jury that it was a question of which witness they believed, the girl or the appellant. The decision to allow the appeal noted that:

'This is not a correct direction and gives rise to the danger that the jury may forget that the onus of proof lies upon the prosecution'

(AG v Moore [1930]: 48)²⁶

The important point made by the Appeal Court was that the judge must direct the jury to examine the credibility of the complainant but that the credibility of the accused was not in question. The judge did refer to the practice of warning juries of the danger of acting on such evidence, though he did not in fact give a specific warning in relation to the case being tried. The judge pointed out to the jury that there was no corroboration 'but failed to give the necessary warning as to the danger of acting on such testimony'. In other words, the jury heard that there was no corroboration, heard about the dangers of testimony about sexual relations but were not told 'in clear and unambiguous language' of the danger of acting on such testimony. Such control and inflexible adherence to text takes power out of the courtroom, away from the jury and locates it in the upper echelons of the legal institution.

This state of affairs is constructed by a court system built on rationality and objectivity which decries the experiential knowledge of the 'lay' person. Yet we must not forget the other function of law which is a method of social control. The institution

²⁵ AG v Michael Cradden [1955] CCA 1955 I.R. 130-141

²⁶ AG v Moore, [1930] CCA, 1930 I.R. 552-559

of law, as a prime source of normative, social and political power, is built on the ethic of making and following rules. This makes it vulnerable to assuming 'Right' without seeking critical evaluation. The narrow interpretation and following of rules has the advantage of acting 'correctly' without having to justify these interpretations on an ongoing basis. Thus, if the rule favours a particular group then it can legitimately continue this bias as a matter of tradition. The object of control in these decisions is the semantic technicalities. Once this is accomplished then those who use it are controlled. Individual judges are subjected to the system, through detailed controlling.

In the case of DPP v. P.C.²⁷ the accused was tried on eight counts – five of indecent assault and three of unlawful sexual intercourse with a young girl 'under fifteen years of age' (in fact she was twelve years old at the time of the first assault). He was a bus driver, driving school pupils to the local swimming pool. The girl claimed that he met her outside the school one day, and brought her to his house. The victim gave evidence of the surroundings in which the alleged assault took place, inaccurate in some details. The crime occurred in the bedroom of the house of the accused.

The judge constructed the following corroboration warning in his instructions to the jury:

'The charges here are very, very serious charges and you must not be swayed or influenced by suspicion, you must and you should have evidence to support what the charges are, not suspicion'.

He begins with a warning about the consequences of a guilty verdict, which in itself imposed additional constraint on the jury, imbuing their deliberations with extra caution.

'It has been mentioned in this case by counsel for the defendant and I will mention it again that there is no corroboration of the complainant's account of what happened and in such cases I have a discretion as to whether or not I should warn you as to the dangers of acting on evidence which is not corroborated.my warning to you is that it has been

²⁷ DPP v P.C. [2002] CCA No. 114 of 2000, 2.I.R. 285-304

found in the past that proceeding to convict people on uncorroborated evidence of a complainant in a sexual case can be very dangerous.'

The judge quite clearly tells the jury about the danger of convicting a man of a sex offence just on the word of the victim. There is no obfuscation in his words; they are designed to be clear and easily understood. He continues:

'That is not to say that you are not entitled to weigh up the evidence and be sure on the basis of the evidence that crime has been committed or that the defendant has been involved in the committing of it.All I am doing is pointing out the dangers that can result in convicting on uncorroborated evidence and I so do'.

He explains the 'danger' of traditional representations of sexual assault victims but yet tells them they must still reason the case out for themselves; that they must look at the evidence and at the statements of the victim and defendant. This is a somewhat illogical direction by the judge in that first he tells the jury that it may be dangerous to convict on the evidence and then he tells them they may do just that. Those formulae can lead, according to the circumstances of the case, either to the placing of an unfair handicap on the prosecution (the victim) or to confusion that may be detrimental to the accused's case. Far from protecting the accused, by requiring the jury to be given a complicated and technical discourse about the evidence to be corroborated, the rules may have the contrary effect to a sensible warning detailing simply the facts of the particular case.

The point here is that control is always kept in the hands of the judge by the use of legal language and rules which can be interpreted in a way that is out of the control of the 'lay' jury. Then further....

'... the prosecutor says that this couldn't be made up by the complainant, this can't be fantasy and they say that she did know that there was a window opposite the door and that there were curtains on the window and consequently that it is enough to corroborate what she says happens. If you accept that ladies and gentlemen of the jury, certainly act on it but you must consider the other side of the coin. ...Is it likely that this happened the way it is described? If you are satisfied it did, then fine, but is it likely? If you have a doubt ladies and gentlemen of the jury you must give the benefit of that doubt to the defendant'.

It is clear that the trial judge is summing up the case for the jury, telling them what both sides argue. He also tells them very clearly that the defendant gets the benefit of any doubt as he is presumed innocent. The jury found the man guilty on one charge and disagreed on six others.

However the phrase 'the prosecutor says that this couldn't be made up by the complainant' was the lynchpin for a successful appeal because it was contended that these words may have conveyed the wrong impression to the jury in that the knowledge of the victim might be construed as corroboration. The Appeal Court show little confidence here in the ability of the jury to act with common sense, with logical and rational ability; or perhaps the problem is that they fear that the jury will use the dreaded 'common sense' that is so threatening to legal knowledge. While acknowledging that it (Appeal Court) had no opportunity to observe the witness in the way that the jury had (for it can only examine a text) nevertheless the Appeal Court rejected the ability of ordinary men and women to make a 'correct' decision. It is a fact that the jury has a similar function to the judges in interpreting the law. By disregarding the decision of a jury to take on board the obvious problem that arises in the lack of corroboration, the judiciary assert the principle that its knowledge is superior to that of the lay members of the jury.

*Under the Constitution it is for a jury of twelve peers of the applicant to determine whether he is guilty or innocent. However, bearing in mind the duty of the courts to protect the constitutional rights of all persons, in exceptional circumstances the court will intervene.....*²⁸

(DC v DPP [2005] IESC)

The degree of exceptionality is often obscured by the declared reason for the appeal but the reality is that juries are monitored to the extent that they conform to the reasoning of the controlling system.

6.9 Conclusion: the collision of traditional, contemporary and patriarchal knowledges

After the new legislation of 1990 (see above) the loss of the safety net provided by the ‘corroboration warning’ challenged judicial security. The judiciary now had to acknowledge the complexity of the issue of the sexual abuse of children, and the shortcomings associated with employing traditional legal reasoning. As Hardiman J. observed in P.O’C v DPP [2000]²⁹ at p.120:

‘To permit such prosecution, in the absence of any scope for corroboration or contradiction after one, two or more decades is, to say the least, to venture into uncharted territory where the normal forensic safeguards are gravely attenuated. The process of the trial itself may be a life altering event for one or both parties and their families, and rarely for the better’.

‘Normal forensic safeguards’ demand corroboration; by its very nature, abuse processes will not provide corroboration, but judges obstinately insist on emphasising the danger inherent in abandoning this rule. For this reason the corroboration warning is still negotiated by the courts. This is not to say that all judges refuse to concede the inconsistent logic, but for those who are willing to acknowledge the problem they are at

²⁸ DC v DPP (2005) IESC 77 2005 4 I.R. 281

²⁹ P.O’C v DPP [2000] SC No. 92. 3.I.R. 87-121

the mercy of the defence team who will appeal the judgement. The independence and individuality of judges is jealously guarded yet they must still answer to the Appeals Court and it is the legal system that ultimately rules. The legal system is a cornerstone of patriarchal society. Change provokes resistance and this, in turn, reinscribes victims into their subordinate relationships.

A victim who attends a trial must listen to the judge warn the jury that there is a danger in accepting uncorroborated evidence. The message from this statement is that there is a real possibility that this person is lying. Smart enjoins us to ‘consider... that the goal of legal reasoning is a matter of social control, a normative one, that generates habits and practices and that provides consequences for those who do not conform’ (Smart 1985). By constructing norms – that the child is the dangerous and complicit – we can see how the reasoning is controlling the complainant, not the aggressor/perpetrator. It is a warning to victims that their complaints will be framed in a discourse of blame i.e. negatively construed. Consequently the amount of disclosures about sexual violence is generally considered to be the most underreported of crimes of abuse (Finkelhor 1984). In addition, Foucault identified the body and sexuality as a direct locus of social control so the combination of ‘sexuality in law’ is bound to provoke intense control. Smart continues:

‘it is important to distinguish between the law and the effects of the law and legal processes in order to identify the contradictions which allow space for change.’

(Brophy and Smart 1985: 17)

So what are the contradictions and how can we fill the space therein? The real contradiction is between the rhetoric and the reality of who the law protects. Knowledge of the dissonance between these two helps to refocus on the balance that law proclaims. It gives an opportunity to re-imagine a law that operates outside patriarchal confines and to examine the structural components that limit a fully

inclusive legal reasoning. The challenge now is not to take refuge in an idealised (patriarchal) past, but to look to the past, examine how we have evolved, how this is reflected in our laws and to question in the future how law can play its part in establishing and maintaining an egalitarian ethos in our society.

Chapter 7: Delay and the Justice system

The crime of child sexual abuse is inherently different to most other crimes because of the factors that inhibit disclosure. This means there may be a longer period between the commission and prosecution of the crime and this poses a problem for the legal system as it is presently structured. This chapter sets out to track the manner in which delay has been treated within the legal system. In particular, I focus on how understandings of delay are necessarily revised and translated into legal doctrine in light of the accumulation of new knowledge and expertise on the issue of child sexual abuse. The issue of ‘delay’ has been the main reason put forward for appealing the processing of cases about child sexual abuse. There are at least two facets to the issue of delay. One is concerned with the notion of timeliness, that anyone who has been sexually abused will disclose this immediately. The second is concerned that the passage of time between the alleged commission of the offence and the disclosure. The latter raises the concern that evidence in such a case may be severely compromised.

7.1 Timeliness of disclosure

The timeliness of the complaint is closely linked to the issue of corroboration (dealt with in the previous chapter) since ‘prompt’ complaint is an issue that affects evidence and corroboration. ‘Corroboration’ and ‘prompt complaint’ are interdependent in the sense that if the complainant does not complain immediately then s/he is excused to some degree if corroborative evidence is available. Conversely if a complainant suffered a rape that produced no corroborative evidence, a prompt complaint itself might serve as the necessary legal corroboration. Thus, prompt complaint and corroboration substitute for one another and it is intended that cautionary instructions to

the jury should be triggered by the failure to produce either. The legal system operates from its understanding of how individuals would react to sexual assault.

The issue of credibility is always at the centre of corroboration and this is further bound up with a criterion of timing that was laid down in the Middle Ages – the speed of the complaint. Hale warned that: *‘If the complaint is made any considerable time after she had opportunity to complain’* then the complaint was problematic (Hale: 1678, *Pleas of the Crown*). For instance, in case of *DPP v Brophy*³⁰ the reasoning of the judge was based on the fact that the girl did not complain until she met her friends later. His comprehension of the girls actions are a good example of the way male reasoning is embedded in legal logic. He says:

‘In the circumstances you will have to consider whether [the complainant] who was and is at an impressionable age, whether her emotions and her young imagination might have been heightened to some extent and might have caused a perception which didn’t truly reflect the reality. She is not on trial. She is a good girl and she is, obviously, very articulate. But I think you have got to look at that aspect of it because how much of it might have been retrospective implication – she didn’t run away, she stayed for the full time. I have gone over this ground before. She didn’t run away when she got out in the air, lunch-time and daylight, the mother, the bus journey. She had time to compose herself. She didn’t say anything to her mother. I would have thought that it is possible that something might have occurred that caused her to think what she was thinking’. (*DPP v Robert Brophy* [1992] CCA :717).

Within this discourse lies the notion of a potentially malicious and unfounded allegation. It demonstrates judicial reticence to accepting accusations of sexual assault. The judge considered the complaint had been derived from ‘retrospection’ implying that the complainant may have fabricated the story. Furthermore, a patriarchal form of reasoning is deployed:

‘It is not a question of whether she is telling the truth or not. In my opinion you have to look at the age groups of people, their stage of development, their sensitivity, their imaginations, their home pressures, or whatever – if you look at the totality and the possibility that perhaps

³⁰ *DPP v Robert Brophy* [1992] CCA 1990 No. 114. I.L.R.M. 709–717

something, a brushing against or something of that nature, might have happened to heighten a perception which may not have been heightened until considerably afterwards. I don't know. I can't put my viewpoint any further than that but I have to give you my viewpoint, because my viewpoint has something to do with the corroborative aspect' (ibid. p718).

The alleged victim is portrayed as innocent, imaginative, making a big deal out of 'a slight brushing against, or something of that nature'. For this judge the complainant could occupy the position of an innocent and imaginative (therefore not credible) witness, possibly grounded in the assumption that women engage in sexual fantasies and then confuse these with the truth. She could also be dangerous and malicious (therefore unworthy of belief). His interpretation of her evidence is built up by the complex set of myths and an assortment of different and often contradictory images of sexual predators and victims. The accused in this case was a mild-mannered, self-effacing stamp collector whose entire life and livelihood were in jeopardy because of the testimony of a 'silly schoolgirl', who had 'stayed for the full time' of their interaction. In spite of this construction of the offender and of the relationship the judge allowed a majority jury verdict to convict. The Appeal Court rejected the benevolent attitude of the trial judge (*'there may be cases where a trial judge is entitled to put a possible view of the evidence which has been canvassed by either the prosecution or the defence. However, it appears to the court that this is not such a case'*, (ibid. p718) and the appeal was granted.

In the very first case reviewed in my research, the young boy victim was noticed to be in 'evident trouble' as he was crying, and the matter could be followed with 'promptitude and efficiency'³¹ (AG v Wm. O'Sullivan [1930]). This is behaviour that falls within the requirements of the court, i.e. they understand this reaction. However, if the victim does not follow the conduct laid down within these legal

³¹ AG v Wm. O'Sullivan [1930] I.R 552-559

parameters the defendant is likely to go free. In the case of Brophy (1990) this condition was not fulfilled as the young girl did not complain of the situation until some hours after the event. The assumption is that, having had time to think about it, not rushing out shouting and crying, obviously the claim must be false;

*'...such evidence is not evidence of the facts on which the complaint is based but to show that the **victim's conduct** in so complaining was consistent with her testimony'*³²

(DPP v Robert Brophy [1992] CCA) (Emphasis added).

In other words if the female reacts any way other than by emotional reaction or hysteria, then the testimony cannot be believed, no other reaction is considered. This is a male construction of events, as they imagine it, and because it is a male construction it is also a legal construction. Difficulty in disclosure is not acceptable to the male system of rules – which are devised to construct men in a particular way. It is men's understanding of how violence works – man to man. It takes no account, because it simply does not know, how women/children are positioned to experience violence. Any action outside the existing legal understanding means abused children cannot be recognised as 'reasonable' but therefore must be either deviant or dependent. All judges are not male, but it is well documented that the habitus of the judge is constructed to reflect the 'gravitas' and authority that is vested in men. When women rise to the higher echelons of the legal profession they adapt to that norm. Feminist scholars argue that women judges reach different decisions because they seek different outcomes (Goldstein, 1992; MacKinnon, 1989; Menkel-Meadow, 1990) but the answer to how a female judge from the higher courts would deal with the issue of violence has not been definitively answered. This is, in part, because 'higher level judges may not be representative of the groups from which they are drawn, thus it is possible that women

³² DPP v Robert Brophy [1992] CCA 1990 No. 114, I.L.R.M. 709–717

judges on higher level courts may be unique from women judges on state courts and far less inclined to break new legal ground' (Coontz 2000).

7.2 Delayed disclosure and judicial reasoning

The issue of delay becomes increasingly significant over time due to: a) changes in legislation, b) increasing public concern and c) a developing relationship between the legal institution and other disciplines. In October of 1948 a case was appealed because of prosecutorial delay but the next case appealed on the issue of delay did not arise until 1991 and from that time the 'problem' has been constituted in a different way. This is the start of the prosecution of cases that are the result of delayed disclosure and they are characterised by a new category of complainants generally known as 'adult victims of child sexual abuse'. Of course, the victims were children when the assaults were perpetrated, but the prosecution of the crime was delayed until circumstances prevailed which allowed the victim to disclose. These cases are interesting in that they involve adapting the accepted legal knowledge to new circumstances. As has been shown, the previous knowledge resulted in a strategy of obstruction; it can be argued that this strategy prevails even while a process of adaptation occurs with the development of new knowledge. Regarding the belated disclosure of abuse, the courts, up to this time, had never engaged with the reason for the delay, but relied solely on the male knowledge which was 'obviously you would tell immediately, in the instant'.

The first case where an attempt was made to delineate when a case may proceed even if there has been a delay occurred in 1991 with the case of *NO'C v DPP*³³ which sets up the ground rules for cases that follow. The judge begins by choosing criteria which must be filled if the defendant is to face trial. The principle decided upon is

³³ *N.O.C. v DPP and His Honour Judge Diarmuid P. Sheridan* [1990] HC No. 66JR. ILRM 14-18

‘Whether the delay could have been avoided’ especially when ‘there is no significant dispute regarding the facts’. In other words, both parties accept that the abuse occurred. The issue of delay is ‘not clear cut’ and is put to a ‘test’ which is whether the delay was reasonable. The question is, reasonable to whom?

The young girl in this case claimed that her brother had frequently had full sexual intercourse with her while both were residing in the family home. She alleged that this course of conduct had continued on a weekly basis from the time when she was 14 years old until she left home to get married in 1981. She reported the abuse to her father when it was happening. Her father did not report it to any authority. It was accepted that the brother was violent and the father had not reported the brother as there was considerable tension between them. The reality for this girl is that her subaltern existence – totally bound up in a relationship with dominant males who had no empathy with her experiences- had to be intensely negotiated, even at the level of survival itself. The only action she was capable of exercising was deciding how and when to disclose. The conclusion of the judge was that:

‘Reviewing her conduct, that is a realistic, understandable explanation as far as it goes for not taking the matter any further. ‘Nonetheless’ - she does not allege that continuing fear of her brother was a motivating factor after she left the family home on marriage’

(N.O.C. v DPP [1990]: 17, emphasis added)

The judge cast doubt on the girl’s evidence here:

‘Her contention that she complained to her father at the time of the alleged offences is of particular significance. If she did so as she alleges then there does not seem to be any reason why Mr. C. would not have complained to the Gardai about his son’s continuing sexual misconduct with his sister’ and further ‘if it is true that his daughter, R., did in fact complain to him as she has alleged’

The judge argued that the father had the opportunity to report to the gardaí and had not availed of it. He decided that because of this the brother would not have to face trial. Both the father and the judge were in a relationship of authority and power over this

complainant. The father had supported the brother; the judge in turn denied the prospect of a judicial forum for the case to be heard. Thus the judge supported the father, did not censure him for his lack of support for his daughter and even rescued him from blame by casting doubt on her allegations. Patriarchal reasoning operates by constructing norms, by detailing and limiting them and this ability gives law power to regulate social life. How the father and the brother behaved was not the focus of concern. In patriarchal societies the family is the source of all socialisation, where men rule and dominate. From the judge's point of view his assessment of 'reasonable' delay on behalf of the victim involves an examination of *her* character, *her* behaviours after the abuse, *her* claims that she was afraid of her brother and finally the *real* reason for disclosure (the abuse of her 9-year old daughter by the same person).

The case is significant for issues that are abstracted into formal principles of interpretation developed in future cases.

First it engages with the notion of reasons for delay, which has the effect of recognising the social context surrounding the abuse. In turn this broadens the legal knowledge of conditions of abuse. Nevertheless the court retains the power to decide which reasons are acceptable.

Second, it becomes apparent that many adults are prepared to disclose their own abuse only because of a concern that their own child or a young relative is, or may be, in danger of being abused.

Finally it brings the issue of memory (and therefore the strength of evidence) into the legal domain. Memory becomes central to cases of child sexual abuse, and because of its controversial scientific standing it is vulnerable to attack from those defending claims of activities perpetrated many years ago.

In this case the reason given by the complainant for disclosing at this particular time is a concern for her own daughter and the reason given for not reporting sooner is that she was afraid of her brother. She was able to provide other evidence of his propensity to violent behaviour. Her father had made some attempts to shield her but did not report him to the gardaí. The judge acknowledges that

‘There is an understandable natural tendency in many families not to divulge to the outsider any information about sexual offences within the family... (nonetheless) there does not seem to be any reason why Mr. C. would not have complained to the gardaí about his son’s continuing sexual conduct with his sister when he found that the abuser was not prepared to mend his ways’ (ibid.)

The judge did not use this character evidence of a violent man to back up the girl’s contention that she was afraid of him, although that choice was obviously open to him. His reasoning is not logical. Firstly he claims to understand the reasons for not reporting and then disregards them completely. However in the midst of all the reasoning lies a hook on which the defence teams and the Appeal Court can hang their arguments for granting appeals. The judge insists that:

‘- she does not allege that continuing fear of her brother was a motivating factor after she left the family home on marriage’.(ibid.)

In other words the judge decides how much time was ‘reasonable’ for the girl to lose her fear of her brother, to be ready to face the consequences of disclosure. The fact that she left home seemed reasonable enough to him, possibly interpreting her marriage as giving her protection. The decision of the courts is to place the responsibility for the delay on the victim rather than acknowledge in real terms the social and cultural reasons that militate against reporting abuse. Remember it is accepted by all players in this case that the abuse did occur.

The problem of time delay presents many difficulties for the court. By choosing the detail of exactly when the girl lost all fear of her brother as the deciding factor on which to grant or dismiss the Appeal the judge directly obstructs all those adults who

wish to complain of sexual abuse as children. He directs the legal path by his focus on the victims' actions rather than those of the accused. The ability to choose one aspect of an argument but to ignore another is, I argue, fundamental to the patriarchal project of law during this time. It has the potential to exploit the legal rules in order to exercise the power of the judiciary over the other players in the process. In this case it positions the victim as the problem, rather than the perpetrator.

7.3 Delay and domination

In dealing with the issue of delay judges refer to an adult rape case from 1976³⁴ in seventeen cases because it defines the phrase 'in due course of law'. "In due course of law" means that a person accused of a crime is entitled to be tried within a reasonable time in order to minimise such problems, regarding evidence and problems about emotional stress while waiting to be tried. The philosophy behind this concern for the accused includes in its scope – jurisdiction, legislation, practice and procedure but also *'the applications of basic principles of justice which are inherent in the proper course of the judicial function'* (Healy quoted in *G v. DPP*³⁵: 381). Justice – 'the essence of a civilised society' – is argued as the principle that underlies the rule of law; as a matter of justice, if the accused person contributed *'by a relationship of domination'* to the delay in reporting, then the case is deemed suitable for trial. In other words, if the person who is accused has contributed to the delay it is 'just' that this cannot be used as a reason not to proceed with a trial. The first category chosen to allow delay – domination - is one that is understood by the judiciary because it is a category that is related to and invested with power. By choosing the category of 'domination' as the test that must be passed, this simultaneously excludes a myriad of other reasons (fear they

³⁴ Healy v Donoghue [1976] I.R. 325

³⁵ G v DPP [1993] SC No. 301. 1.I.R. 374–383

will not be believed, shame, shattered self-esteem etc.) that may contribute to delayed disclosure and of other settings for abusive relations.

‘One of the most interesting features of law as a system of social conventions is its ability to make things true or, to put it another way, to create legal categories that permit characterizations of situations and practices that are true or false’.

(Balkin, 2003:103)

The understanding of what will obtain a successful outcome for the DPP now informs the practice to be employed regarding the choice of case to submit to the court; the legal counsel has a new piece of knowledge to inform defensive strategies and the abused person is excluded from partaking in the ‘civilised society’ if the case doesn’t ‘fit’ the legal standpoint of ‘truth’. Practices such as deciding categories, and of filtering and classifying acceptable knowledge are undertaken by judges. They are taken from the standpoint of those already in a situation of power, not from the individuals who experience the crime. The prospect of change is therefore bound to be cautious and slow.

Dominion (or domination) was described in its most graphic form in the case of *B v. DPP*³⁶ (*B v DPP* [1995-1997], 1194 No. 161 J.R.:190). The characteristic of dominance, where an atmosphere of unquestioned authority was in place, was evident in the ‘B’ case (Inglis 2008a: 205). This case concerned allegations of abuse perpetrated by a father on his three daughters. This man is portrayed

‘as a domineering husband and parent who subjugated the members of his family. He brought about an atmosphere in the home of such menacing threats and violence that any initiative or capacity to protest or complain was suppressed. His brutal dominance was such that he created a strong and prevalent atmosphere which prevented and stultified normal complaints and reactions and this hold over his family had pervasive, persistent and long-lasting effects’ (p149).

The depiction also undertook to graphically demonstrate

³⁶ *B v DPP* [1995–1997] 1194 No. 161 J.R.; SC No. 35 of 1996, 3.I.R. 140–205

‘the tender age of the complainants, and the alleged threats of violence and acts of brutality which are likely to have affected the mind of the complainants’.

Setting out this strong description of dominion as a standard is a classic strategy for excluding cases that do not reach this level. This case is cited in 40 of the remaining 127 cases and is an exemplar of the outcome of wider structuring institutional constraints.

By 1996 knowledge of the relationship between the perpetrator and accusers had become more detailed, scrutinised and categorised. Foucault understands this as part of the disciplining process. By deconstructing the relationship into its constituent parts the scope for producing new knowledge and discourses is broadened considerably. By elucidating the reluctance of young children to accuse ‘persons in positions of authority’ and attributing this to an ‘innate inhibition’ the judge re-instates the ‘naturalness of the power relations between the subject in the case, creating new subjectivities in the process. Yet although ‘Dominion’ is used to contain and control other discourses, the concept itself is challenged by the judiciary:

*‘it would be unfortunate if the discredited orthodoxy of the past were to be replaced with an equally rigid orthodox view that in all cases of delay in making complaints of sexual abuse the delay can automatically be negated by dominion’.*³⁷

(PC v DPP [1997-1998] HC/SC: 43).

What are the judge’s concerns? She acknowledges that previously accepted views were untenable; she challenges the subtle and encompassing effects produced by ‘dominion’. These effects become the subject of debate over subsequent years. The context of this statement is the rise in the number of cases and the new arguments contained therein that mount an offensive on the prevailing attitude. When knowledge that supports victims is introduced – such as the ‘domination’ argument – it must be taken in control. At the institutional level the desire is to control discourse. In every society, *the*

³⁷ PC v DPP; Judge Flann Brennan [1997, 1998] 1996 No. 176 J.R.; S.C. No. 299 of 1997

production of discourse is at once controlled, selected, organised and redistributed according to a certain number of procedures, whose role it is to avert its powers and its dangers, to cope with chance events, to evade its ponderous, awesome materiality' (Foucault 1972). The judiciary exhibit an anxiety resulting in attempts to corral issues which are threatening to become disparate and uncontrollable. They create new mechanism of control. Proving Dominion becomes tedious and, in itself, reproduces obstructive practices. Further, 'dominion' obviously does not cover all of the issues. New knowledge is needed and it is the link between the psychological effects of abuse and the acceptance of this knowledge that brings meaningful change to the processing of child sexual abuse in the law.

7.4 Extending the grounds for the 'delay' appeal

As the number of cases of appeal on the issue of delay, corroboration and sentencing grew, the judiciary became conscious of the problems that lay in store. Led by feminists and the media the reality of child sexual abuse was now being spoken about and demanding acknowledgement in the justice system. A substantive acknowledgement that allegations of sexual abuse of children and young people fall into a special category had to be acknowledged. Strategies of categorisation provoke other 'tests' which must be passed before the case is allowed to proceed. Justice Denham argues that there are many possible factors that might be present in these cases and she proceeds to name some that are relevant to the case of B v. DPP. These include: relationships, dominion, whose delay? the nature of offence, alleged sexual abuse in the home, alibi, witness and admission of guilt. In providing this expanded range of categories the standard and opportunity for successfully prosecuting cases is considerably raised. For example:

- The issue of ‘whose delay?’ is applied to the Gardai, the Courts, the Prosecution, the complainant and the accused. Thus there is a one in five chance that the accused can be at fault.
- By including ‘the home’ the weight given to this specific place effectively warns prosecution of a greater difficulty for cases outside this arena.
- Admission of guilt is not always as simple as it sounds. In spite of the fact that MG (2002)³⁸ admits guilt of the offence against the male complainant in the case, but also of numerous other offences against others, the defence pleads delay on the grounds of ‘unreasonable delay’ and ‘witness not available’ etc.

The point here is that, once the court produces a category it creates the possibility that something is true because it is true in law. It can obliterate other truths because of its position in the hierarchy of knowledge. Thus by broadening the factors that must be taken into account, the defence have been offered a greatly increased opportunity to plead for dismissal. How is this position maintained?

The grounds used for a ‘delay’ appeal range from

- Prejudice against the accused because of the length of time that has elapsed,
- Abuse of process which then feeds back into delaying the process
- Lack of specificity on dates that abuse was perpetrated because of the amount of times and the length of time since it happened

The defendants go to the Appeal Court to prevent the trial from taking place, or to claim that their trial or sentence was unjust. They argue their point through legal precedent, statutory legislation and constitutive law. There is no Statute of Limitation in Irish law for serious crimes i.e. a time limit for these crimes to be prosecuted and tried. Crimes

³⁸ MG and DPP [2002, 523JR] , unreported, 2737– 2762

such as murder, rape, indecent sexual assault and unlawful carnal knowledge fall into this category. The arguments about delay follow two strands, the first being whether there is a risk that the trial will be prejudiced against the accused because of difficulties with evidential details. The second argument is based on who carries responsibility for the delay. The first one focuses on the accused and the arguments that develop from this involve a concern with the law, i.e. the rules and reasoning of legal concern. This questions the possibility of arriving at a decision by using traditional legal reasoning – a knowledge derived from practical proof rather than assertion. It questions the acceptance and insertion of new knowledge (experiential and psychological) into the process. The second argument of ‘whose delay’ – a phrase that developed over time, involves a deconstruction of the relationship between the accused and the alleged victims. This becomes a site of struggle in many cases even before the trial itself. ‘Whose delay’ searches for accountability, for who is responsible for the delay. If the responsibility can be placed at any door other than that of the accused then no trial will take place as it would be unfair. Thus the victim bears the consequences arising from the actions (or non actions) of others. When the question ‘whose delay’ is asked, the courts search many areas for explanation, but frequently fail to be reflexive in their inquiries.

The stages to be undertaken in the prosecution of criminal offences are many but in cases of child sexual abuse the system is used to its fullest extent. Cases of adults reporting incidents of abuse that occurred when they were children entered the system during the final decade of the twentieth century. This is a new phenomenon for the judges and they advise: ‘if a person’s trial had been excessively delayed so as to prejudice his chance of obtaining a fair trial.....the appropriate remedy was a judicial

review’ (G. v. DPP [1994])³⁹. They point the way and then profess themselves powerless when the system is, in a real sense, abused. The judges declare themselves to be helpless when it occurs. The judge (O’Flaherty) in the Supreme Court judgement of O’C v. Judge M. Smith and Anor rather exasperatingly says:

*‘These prohibition proceedings began as long ago as October, 1993.....I take this opportunity, **and I think I speak for all members of the Court**, to say that the delay such as is alleged has now been accentuated by the delay that has taken place through the processing of these prohibition proceedings....I beg leave to point out that these prohibition proceedings in my estimation, in any event, seem now to be taking on a life of their own’*

*(Emphasis added)*⁴⁰

The issue here is that there is no place in the system to accommodate a knowledge that is now widely explored and voiced outside the system – that victims of abuse may take years before they are ready to disclose their experiences; voices that had been silenced have found support for their stories. This disjuncture between awareness of the problem of delayed disclosure and its acceptance creates problems within the legal system while at the same time, creates and maintains activity for the system. In one sense a new product (in the form of knowledge) has been introduced. Where the law is concerned this situation could almost be termed a paradigm shift in terms of knowledge. Kuhn (1970) in his *Structure of Scientific Revolutions* explained that a paradigm shift occurs when new knowledge is introduced that requires a reworking of the knowledge that is already in place. Because it demands a complete re-evaluation of existing knowledge and practice it is not readily accepted. The judge reflects the reality faced by all victims of abuse when they enter into the legal system. He blames the system but fails to admit that it is the decision of the judges that ultimately inform the practices.

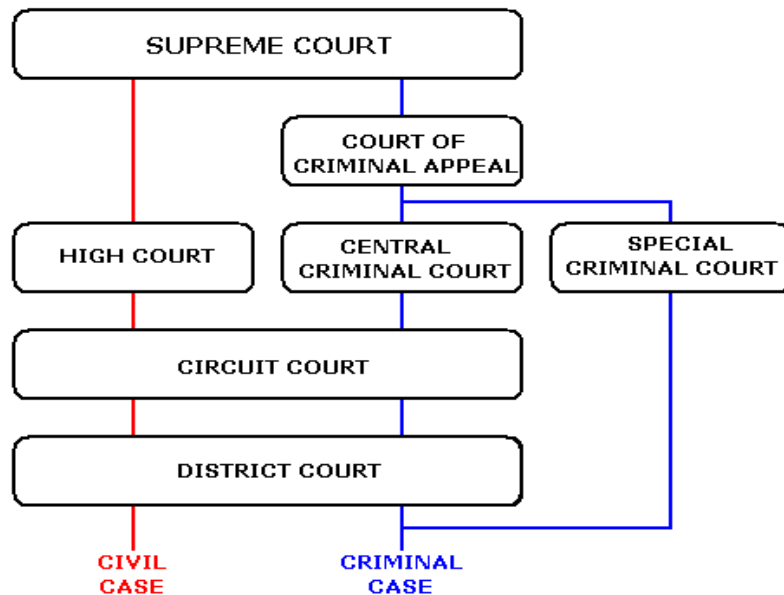
‘Increasingly, it is regarded as par for the course that if there is a case of a sexual charge being brought the next stage is an application is made

³⁹ G v DPP [1993] SC No. 301. 1.I.R. 374–383

⁴⁰ O’C v Judge M. Smith & Anor [1997], unreported, 1890–1896

to the High Court to prohibit the proceedings. ...However, if that is the way things have to happen so be it.....' (ibid.)

The judicial reasoning and decisions taken in the early stages of the process determines the path through the system. It is against this that all new knowledge must be set. The time taken to admit new knowledge into the legal system is 'unfortunate' for all those engaged in the process, particularly those who have no power to change it. This increases the sense of powerlessness for those who look to the 'system' for justice. The options and possibilities outlined below do not even fully cover the processes as we will



see later.

Figure 2 Possible paths through the judicial system

Habermas argued that law achieves its validity through a process of idealisation combined with pragmatism; in modernity mutual understanding replaces authority as the mechanism of operation. But who is the understanding between? Foucault explains the situation better by identifying law as just one of several disciplines involved in child

sexual abuse. Law, for him, is strategic. It is concerned with its place in the hierarchy of social institutions. To reiterate, law's authority stems from its place in the hierarchy of knowledge. Carol Smart (1989: 89) explains that by fetishizing law as the prime system with access to truth and justice we decontextualise the issues under review. Appealing technicalities rather than the substance of the case affirms the rights of the individual accused and acts as a defence of law's own institution. Appeals on technicalities often result in patriarchal interests being served. The system is designed to block the prosecution of innocent persons (mostly men) so the level of proof required before prosecution occurs is very high in the case of child sexual abuse and especially when the case involves delayed disclosure. By placing much of the concern and resources on the side of the accused, the system becomes a means of obstruction for the accused and crucially, also a means of deepening distress for the victim.

In the case of 'B'⁴¹ the accused was charged in May 1992. Five years elapsed and no trial had yet taken place. This case was heard at February 1997 after several challenges. At the close of judgement Judge Denham remarked:

'The delay to the trial of approx. 3 years which has arisen as a result of these proceedings is to be regretted and avoided in any future similar actions. Such proceedings, if not placed on a fast track by the Court itself, should be brought to the attention of the Court as soon as possible, with a view to obtaining an early date' (B v DPP [1995-1997])

This admonition was merely rhetorical. Appeals continue to be taken on the same point of law and to be allowed.

7.5 The emergence of new knowledge: a force for justice?

As judicial knowledge about the issue of child sexual abuse grows, the judges can set, maintain, change and raise standards required for prosecution. While this

⁴¹ B v DPP [1995-1997] 1194 No. 161 J.R.; SC No. 35 of 1996, 3.I.R. 140-205

deepening understanding is derived from external actors who contribute to the trials (such as psychologists, social workers, and the gardai) it may result in further delays for the prosecution. In fact each new layering of knowledge has the potential to be exploited for the benefit and interests of the institution which is appropriating that knowledge. It also involves a learning curve for the individuals and/or institutions who must now prepare themselves for their insertion into the ‘master’ institution of law. Further, by categorising, typifying, absorbing the stock of knowledge of abused children, a space for the subaltern emerges.

Critical reflection proposes that professional recognition is enhanced when it has the opportunity to operate across disciplines. Psychological knowledge has in the recent past been made available to the legal profession. It comes within the orbit of operation of the acknowledged master institution (Law). To help the prosecution put forward a stronger case psychology can supply additional knowledge and this often takes the form of psychological assessment. Professional agencies, such as the ‘psy’ professions had to learn the standards of reporting required by the adversarial legal system. These are of a different nature to those used within these professions. Because of this, the reports took longer to prepare and the methods used to consult with their clients had to conform to legal rules and understanding, rather than to the pre-existing disciplinary rules. In the case of *BJ vs. DPP*⁴², wherein a man was accused of indecently assaulting a girl ten years before she disclosed it to the Gardai, the psychologist was asked to provide a report explaining the reasons for her delay in reporting and whether these reasons were ‘reasonable’. The Appeal judge characterised the knowledge of the psychologist as being of ‘marginal value’.

⁴² *BJ and DPP* [2000 No. 542 JR], unreported, 3243–3280

The notion of value lends itself to the theory espoused by Cohen & Levinthal (1990). Writing in the domain of commercial organisations, they argue that learning is most efficient when the existing knowledge base is close to the new domain and thus that the process of assimilating new knowledge into an organisation will occur most readily when that organisation has the ability to *'recognize the value of new, external information, assimilate it, and apply it [to commercial ends]'* (Cohen & Levinthal, 1990: 128). They posited that the more similar prior knowledge is to new knowledge, the easier the absorption of the new knowledge. This theory can just as readily be applied to the relationship between the law and psychology.

The disjuncture between the objectives of the knowledge within these two disciplines has the potential to make the relationship difficult and combative. When psychological evidence was introduced as an explanation for delayed disclosures of child sexual abuse confusion ensued. Law, requiring proof, sought reassurance as to the credibility of the complainants. The aim of psychology, in contrast, is to enable the individual 'client' to make sense of and to come to terms with, his experience. As a discipline it is concerned with the mental process that accompanies behaviour. Rational science, upon which law's reason is based, conceives an objective reality whereas psychology examines how the subjective conscious is related to reality. Thus, in this case the psychologist explained to the court the differences that existed between normal counselling or psychoanalysis 'where the story unfolds over many months and probably years'. His understanding was that his role was that of a listener, not an investigator. While judges have tended to treat this psychological element with suspicion and resistance, little by little they have opened themselves to the possibility that factors other than pure logical reasoning are at play:

‘Our knowledge of the extent and the dynamics of child sexual abuse is of very recent origin and is growing.....it appears that rational consideration of abusive events is frequently suppressed for complex personal, family and social reasons’

(*J.L. v. DPP: 145*)⁴³

The judge still has a problem considering that the behaviours that accompany sexual assault are, in fact, rational, i.e. what seems reasonable behaviour to the victim is not apparently reasonable to him.

The judge is further confused about the role of counselling saying, ‘*unless there is counselling the victim may not be able to complain formally*’ (p.146). Many victims disclose their abuse without ever receiving counselling from a member of the ‘psy’ professions (the most pressing reason for disclosure actually stems from a concern for other people – see discussion below). The judge uses a variety of writings and background research to support his arguments, concluding with the following two excerpts:

- In an Irish work, Casey and Craven: Psychiatry and the Law (1999) the authors, one of whom is a university professor of psychiatry and the other a medically qualified barrister say at p.69:-
‘Increasingly there are accusations of child sexual abuse directed at those who have committed no such crime.’
- The Canadian jurisdiction...in a particular dramatic case, R. v. E.F.H. [1994] Ont. CJ Lexis 140, in rejecting an appeal from a conviction based on sexual abuse which had been repressed...observed:
‘...we are mindful of the fact that this type of case, perhaps more so than any other, carries with it the potential for a serious miscarriage of justice.’

We can see here the traditional arguments of the court. The first harks back to the Hale judgement and potentially devious nature of the complainant. The second focuses on a concern for the accused. Most significantly however this case is cited in **23 of 89 cases subsequently tracked**; i.e. in one in every four cases that followed. Continuing

⁴³ J.L. v DPP [2000] 2IR 122

discourses of disbelief act a form of resistance to change. Rather than appropriating the knowledge proposed by the psychologist the judge exploited alternative controversies within the profession and used those as a strategy of resistance.

The process of integrating new knowledge is complicated by the importance for the legal institution of maintaining primacy in the hierarchy of knowledge, a primacy which provides the authority necessary for its validity and operation. To this end it must maintain a strict monitoring of the developing relationship between the two institutions.

'This has not been the first case in which courts have commented upon the psychological evidenced adduced in cases of this nature.....Justice is a two way process and as experts fulfil a unique role within that process, it is incumbent upon all of them so described, to practice, adhere to and implement their assignment in the manner in which case law dictates'

(BJ vs. DPP, p.35)⁴⁴

Of course the courts cannot be seen to reject all new knowledge and it is a fact that the learning process, if slow, does occur in incremental steps. In the judgement of a case⁴⁵ in 1999, Justice Keane noted:

'Clearly, the fact that the offence charged is of a sexual nature is not of itself a factor which would justify the court in disregarding the delay, however inordinate, and allowing the trial to proceed' (P.C. v. DPP)

Yet by the following year Justice McGuinness was able to acknowledge:

*'In the present case the understandable and clearly diagnosed inhibition against disclosure must arise out of the fact that this assault **was of a sexual nature**. Had the complainant's assailant caused her equally serious pain and injury by, say, beating her with a stick in his caravan, it is inconceivable that she, a child of seven, would not have run straight home to her parents and reported the incident'.*

(J.L. v. DPP⁴⁶ emphasis added)

⁴⁴ BJ and DPP [2000 No. 542 JR], unreported, 3243-3280

⁴⁵ P.C. v DPP [1999] 2IR 25

⁴⁶ J.L. v DPP [2000] 2IR 122

In this particular case the accused was charged with having raped, buggered and indecently assaulting the complainant some twenty one years earlier. At the time of the alleged offence the complainant was between seven and nine years of age. A report from a psychologist concluded that there were sound psychological reasons why the child had not made an earlier complaint. One of the Supreme Court Judges was concerned that *'as there was controversy in expert opinions as to the nature of repressed memory, the court should be cautious of psychiatric evidence'*. What is happening here is that the Judge is retaining the right to decide what psychological knowledge is valid and to declare the primacy of law in the hierarchy of all knowledge that contributes to the construction of both victim and accused in the court.

I have argued that the structure of legal reasoning privileges the law above other disciplines and this affects the impact that that other actors who are involved in the process could have— for example the Garda Síochána. For the complainants the police force is the first point of contact with the judicial system. Spivak argued that most individuals are prevented from being the subject in their own terms; that victims voices depend on the external discourses that are continually shifting and shaping the social reality. It appears then that as changes to 'external discourses' occur they produce incremental attitudinal changes with the circles of knowledge that surround this issue, including the state institutions that are involved, such as the gardai and social workers, medical profession and media. However these institutions have to find a fit with the legal system which is the final arbiter of their knowledge.

In the case of A.W.⁴⁷ it is possible to see how the fit between the Gardai and the legal system is problematic. One of the most widely used claims of appeal is that the

⁴⁷ A.W. and DPP [2001] IEHC 164 [Online]. Available <http://www.bailii.org/ie/cases/IEHC/2001/164.html>

complaints referred to in the charge are too broad – they are not specific enough. Abuse generally takes place over a period of time and it is difficult for young people to put an exact date or time on the abuse. The account of the charge against this man can be summarised in this convoluted way:

‘The Applicant in these proceedings is a 64 year old man from a small town in the West of Ireland who is accused of 39 offences of rape, unlawful carnal knowledge and indecent assault involving two nieces and a nephew. Thirty counts of indecent assault, unlawful carnal knowledge, attempted rape and rape concern F W, a niece; 8 counts of indecent assault and rape concern C W, also a niece and a single count of indecent assault involves D W, a nephew. The Complainants are siblings. The offences against F W (d.o.b. 23rd September, 1961) are alleged to have occurred over a period of 5½ years between May, 1973 and December, 1978 (when F W was aged between 12 and 17 years). Those against C W (d.o.b. 29th October, 1957) are alleged to have been committed between September, 1973 and January, 1977 (when C W was aged between 15 and 18 years of age). The indecent assault of D W (d.o.b. 23rd December, 1965) is alleged to have occurred between April, 1977 and October, 1979 (when D W was aged between 11 and 14 years).’

(W. (A.) v DPP [2001])⁴⁸

By appealing against the lack of specific dates the defence automatically gains a reprieve and hopes to put a stop to the process altogether. In an effort to counter this defence delay tactic, the office of the DPP and the Gardai made strenuous efforts to tighten up on dates so that alleged offences could be pinpointed as having occurred at more precise dates and times. This meant continuous attempts to interview different witnesses etc. which, of course, resulted in a longer time to process the case. The Garda witness also ‘stated that the local Gardai had up to 40 such files in progress in relation to similar offences’. The judge replied that while he appreciated this problem ‘any difficulties thereby arising cannotbe visited on the Applicant’. This exchange gives a glimpse of the bureaucratic tangles and lack of resources prevailing in the justice system; obstacles that give a lie to the notion of balanced justice.

⁴⁸ A.W. and DPP [2001] IEHC 164 [Online]. Available <http://www.bailii.org/ie/cases/IEHC/2001/164.html>

A further example of strategies of resistance can be shown in the case of MG⁴⁹. In this case the Gardai interviewed the accused man who *admitted* the charge and when asked how many children he had interfered with, he replied ‘don’t know, there could be eight or nine’ and he mentioned seven names. The Garda then explained how he had to interview people in an attempt to trace and cross reference complaints in this and other similar cases with limited resources.

Time and again within the system the focus of concern appears to be with the accused. Obstacles are placed in the way of the victim even when the accused admits to the perpetration of abuse. A lifetime of misery and problems for the young victims which are demonstrably related to the actions of one person are discounted systematically. The ‘balance’ espoused by the justice system seems to privilege the concern of the accused over those of the victim:

‘There is clearly a balancing exercise to be carried out between the rights of the community to have perpetrators of serious offences prosecuted and the right of the accused person to properly defend himself from an allegation which, if substantiated, may be expected to attract a lengthy period of imprisonment, ‘lifelong stigmatisation and financial and familial catastrophe’, in the words of Hardiman J. in P O’C -v- DPP [2000] 3 IR 87 (at p. 120). ‘

(W. (A.) v. DPP [2001].⁵⁰)

The knowledge generated by the gardai must ultimately submit to the restrictions of the dominant institution, (Law) to which they report.

This injunction also applies in the case of social workers. The Irish Association of Social Workers recognises the complexity of this problem and notes that:

‘Because social work often operates on the edge of the individual’s normal social functioning, or the limits that social systems can tolerate, there can be a tension between the social control, social care, social justice and social change functions of social work. This tension may be resolved by consideration of what is right or wrong; what is good or bad;

⁴⁹ MG and DPP [2002, 523JR] , unreported, 2737– 2762

⁵⁰ A.W. and DPP [2001] IEHC 164 [Online]. Available <http://www.bailii.org/ie/cases/IEHC/2001/164.html>

or the impact on the individual's happiness – all as determined by the service user, or by reference to a professional standard'.

(http://www.iasw.ie/images/docs/iasw_codeofethicsmay2006.pdf)

We can see therefore the disjuncture between the goals and ethics of social work and the legal institution. The opposition of knowledges creates a dilemma that is predictable. In their code of ethics the IASW warn:

'The practice of social work operates within systems that have a regulatory function. Social workers must be cognisant of the inherent tensions between support and control that may arise. In addressing such tensions, social workers will at all times strive towards the objective of the service user maximising their own ability to make and carry out decisions affecting their quality of life.'

http://www.iasw.ie/images/docs/iasw_codeofethicsmay2006.pdf

A good example of the problem can be illustrated by the case of P.M. v DPP⁵¹. In this case the eldest girl in the family was subjected to sexual intercourse by her nine year old brother and this continued for 7 years. The family had a difficult history of violence and was part of a file being kept by the social worker at the Dept of Social Welfare and their family doctor. Claims of abuse of two younger sisters were made to the parents and the mother reported this to the family doctor and, it appears, to the Gardai. However, once a medical examination revealed 'nothing abnormal' the parents were adamant that they would not pursue any further prosecution. The young girl understood that '*...neither of my parents wanted me to complain my brother to the Gardaí. The entire episode put an enormous strain upon the family and each of its members.*'⁵² and so no follow up was made. Even when this 'boy' was 21 it was reported within the family that his 3 year old sister was in danger from him and from his friend. Still there was no complaint by the girl as she did not want to upset the family. However when her baby sister (now 7 years old) reported she had been raped the complainant realised that her mother was

⁵¹ M(P) and Malone and DPP[2002] IESC [Online] Available: <http://www.bailii.org/ie/cases/IESC/2002/46.html>

⁵² M(P) and Malone and DPP[2002] IESC [Online] Available: <http://www.bailii.org/ie/cases/IESC/2002/46.html>

'either unwilling or incapable of protecting my little sister from my brother's advances'
(p.3).

In this case both social workers and family doctor had delayed reporting the case, taking into consideration the wishes of the 'service user' (as termed in their ethics statement above). This complainant presented her dilemma clearly:

'The reason why I delayed in pressing charges against [the applicant] is mainly because I was still living at home and I did not know what to do. I had no support from my family, I knew my mother did not want me to press charges and after our visit to St. Clare's Unit my mother had a nervous breakdown. I did not want to put more pressure on my mother at that time. When I moved out it had always been on my mind. I had been worried about J, whether [the applicant] has tried to interfere with her. I would never be able to forgive myself if he ever did anything to J, or any other child like what he did to me. If he ever did I would feel responsible for not doing something about it. It has been a nightmare for me and the nightmare is nearly over.' (ibid.)

At the time of the disclosure the child assessed her situation accurately. The psychologist's report refers to her having been ostracised by her family and not having seen any of them 'in the last four to five years' as a consequence of making the statement. The social workers are caught between the regulations of the law and the wishes of their client, but because truth is determined by the law the operating knowledge of the social workers merely serves to add another layer to the resistance against the experiential knowledge of the victims of abuse.

7.6 The concept of 'delay' and the justice system

The rule of Law, when applied in liberal terms, protects the accused. This protection can be, and is, abused. Women who disclose abuse and who seek recourse to justice are silenced by the very system they expect to provide justice. It is this same system that ironically colludes in providing the means and opportunity that allows these strategic practices to continue.

This systematic prolongation of legal wrangling is effective in preventing more women from using the courts, thus producing a gendered biased justice.

- In the case of DPP v. MS⁵³ the accused attempted to apply to the court to quash the 11 counts with which it was intended to proceed because the Act under which he was charged was inconsistent with provision of European Convention for the Protection of Human Right and Fundamental Freedoms. He argued that ‘...since the maximum sentence in the case of an indecent assault, where the complainant is a male (his victim was male), was ten years penal servitude, but where the complainant is a female [it] was two years imprisonment’, this therefore constituted an unlawful discrimination on the ground of sex. The case was argued on legal grounds re relationship between courts and constitution and the matter stated above became immaterial.

It is acknowledged that individuals who are affected by gendered inequality have a right to question this discrimination but we can see the direction that is laid out ahead for future obstacles. In this case, for example, the accused was

⁵³DPP v S(M) [2003] IESC 24, [2003] 1 IR 606[Online] available <http://www.bailii.org/ie/cases/IESC/2003/24.html>

1. Charged in December 1996, →
2. He was given leave to apply for Judicial Review which was heard by the High Court in 1999 →
3. He lost but appealed to the Supreme Court →
4. He lost that case in December 2000 –4 years have now passed. →
5. In June 2001 he was returned for trial and declared his intention to appeal on the grounds stated above. →
6. A year later, July 2002, the Circuit court judge directed him to apply to court to have these legal questions answered. →
7. His case was heard in October 2002 – it is now six years since he was charged. →
8. Because the District Court needed consultation on the issues the case was directed to the Supreme Court to be heard in April 2003 – 7 full years and no trial had yet taken place.

Figure 3. Prolonging a case

This man was accused of committing a ‘number’ of offences of indecent assault. While the system provided all these steps, there was one, and perhaps more, victims who had disclosed their abuse, expecting justice. The term ‘justice delayed is justice denied’ is not applied to victims.

In this chapter we analysed the legal reasoning around the issue of delay, which is the most common reason to appeal. The chapter outlines the foundation of legal understanding about delay as one which is rooted in suspicion and fear, based as it is upon traditional myths about women and sexual crime. The emergence of the concept of domination was noted as an explanation for delay, but the concept while potentially transformative is monitored and strictly controlled. The concept of domination in turn is also used as a force to exclude other reasons for delay, as cases are not considered appropriate if there is no presence of domination. This ignores the reality that the

success of many abusive relationships depends on the absence, rather than the presence, of domination.

The acceptance and appropriation of interdisciplinary knowledge is the element that is most effective in shifting traditional legal knowledge away from its patriarchal foundations. Psychological ‘experts’ explain the processes involved in abuse and the effects of same. The complexity of the crime brings practical procedural problems for the DPP and the Gardai, which means they must be reflective about their management of the issue. The loss of complete autonomy for the Irish legal system, because of a connection with external judicial force (European Law) has the potential to force the judiciary to acknowledge the inadequacy of traditional reasoning about abuse.

Knowledge is at the heart of the issue of delay -where it originates, how tradition affects understanding and how new knowledge is negotiated, i.e. whether it is accommodated or resisted. I have argued that Law stems from a patriarchal mindset and that the legal reasoning about the reasons for delay is frequently gendered. Informed by a concept of women as ‘dangerous’, it is possible to see why there is such judicial resistance to accepting new knowledge and why gendered reasoning is so enduring. Yet knowledge continually advances and knowledge in law is not immune to new developments. Sceptics may argue that patriarchal reasoning is under a strain before the onslaught of competing feminist stories. These narratives are presented in television talk shows, news items, political debates, novels, academic circles and general societal knowledge. My reading of the Appellate court proceedings suggest otherwise. Patriarchal narratives retain their credibility within the court arena. They are however contested by the emergence of new knowledges, and the potential is there for the legal

system to evolve in a dialectical process so long as it takes cognizance of alternative knowledge systems.

Delay is manifestly the most problematic issue for the courts. New awareness and voice have emerged from the adult survivors of child sexual abuse and they now seek resolution from the Courts of Justice. The resultant clash between traditional legal knowledge and resolute victims seeking restitution through the courts poses a real challenge to the judicial system.

Chapter 8: Sentencing – judicial reasoning about guilty men

8.1 Introduction

When a perpetrator of sexual abuse of children is found guilty by the court he is sentenced by the judge. The length or form of sentence can be, and is, appealed on the basis of severity or of leniency, on questions about judicial interpretation and/or about precedence. This chapter examines the factors that contribute to judicial reasoning on the culpability and seriousness of acts of sexual abuse of children and finds that the central concept involved in sentencing is knowledge, in the form of a particularly patriarchal legal understanding. It finds that the key philosophy of punishment is grounded in a concern for and the rehabilitation of the offender. It also argues that the victims of abusive actions remain abstract rather than real within judicial reasoning. Their presence, their voices are largely absent from the court arena. I argue that judicial knowledge is largely constructed within a patriarchal institution that is part of a cultural network of patriarchy. Such knowledge draws on and operates processes of power that are resistant to change. The privileging of so-called ‘scientific’ and rule-bound legal knowledge above experiential knowledge means that the judiciary and legal personnel in their practices support and maintain the power/knowledge system of which they form an intrinsic part. This aspect is central to our understanding about the ‘how and why’ of judicial decision-making, because it explains the way in which legal knowledge has become separated from the gendered citizen’s notion of justice. From a user’s perspective, in particular victims of abuse, the justice system’s gender biased knowledge reduces its capacity to affirm and validate their experiences.

The relationship between punisher and punished is one of the core definitional relationships of inequality in our society (Whitman: 2003). Foucault's theory allow us to examine how power operates in unexpected ways; how it always works through the materiality of the body and it does so through a system of knowledge relations. It can be applied, nevertheless, to more transparent and obvious instances of power in action – such as child sexual abuse. The naked inequality of power relations between an abusive adult and a child, according to Foucault's concept of knowledge, is developed through understanding how it is employed as a factor of control. To achieve control there must be an awareness and understanding of the object of control – to know 'what makes it tick' – how it will act and react to domination – where its' strengths and weaknesses lie. That same inequality of power lies between the judge, the offender and the victim. Understanding the offender is achieved through historic institutional knowledge and through the introduction of expert knowledge. The means of control of the issue is accomplished through legal rule.

Foucault recognised the disciplinary factor in the institutionalisation of knowledge and how the combination of institutions generates domination. Therefore the tighter the network of shared knowledge around the legal domain, the more likely the legal knowledge will be considered as true knowledge. The production of criminological knowledge in the public, political and academic sectors will simultaneously be reflected in legal decision making. Mannheim's understanding of knowledge is one of the general public – how the 'man on the 67 bus' understands the concept of punishment. This understanding is rooted in both head and heart – cognitive insight, intuitive instinct and normative assumptions about the reality we inhabit. What this general knowledge does not contain is the specialised legal and scientific knowledges that produce the outcome of trials and appeal, especially the sentencing

element in the process. The constituents of this general knowledge are personal, individual experience, shored up by the mass media and political debate. This does not mean that one type of knowledge is disconnected from the other. In fact it is fair to say that these knowledges are intertwined and each informs the other. We need to understand the dynamic of influence between the institutionalised knowledges which are: (a) legal knowledge from the legal professionals and the judiciary, (b) medical knowledge in the form of expert witnesses and (c) the prosecutorial knowledge (Department of Justice, the Gardai). Against this is the general knowledge of media, community and individual. It can be argued that the stronger the relationships among the members of each group the more likely the knowledge produced within that group will act as a dominant knowledge. Conversely, conflicting or competing knowledges within a group will weaken the influence of that knowledge. In other words if the gardaí, the DPP, the judiciary, the psychologists and the prison service all subscribe to the same frame of reference the institutionalised knowledge produced will be *the* dominant knowledge system in that society.

Changes in the system are generally a reaction to the social, economic, scientific and political society in which it operates. Major or minor changes are most often driven, not by the judiciary, but by bodies external to the court such as legislation or law reform commissions (for example those on Sentencing and on Child Sexual Abuse). These in turn are informed by public agitation or other interests. The courts must provide the community with a central core of stability, prediction and continuity and because of this the judiciary must treat change and innovation with caution. However the legal processes must also reflect structural adjustments in the culture, economy and society. They must, in other words, reflect the dialectic of change and continuity. The balance between continuity and change is the issue here, because change threatens the

dominance of the knowledge that has been accrued over decades and in so doing, may challenge the power implied in that dominance.

8.2 How Cultural knowledge informs judicial knowledge

One way of understanding the relationships of groups within the criminal process is to use the perspective of dominance, developed by Savelsberg (1994). He recognised the inter-relatedness of knowledge production, legal decisions and culture. The cultural factor is further explained by Garland (2001) and we can pursue some of these insights in the case of Irish law. He argues that discourses of dominance and control may not be noticed in our democratic society because the operation of these concepts takes place within a developing general knowledge. As Garland puts it ‘we quickly get used to the way things are’. Control is achieved by the institutionalising of criminal knowledge which in turn becomes the dominant knowledge within the society and this in turn facilitates further control. In a highly bureaucratised society the dominance of the ‘system’ ought to ensure that rules are followed to a greater degree and the possibility of an individualised approach is minimal. It should follow that there will be consistency and predictability in sentencing. The system exposes the problem of inconsistency when different judges make decisions on the same case, applying a common set of rules or guidelines but declaring different outcomes. For example when Quinn⁵⁴ was sentenced by one judge he was awarded the possibility of a review of that sentence. His review was refused by a second, different judge. The Appeal Court noted:

⁵⁴ DPP v Quinn [1998, CCA], unreported, 2114–2116

'The members of the Court take the view that so far as possible where a particular judge has imposed a sentence with this type of condition that if at all practicable the matter should be brought back before that particular judge.We do not say it is essential that it should be done; but it is desirable that the case should be brought back before the same judge for review'

(p.2116)

Nevertheless, judges also insist that they follow legislative rules and precedents in order to ensure fairness. Any erratic or spurious reasoning is firmly concealed by the dominant discourse of a hierarchised legal knowledge.

Savelberg's theory is useful when we examine the other dominant discourses in Ireland – the Roman Catholic Church, Nationalism, and Economic and Political agendas. Thus morality, identity and new wealth were the ingredients for an Irish criminological knowledge that has undergone changes through retribution → deterrence → rehabilitation → retribution (Ryan 2008). Sentencing policies reflect the changing status of punishment and prisons. The punitive perspective held by the judiciary impact on the sentence they hand down to the offender. So, while there are cases in this data where punishment can be identified as the prime motif but it is fair to say that judicial knowledge has resisted the latest shift from viewing prison as places of welfare and shelter to places of punishment⁵⁵and continue to show concern for the offender.

Two distinct knowledge centres construct a dominant social knowledge of crime. On the one hand, the state introduces punitive sanctions, legislative policy based on fear, with a goal of public protection. On the other hand the discourse of fear provokes collective social anger expressed in righteous (implicitly, therefore, imbued

⁵⁵ See Ryan 2008 for a detailed history of this shift and of the principles of the Irish judiciary in sentencing policy. He argues: As a result of the vital information provided by the Probation Service, judges can make more informed decisions about the best possible sentence in relation to the circumstances of the accused.³⁰ This glimmer of hope is reinforced by the Law Reform Commission Paper on Sentencing in 1996, that rejected the 'just deserts' principle in Irish law as they did not 'agree with this prioritisation or necessary inclusion of retribution as an aim of a particular sentence', again agreeing with penal welfare ideals.

with emotion) demands for increased punishment. Clamours are for ‘victim first’ sentences, keeping retribution as the principle of law along with ‘keep them off the streets’ which envisions prison as effective sites for obstructing crime. This rhetoric is reflected in the sentencing discourse, but hardly practised, as we shall see, for rehabilitation is the prime principle operating in these cases. For example in the case of Quinn⁵⁶ the judge said:

‘I am sentencing you to eight years imprisonment and I am allowing you the right to apply to have those sentences reviewed after three years if you can show to this Court that you have been cured of your ways and that you are again a safe and fit person to be let loose in society’

(p.2114)

When the matter was due for review, the Judge refused to change the sentence because of ‘a statement from the man’s wife’, which must have reflected poorly on her husband.

However, this decision was appealed and the Appeal Judges declared:

‘The course that the applicant has taken is that he has been a model prisoner and has given a good account of himself there. Whether one is ever cured of these propensities; whether it is ever possible to be sure that a person is cured is questionable.....one hopes that he will have learned his lesson and will not re-offend.’

(p.2115)

The judge recognised that the condition upon which the man was punished was unlikely to be fulfilled and the only way the man could be given ‘hope’ was to ignore the seriousness of the crime, disregarding completely the harm done to the victim. The notion, therefore that the Irish Courts have followed those of the United Kingdom and the United States in a politically neo-liberal ‘new-right’ direction is false. In fact, according to O’Donnell:

‘We are fortunate to have missed out on the grave damage afflicted by the ‘nothing works’ school of thought.....’

(O’Donnell, 1998:53 ICLJ)

⁵⁶ DPP v Quinn [1998, CCA], unreported, 2114–2116

O'Donnell argues that one of the reasons we do not subscribe to the other western criminal systems lies in the lack of debate about the effectiveness of different criminal sanctions. This is because a lack of criminological research and the low level of crime have not stimulated general debate.

8.3 The rationale for judicial sentencing

The principle actor in the court of law is the judge. S/he makes the decision, and if this decision is appealed then it is another judge who makes a further decision. The offender and the victim are players also, of course, and it is interesting to see how the roles they perform change to a greater or lesser degree over time. The key to this analysis is the focus on 'how abuse is spoken of', as it will unlock the meaning and purpose of both substantive and procedural discourses to the general society. Each case poses substantive legal questions but they are entangled in a procedural history. Although cases are appealed on specific issues, the Appeal Court can pay greater attention - give more weight - to the way the case was carried out, or to ruling on the particular crime of abuse. Judges in the Appellate Courts focus on procedural rather than substantive issues of law. This may prove frustrating for the victim and even the general public, who impatiently note that technical issues seem to be the force of justice, rather than the principles involved. There is a tension for judges in the requirement to exercise judgement and follow rules of law derived from historical knowledge. This tension is readily observed in the decisions of the Appeals Courts regarding issues of delay and corroboration. Greater unanimity is discernible in sentencing policy.

Punishment operates as a deterrent but it has other functions too; it defines social boundaries, justifies norms, reflects social values and provides a release for the

tensions aroused by deviant acts – fear, harm, anger etc. These functions are engaged in different ways by different judges; they are filtered, developed or otherwise mediated by the individual judge's perception of the offence. Punishment is not always directed at the individual offender. It could instead be an issue of social control, impacting on society in general, or it may function to maintain the ideology that law reflects social norms. This depends on the motives of the judges who operate the legal system.

One would imagine that the penal system operates on a consensus regarding the objectives of its work, but this is not the case. In 1996 the Law Reform Commission produced a Report after much consultation with the judiciary and other contributors.

The Report stated:

‘Our examination of the way in which the traditional objects of sentencing answer the question ‘why does the criminal justice system sentence offenders?’ leads us to a number of conclusions. The capacity of the utilitarian concepts of rehabilitation, deterrence, incapacitation, and compensation (in so far as it is utilitarian) to achieve their objectives has been thrown into doubt by the results of research. On the other hand retributive justifications for the imposition of criminal sanctions do not rest on a secure foundation. What we are left with are doubts about the traditional, utilitarian justifications for sentencing, one weak moral justification the success of which cannot be appraised and a general feeling, which cannot be substantiated, that the imposition of criminal sanctions may have some effect on crime prevention and crime control because of deterrent or incapacitative effects. We know a lot about what punishment cannot achieve, but we know a lot less about what it can achieve. There is no simple answer to the question ‘why does the criminal justice system sentence offenders?’... The Commission reached no conclusions as to what the object or objects of sentencing should be’.

(Law Reform Commission Report on Sentencing, 1996)

Ultimately the Commission leaned towards a ‘just deserts’ policy, one which had proportionality at its centre. In its Report it recommended that a sentencer in choosing between two sanctions of equal severity may have regard to:

- the rehabilitation of the offender;
- the deterrence of the offender or others from committing further crime;

- the incapacitation of the offender from committing further crime;
- the provision of redress to the victims of the offence or to the community and should choose the sanction which is more likely to achieve rehabilitation, deterrence, incapacitation or redress as the case may be.

The principle of proportionality is the tool used by the judiciary as a defence against demands for retribution. As public concern and anger about the social fact of child sexual abuse grew, calls for stern punishment increased. This perceived ‘moral panic’ had to be restrained and the justification for retaining low sentences lay in the insistence that the punishment must be proportionate. This is achieved by matching the offender to the crime (note: this case is not included in data base as csa is not the issue involved).

*‘Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused’*⁵⁷

(DPP v McCormack [2000] 4 I.R. p. 359)

It can be argued that the complete system of law is about achieving a trial (which includes the sentencing process) that is fair to the offender (O’Malley: 2006). Power is held by the judiciary and it is they who decide who should be the beneficiary of legal processes. This does not always equate with societal perceptions of justice.

The judge’s motives are critical to the sentence. In thirty eight cases concerned with sentencing, the most consistent motive of the judges is a concern for the rehabilitation of the offender, within the punitive action.

*‘Justice involves standard of fairness, fair procedures and respect for the dignity of all persons concerned with the trial’*⁵⁸.

(DPP v MC, [1995])

⁵⁷ DPP v McCormack [2000] 4 I.R. 359

⁵⁸ DPP v MC, [1995, CCC], unreported, 2061–2081

Words like ‘Justice’, ‘Just’, ‘Balance’ are all code words that have the offender in the gaze. They pre-empt a sentence that will appear to be unbalanced or unjust in the eyes of the victim. The validity of this perception can be examined in the case of ‘Z’⁵⁹.

The case of ‘Z’ is a continuation of the notorious ‘X’ case that occurred in 1995. In this case a young girl (14 years of age) sought an abortion because she had been subjected to sexual assault by the father of her best friend and she claimed suicidal tendencies. This brought the cultural issues of religion, gender and sexuality into focus and caused frenetic debate and angst throughout Irish society (McGrath: 1996). The man at the centre of the action had initially denied any responsibility for the baby, and had implicated a young man who lived in the neighbourhood. When he was confronted with scientific evidence of his guilt (DNA proof) he reluctantly and belatedly admitted his actions and pleaded guilty. The judge sentenced him to two consecutive seven year sentences. The Appeal Court reduced the 14 year sentence to 4 years. It’s justification for doing so was that the trial judge had not given sufficient weight to the plea of guilty. However, while the man had belatedly acknowledged guilt he had initially denied the accusation, had implicated another person, and only admitted his crime when the police produced DNA evidence of his guilt.

‘We must hold out some possibility of hope and redemption...we cannot believe that an exemplary sentence would serve any purpose in this case. We have to bring balance and reason to the case. We repeat as strenuously as possible that young girls must be protected. Those who molest them must be treated severely’⁶⁰

(DPP v Z)

This is a typical case of the way the judges employ rhetoric of severity, while actually imposing a less severe sentence. The Appeal Court claimed that credit must still be given to the man for pleading guilty as

⁵⁹ DPP v Z, [1995, CCA], unreported, 2198–2216

⁶⁰ DPP v Z, [1995, CCA], unreported, 2198–2216

‘in criminal law it would be wrong to look upon any result as certain; with scientific evidence the witnesses must come to the stand; the various segments establishing the reliability of the evidence must be put in place; the jury must be satisfied beyond reasonable doubt that the evidence should be accepted’...

(ibid.)

The court is claiming here that scientific knowledge is not as certain as legal knowledge. Legal knowledge is seen to enable a truer interpretation of human frailties and abilities. The law has the power to claim this without refutation, just as it has the power to minimise the offender’s wrongdoing. It can interpret his false accusation as ‘a bad thing to do’ yet it deems it irrelevant: ‘it should not have been taken into account either to enhance the sentence’ (ibid). The concern of the courts is that no innocent man is wrongly convicted of crime and they use this to justify the issue of corroboration. Yet here was a man who wrongly accused another and this offence goes unpunished. Interestingly, the reasoning of the judge accords with the law. The offender ultimately did not pursue a trial and this must be taken into account. Precedent required that his sentence be reduced. By accepting legal rules, interpretations and previous rulings without question we fail to look at the inherent problems – much of the legal deliberation focuses on the rights of the offender rather than the rights of the victim. The concept of justice is frequently invoked to justify the decisions of the Appeal Court. In the case of DPP v RB⁶¹ the appeal court notes that *‘the situation is different where decades have elapsed. It is the duty of the trial judge to achieve a just sentence in all the circumstances.’* The Appeal Court judges are aware that the sentences appear unjust, that this perception must be controlled and this control is exercised through a discourse of balanced and caring justice.

⁶¹ DPP v RB [2003, CCA], unreported, 2871–2891

8.4 Rehabilitation and retribution

The judiciary's policy on rehabilitation considers the future. When the problem of child sexual abuse became known it was inevitably linked to and confused with paedophilia and this confusion influenced the sentencing of the offenders. If child sexual abusers are situated in a medical category the compulsive and addictive elements associated with paedophilia means that the prospect of rehabilitation is affected – i.e. that assessing the likelihood of achieving a 'cure' is now difficult. This knowledge does not divert the concern of the judiciary away from the offender. In the case of DPP v M⁶², although this 50 year-old man had committed rape and assault and perpetrated an escalating cycle of abuse on six young boys in his care the Supreme Court argued that:

'The personal circumstances, including age, of the appellant must be consideredthe appellant will be in his final trimester of life when he is considered for remission....He has indicated a willingness to undergo assistance to learn to control his propensity for paedophilia. His previous record (he gave up alcohol abuse) indicates that he will strive to be successful'.

(p.319-20) emphasis added

Rehabilitation then is not just a matter of the future. Unusually, these are historical cases. The court can take cognisance of the pattern of behaviour of the offender since the time the offence was committed

'Rehabilitation into society is an important concept in the criminal law. It is an important aspect of sentencing. In this case the learned trial judge failed to take into consideration or to weigh sufficiently the circumstances of the applicant which indicates that he has over the years redeemed himself.in the circumstances part of the sentences should be suspended. This reflects the mitigating factors and enables the applicant to continue his rehabilitation'

(DPP v RB [2003, CCA], p2902)⁶³

In spite of the fact that the charges were contested and a verdict determined by a jury it was decided that the sentence of 4 and 5 year concurrent sentences should be reduced to

⁶² DPP v M [1994] 3 I.R. 306–320

⁶³ DPP v RB [2003, CCA], unreported, 2871–2891

3 year and 4 years and the last 2 and 3 years respectively suspended, leaving the offender with one year's sentence of which four months had already been served. In reality the offender walked from the court in spite of his actions being described as '*an appalling breach of trust*' and '*very, very serious offences*' (p.2894). Such an outcome reflects the complexity of the system in which sentencing occurs and the conflicting expectations that sentencing is supposed to fulfil, particularly when that social system is undergoing change.

A man who assaulted a young child, boy or girl, over many years (sometimes decades) previously, and who has not been accused of any crime in the intervening years does not seem to be in need of rehabilitation. Yet if the victim has suffered debilitating consequences of the initial action for these same number of years how can the crime be measured? Who decides? Where is the balance of justice to be achieved?

The answer to the question concerning who owns criminological knowledge is contained in the complexity and combination of changing social, political and cultural knowledges. Ultimately, although knowledge is fluid and adaptive, these aspects are under the control of those who own the processing of this knowledge – the judiciary. Its knowledge is expressed in individual cases, especially those that involve characteristics that are easily understood by the mostly male judiciary. In spite of the general trend towards rehabilitation, the Courts are prepared, in certain cases, to take a retributive attitude and the punishment objective was noted in six cases⁶⁴. For example in the case of Vincent McKenna⁶⁵, a well-known activist in the conflict of Northern Ireland, the court took a serious approach. McKenna was known for taking the part of the families in their struggle against local paramilitary bullies and thus had a very positive

⁶⁴ Grummer, Lee, O'Dowd, McKenna, Langan and W(N).

⁶⁵ DPP v Vincent McKenna [2002, CCA], 1.I.R. 347-351

reputation. Nevertheless the Appeal Court increased the concurrent 2 sentences of 3 years each because they took into account ‘*the particularly depraved nature of the offences...it would be an injustice to the public not to impose consecutive sentences*’. The imprisonment was effectively doubled. Note here, however, how the justification for the change was in relation to the public, not to the victim. There is continuous tension in the reasoning of the judiciary, as to the role of the victim and the public. While the issue of victim-impact statements will be discussed later it is noteworthy that the judges tend to set the public and the victim in opposition. In the case of DPP v M⁶⁶, (see above) where the appellant was a member of a religious order, and was charged with 68 charges of ‘illicit sexual activities’ with boys in the school in which he was a teacher, Justice Denham insisted that:

‘The nature of the crime, and the personal circumstances of the appellant, are the kernel issues to be considered and applied in accordance with the principles of sentencing, for this is an action between the State and the appellant, and not an action between the appellant and the victims’

(DPP v M [1994], p317).

The Supreme Court asserted the policy of rehabilitation over that of retribution. Although it recognised that the assault had involved ‘a planned system of extensive child abuse’ it detaches control of the process from the victims, rendering them powerless.

This is explicit in another judgement:

⁶⁶ DPP v M [1994] 3. I.R. 514–525

'I am bound in cases of this nature to take account of the effect on the victims and the evidence in this case is that all three girls are 'mentally unscathed'; (this, in spite of sexual interference or rape on 6-yr. olds on over 400 occasions) ...I have also to consider the position of the community and other persons who might be interfered with in the futureso accordingly, in the conflict that exists between the matters that I have to take into account, I am giving total priority to the protection of the community.'

(G v DPP [1993])⁶⁷

While the victim is taken into account this is only in the sense that a plea of guilty earns the greatest mitigating value to the offender because the sentence is reduced. Judicial comprehension of the crime of child sexual abuse is enacted in a social context. Despite this the judge does indeed own the knowledge in the sense that s/he has the power to decide how that knowledge is operated. The patriarchal bias of their judgements shown above clearly demonstrates its resistance to new knowledges which have been generated in the broader society.

8.5 Medicalising crime: paedophilia

Sentencing decisions which have the offender as the focus also use disease as a justification.

'Paedophilia is a disorder recognised by psychiatric science as such – he has a disease which can be treated and that he wants to be treated'

(DPP v M)⁶⁸

At the beginning of the century, there was no name for a person who induced or forced children to have sex; by the end of it such people could be fit into various taxonomies, especially the paedophile. In psychiatric circles Paedophilia is a clinical diagnostic category with a very specific and limited meaning. According to the American Psychiatric Association, it refers to a person aged over 16 who .has had repeated, intense, sexually exciting fantasies for a period of at least six months, has had sexual

⁶⁷ G v DPP [1993] 1 I.R. 374–383

⁶⁸ DPP v M [1994] 3.I.R. 514–525

urges or has carried out behaviours involving sexual acts with one or more children (usually under the age of 13).

(see: Diagnostic and Statistical Manual for Mental Disorders accessed 20th July 2006 on <http://www.behavenet.com/capsules/disorders/pedophiliaTR.htm>)

Furthermore, it is implied that the fantasies, the sexual urges or behaviours, act as considerable impairments in the individual's ability to function socially, professionally or within other important spheres. Some of those who conform to this definition pose a very serious risk to children and can be individually responsible for the sexual abuse of large numbers of children. However, to be clinically diagnosed as a paedophile, a person need not necessarily have committed any act of child sexual abuse, so it cannot be said that all paedophiles are sex exploiters. It would be wrong to claim that all sex exploiters are paedophiles, and this would remain the case even if the term were more loosely used to refer to adults with a sexual interest in young children (as it is popularly used). The term itself therefore promotes confusion - in society generally but also within the courts. Judges are likely to deal with the offender as someone who fits the psychiatrically defined paedophile regardless of the facts of the case.

In the case of DPP v R⁶⁹ the convicted man had engaged in:

'mild physical contact which quickly developed into serious and frequent beating and punching'

He

'sexually and physically dominated her psychologically in a manner and to an extent which was truly horrific'

The judge listened to the medical report:

'over the past few years Mr. R seems to have gained some insight into his condition. He has come to an understanding of the situation and has insight enough to see that he does need help and treatment'.

This profile is of a man who was enraged, dominant and powerful, exercising authority in a violent way. It is my contention that the judiciary may be conflicted about the

⁶⁹ DPP v R [1999, CCA], unreported, 2117

appropriate sentence for crimes if they are confused about the motives and actions of the offenders. This confusion among both the medical and legal professions is, however, understandable because different knowledge from different disciplines must be integrated before judgment can be passed. An ‘expert’ in law is not an ‘expert’ in psychiatry.

Since the 1950’s paedophilia has been a contested category within the psychiatric profession. It provokes discussion in much the same way as homosexuality did previously, i.e. it can be construed as a sexual orientation and not as an illness. The main thrust to the argument is that issues about consent, power and harm are irrelevant to a diagnosis of mental illness; they are a moral and sometimes a legal issue, but not a medical one. Foucault explains this pathologising of behaviour by referring to the popular and intellectual history surrounding habit, the politicisation of personal habits, the rise of the medical profession, and imperial attitudes. The judiciary cannot avoid being part of this process. When sentencing the sex offender it is caught up in the discourse of traditional legal thought ameliorated to some degree by popular and expert knowledges. Thus, in *DPP v Quinn*⁷⁰, the trial judge agreed that the offender could apply to have his sentenced reviewed in three years:

‘if you can show the Court that you have been cured of your ways and that you are again a safe and fit person to be let loose in society’ the Appeal Court acknowledged ‘whether one is ever cured of these propensities or whether it is ever possible to be sure that a person is cured is questionable’ (DPP v Quinn, [1998 CCA]).

The interpretation of paedophilia as dangerous is used as a tool by the defence in appealing sentence. When an appeal is launched the defendant proposes mitigating factors that should be taken into account. Thus the fact that an offender is described as

⁷⁰ *DPP v Quinn*, [1998 CCA], unreported, 2114–2116

‘not a paedophile’ has implications for his level of culpability and his perceived level of danger to the community.

‘The applicant is not a paedophile. He had a control over his daughter but did not have a similar relationship with other members of the family. There is no evidence that he is now a danger to others, nor that he is likely to re-offend. There was only one victim’.

(DPP v. D.H. [2000]⁷¹ p 2596)

This perverse use of knowledge is a disturbing factor in the adversarial system. The relationship between the label of paedophile and the extremely violent actions of this man is of little relevance.

The circumstances of this case were described by the trial judge:

The grim and tortured existence of this girl who is now a woman stands out quite clearly from the book of evidence. Initially he was a violently abusive father who commenced bringing in blue movies into his house,, psychologically damaging his daughter by among other things referring to her weight, having carnal knowledge of her in a field, she was one of nine children and she protected them because she felt if her father had sex with her then he wasn’t [sic] violent to the rest of his family.....’

(DPP v. D.H. [2000 CCA], p2594)

The effect on the girl was devastating, yet the defence applied the argument that because the father only violated her and no other member of the family ‘*there was no evidence that he is a danger to others, nor that he is likely to re-offend*’ (p.2596).

Introducing this factor skews the reasoning process. While the trial judge took full account of the deleterious effect on the victim and imposed a sentence of twelve years the Appeal Court took the paedophile factor into account (as well as other factors) and reduced his sentence to eight years.

Pathologising criminality means judging the person and not the crime, which means the judge has to engage with the likelihood of rehabilitation. In other words, how ‘dangerous’ is the man, how likely is he to commit another similar crime?

⁷¹ DPP v. D.H. [2000 CCA],unreported, 2591–2606

Dangerousness is defined by social mores.

‘The transformation of the criminal justice system from making assessments of guilt or innocence, to making medical judgements of dangerousness or curability, has been generally supported by recent scholarship’

(Nye: 2003:123)

According to Nye, the principle of the individualisation of punishment, designed in the 1880 and 1890’s to fit each criminal’s particular depravity has been generally implemented in sentencing. A whole medico-psychiatric evaluation of sex criminals virtually set aside any consideration of individual rights in the name of community security. But the picture is more complex than this. As Graham Burchell has written,

‘. . . the state’s interventions in particular areas of life are brought under critical scrutiny in terms of their legitimacy (do they encroach on the necessary freedoms of individuals?) and the competence and cost-effectiveness of its methods (can the objectives be achieved without state intervention: that is by members of society themselves?)’

(Burchell, 1991, p. 143, quoted by Nye: 2003).

Knowledge of paedophilia confuses the issue of dangerousness:

‘It was also urged before the learned trial judge that paedophilia was a disease and this was accepted by him. There was no evidence, however, to suggest that it was incapable of control and the fact of there being a strong element of compulsion in the condition highlights the necessity of protecting young children from the resulting misconduct....Another factor in the case is the question of the likelihood of a recurrence of the misconduct on the release from prison of the appellant. During the years when the offences were committed he was constantly in the company of young boys who were an undoubted temptation for him having regard to his propensities. If he returns to his religious community his superior will see to it that he will not have the same opportunities and, should he seek a post elsewhere, it would seem unthinkable that a reference would not be sought from his present superiors.’

(DPP v M [1994]⁷². p.313)

The judge believes that the ‘misconduct’ was the actions of a man who is not responsible for his own behaviour; he is at the mercy of a ‘strong element of compulsion’. This particular interpretation and appropriation of medical knowledge

⁷² DPP v M [1994] 3.I.R. 514–525

fulfils the requirements of gendered justice. It allows the reproduction of traditional understanding of how and why men behave as they do.

Judicial discourse maintains that the function of the court is to consider only

'the offences and their nature and their circumstance; but this is not done for the purpose of determining whether the appellant should be incarcerated for the future so as to prevent him committing further offences: he is sentenced solely for the offences before the court.

(Ibid: p.316)

It is clear at this point that judges are bound into rehabilitation to the exclusion of other motives for sentencing. For example, in consideration of the age of the offender (in this case in his fifties) they say:

'In this case the appellant will be in his final trimester of life when he is considered for remission. Age is thus relevant to the concept of keeping the light at the end of the tunnel visible, with the consequent effect on motivation and rehabilitation'.

(ibid. p.319)

8.6 Sentencing and the exercise of judicial discretion

By the year 2002 judicial discourse had shifted to acknowledge the victim although the judiciary still finds it difficult to translate the new awareness into the sentencing. To a great extent the focus remains on the perpetrator and not on the victim. In the case of J.M., the offender, aged 84, had been a principal school teacher and held a position of respect in his community. There were psychiatric and medical reports regarding his state of mind, and his physical condition. There were reports from a senior probation and welfare officer and from psychologists. In spite of differing opinions the general summary was that:

'This is a case where we have an 84 year old man who is currently before the courts in a very advanced stage of health and mental deterioration. He is depressed and continues to be at risk for suicide. A brain scan shows cerebral atrophy. He has multiple physical problems

and appears to be closeted by his family. He has remorse for his victims and is concerned at the effect upon his family.’⁷³

(DPP v J.M. [2002])

The trial judge had taken all of these factors into account and finished: *‘I believe that a sentence in the range of four years is appropriate in his age range. That is based on the balanced view of the proportionality of sentence’*. He went on to sentence the man to three years for each offence, to run concurrently. The appeal court considered the specific factors in the case however, one of which was

‘the undoubted fact, as evidenced by the testimonials on his behalf, that he was a person of high standing and reputation in his communitythe fact that the accused yielded to the temptation to commit these acts over so long a period and on so many occasions is manifestly tragic, but it is on any view a tragedy, not merely for his victims, but for the accused himself’

(Ibid p366-7)

The justification for so doing

‘...should not be misunderstood. It is not the function of the courts to extend mercy to criminal offenders. The right to invoke that great virtue is, in the punishment of crime, reserved exclusively to the executive. The exclusive prerogative of the court is the administration of justice in accordance with the Constitution and the law. However ...a just and proportionate response to the particular circumstance of the accused.....required the suspension in it’s entirety of the term of imprisonment....’

(ibid. p370)

The assertion that the Court is not ‘extending mercy’ does not, in my view, mask the true intent, which is indeed to exercise the prerogative of mercy. The judiciary can empathise with this man, whose social standing is similar to its own. The horror of the fall from grace is readily understood. In balancing this with the tragedy that has befallen the victim different weightings are applied. The man walked free. In the second case Counsel for the defence in its appeal about the sentence for ‘M’ knowingly

⁷³ DPP v J.M. [2002] 1 I.R. 363–371

(and successfully) appeal to this empathy⁷⁴ . When speaking about the consequences that face those who ‘*yield to the temptation to commit these acts over so long a period*’ they note that ‘*imprisonment is particularly difficult for a child abuser*’ (p313). The power of the judiciary is manifestly apparent in these cases and the manipulation of the principles of law can only occur in an environment that rules without question. To be successful the perception of objectivity and balance must be maintained. For this reason, therefore, the strategic discourses must emphasise these qualities while pursuing the patriarchal agenda.

In the next case where the man is now 89 years of age.

‘This man is suffering from prostate cancer....He has no previous criminal convictions and has now suffered all the humiliation and indignity associated with being convicted of such serious crimes’.

(DPP v P.H. [2002 CCA], p.2097)

The sentence was three years with the final year suspended. The Appeal Court dismissed the appeal but noted:

‘The court would, however, express its hope that the executive will be in a position to detain the appellant in conditions which take account of his advanced age and state of health.’

(ibid. p2099)

These three cases shared the mitigating factor of age. The first offender was a priest and the Court was concerned that the man would be in his final trimester of life when he left prison, the second was a principal teacher who, in the eyes of the judges, had been disgraced enough and finally the family man who ‘*given his age and his history, was clearly unlikely to represent a risk for any other victims in the future*’. Only the final case produced a prison sentence. The lack of consistency here cannot be explained by changing social mores, as two of the cases are heard within months of each other; it cannot be explained by particular individual judges, as the last two share the same panel

⁷⁴ DPP v M [1994] 3.I.R. 514–525

of three judges, and still differ in their motivation. What might explain the inconsistency? One explanation may involve the social status of the offender:

‘Low-status defendants may be viewed with less empathy, and as more blameworthy. Judges may also see poor defendants as having fewer prospects and social supports. As a result, such defendants are also seen as showing less potential for rehabilitation’.

(Western 2006:4)

If the judge eliminates the possibility of rehabilitation it means that a policy of retribution or deterrence must be employed in the decision making process and this is not a course they wish to take.

The power vested in the judiciary is held in the authority to exercise discretion. If this is usurped, for example by mandatory legislation, the judges are transformed into administrators. For this reason they insist that every case is unique and therefore every case needs careful consideration and judgement. Judges carefully explain the most important constituent of sentencing – it must do justice in the particular case. The judicial rhetoric that every case is unique is, of course, somewhat invalidated by the convention of relying in coming to judgement on precedents set in other cases. Uniqueness belies comparison, whereas using precedents involves differences and similarity, tenets of comparative decisions.

It could be argued strongly that the Appeal Court is ‘acting in blind imitation of the past’; that the discretion exercised by the judges in the Appeal Court is informed by the past, and by research and inter-disciplinary knowledge from broadly based sciences and professions. Instead, judicial discretion is informed from within its own history of practice, from the trial courts to the appeal courts and back again, taking only selective account of the available research on the effects of abuse of young children. A similar point is made by Ngaire Naffine in the context of academic writings on rape:

‘traditional legal thinking about the nature of rape and how the law should best deal with it depends on outmoded and contested images of

women and their relations with men....while academic lawyers continue to analyse legal doctrine in a matter which excludes the insights of other disciplines (in particular the feminisms, criminology, and the social sciences)... they will be poorly placed to understand the true complexity of the crimes they wish to dissect and analyse and more particularly what those crimes mean to the women affected’.

(Naffine 1992: 767)

Smart had previously argued that the law ‘exercises power ...in its ability to disqualify other knowledges and experiences’ (1989:11). In these cases the knowledge and experiences of the victims do not appear to enter into the Appeal Courts’ deliberations prior to making sentencing decisions. The judges do, however, appear to be attuned to the offenders’ experience and knowledge and make explicit reference to this in their judgements.

We have looked at some of the factors that account for the sentences given already. However, when sentencing involves judicial discretion it is clear that the consideration about the seriousness of the crime is driven by *judicial perception* of the seriousness of the crime. According to the Law Reform Commission Report

1. The severity of the sentence to be imposed on a person found guilty of an offence should be measured in proportion to the seriousness of the offending behaviour.
2. The seriousness of offending behaviour should be measured by reference to:
 - a: The harm caused or risked by the offender in committing the offence; and
 - b: The culpability of the offender in committing the offence.

(Law Reform Commission 1993)

Seriousness is reflected in legislation and the maximum penalty imposed is an indication of the gravity of the offence. Legislation on Sexual Offences has undergone many changes over the last two decades, reflecting the increasing concern and priority given to the issue. The Law Reform Commissions adopted the Australian definition of CSA which acknowledges the wide range of ways in which children can be sexually

abused outside of the conventional definition of the offence of sexual assault. These recommendations reflect increasing collective knowledge regarding the dynamics and the pervasiveness of child sexual abuse. Feminist lobbying combined with the gaze of the media has ensured a constant discourse about sex; reports of rape, child sexual abuse, pornography, sex trafficking and tourism, are daily features in the media.

Courts have long recognised that they are to have regard to the maximum penalty as an indication of the gravity of the offence. The maximum sentence is supposedly reserved for the worst type of case in that particular offence. However the judiciary uses this perspective to impose lesser, even lenient sentences because it claims it is possible to envisage a worst case.

'The maximum sentence for the charge of rape is now life imprisonment...it is true that maximum penalties are rarely imposed. This reflects in part a change in social outlook. It also reflects the disturbing reality that bad though any particular case may be human depravity may sink even lower'

(DPP v R⁷⁵ [1999])

It is always possible to imagine a worst case, so it is an abuse of process to interpret the legislation in an adverse way. When 'M'⁷⁶ pleaded guilty to a number of counts of buggery, indecent assault and sexual assault, the trial judge stated that he had taken all the circumstance of the case into consideration before imposing a lengthy sentence. The five-member Appeal Court acknowledged that the crime had been a 'planned system of extensive child abuse...a gross attack on human dignity, bodily integrity and a violation of constitutional rights'. Nevertheless it asserted that:

'The learned trial judge took the view that this was the worst case to come before the Central Criminal Court' to his knowledge. I find it difficult to agree with this. There have been many cases of brutal and violent murders or rapes...which would be regarded by many people as being even more serious. There was no evidence or suggestion of brutality or violence in the present case and although it is a most serious

⁷⁵ DPP v R [1999 CCA], unreported, 2117

⁷⁶ DPP v M [1994] 3.I.R. 514-525

case it would seem that the very extreme view taken by the learned trial judge undoubtedly coloured his assessment of the appropriate sentences'

(DPP v M [1994])

The issue of violence is significant in judicial reasoning. It resonates and is integral to male understanding of assault. This fails to recognise that the act of sexual abuse of children is intrinsically different to adult on adult assault. Although it involves bodily assault the interactional dynamics of this relationship depend on greater subtlety than violent dominance. The characteristics of CSA are often synonymous with other adult-child relationships. It is about persuasion before coercion, about exploiting ignorance and innocence whereby children do not know the activity is wrong until later, at which time they assume guilt for their actions (Furniss 1991).

In spite of constant reiteration of new understanding of the dynamics involved in this crime, the judges still hone in on the fact that 'there was no physical violence' in a case where a girl had spent her whole life in a dominant and abusive relationship with her father⁷⁷. The Appeal Court took the lack of physical violence into account when weighing up the mitigating factors in favour of the offender reducing his sentence by four years.

Strategically, the Court of Criminal Appeal acknowledges the experience of some victims. In the case of Michael Balfe⁷⁸ (2000) the judge noted that '*One of the Counsel in the case said it was one of the most distressing he had come across in his career and one could well believe it*'. Interestingly, it was the fact that the man showed no fear of the law that incensed the judiciary: '*One of the most extraordinary aspects of the case was that before his trial the Applicant, while released on bail, raped his daughter again (p.2420)....under these circumstance this Court could not take the responsibility of interfering with the trial Judge's sentence*' (p.2422) The rapes are

⁷⁷ DPP v DH [2000 CCA], unreported, 2591-2606

⁷⁸ DPP v Balfe [2000 CCA], unreported, 2420-2422

problematized to some extent and in fact the Court notes that *'the trial judge in imposing these sentences was particularly conscious about the duty of protecting his second daughter'* yet they leave the door open for leniency by declaring that the point might arrive when it is considered safe to release him again on society and *'if this man makes the hoped for progress then this Court will not be distressed if the Executive were to take the responsibility of according him leniency at that particular stage'*.

In the case of G.McC⁷⁹, the offender was found guilty of possessing 783 images of child pornography and charges of rape, sexual and indecent assault on six named victims.

The opening words of the trial judge stated:

'The video evidence produced has been so disgusting that I, as the judge of this court who handles up to 140 cases of this nature every year, couldn't go through with watching ten minutes of it.'

(p.13)

The Appeal Court however disagreed, claiming that they could not discern any additional factor over and above what emerged in the summary of facts outlined to the court relevant to the determination of an appropriate sentence. This crime of child pornography and child trafficking is relatively new and the courts had to research other jurisdictions to find a 'worse' case, which they did. They quoted cases from the United Kingdom which entailed a total of 20,000 indecent images and where 'some of the children were clearly distressed'. The sentence of 14 years was reduced to ten years, especially because the offender pleaded guilty immediately. It has been argued (O'Donnell and Milner 2007) that the disparity in sentencing practices for a pornographic crime is rebalanced in the Superior Courts, on appeal. My review of appealed cases concurs in that the tendency to reduce sentences in such cases is one of the most consistent features of the Appellate Court judgements.

⁷⁹ DPP v G.McC. [2003 CCA] , unreported 4030-4053

Pleading guilty to the charges of the court is the most important mitigating factor according to the judiciary. Without exception it is the principal reason mentioned by the Appeal courts for reducing sentences:

'I have no doubt, however, that in the case of rape an admission of guilt made at an early stage in the investigation of the crime which is followed by a subsequent plea of guilty, can be a significant mitigating factor. I emphasise the admission at an early stage because if that is followed with a plea of guilty, it necessarily makes it possible for the unfortunate victim to have early assurance that she will not be put through the additional suffering of having to describe in detail her rape and face the ordeal of cross-examination'.

(DPP v Tiernan [1988])

and the absence of such a plea is the reason for not reducing it.

'..Yet when these matters ultimately came to light the appellant, instead of accepting the consequences of his behaviour, persistently denied that he had done anything wrong and one can well understand the obvious difficulty which the trial judge, who had the advantage of observing his demeanour in the witness box, had in accepting the belated recognition of his guilt on the day the sentence was about to be imposed'⁸⁰

(DPP v P.H. [2002] CCA).

Thus, in spite of the age of this man (89), the appeal was refused and he was imprisoned. The basis of the reasoning is a concern for the victim and it seems that there is an element of this here. But it does not rest solely with that.

The offender who pleads guilty is assessed as being remorseful for his actions. His guilty plea also benefits courts in economic terms. Such pleas save enormous public expense. They reduce the congestion of the lists. They permit the courts to attend more speedily and efficiently to those cases which are contested. They allow police, prosecutors and many others to devote their time and energies to other cases

'In this case there was a plea for which the applicant must get a benefit, even though it was a late plea and the full prosecution case, with witnesses, was gathered ready to proceed. Thus the benefit of an early

⁸⁰ DPP v P.H. [2002 CCA], unreported, 2088–2099

*plea to the prosecution, to save gathering witnesses etc. ...only accrued just before the trial commenced.*⁸¹

(DPP v WN [2003 CCA,])

We have seen in the previous chapter how, in relation to the issue of delay, it is victims who ultimately pay the price for inefficient use of resources (Gardai etc.) and therefore in the name of the common good, it is acknowledged that the economic element applies to victims as much as anyone. However the benefit cited by all the judges is only attributed to the victims; it means they do not have to endure a trial. Crucially, implicit in this reasoning is that the system is constructed in such a way that the victim will suffer in partaking in it; it is intrinsic in the process.

'...he pleaded guilty and did not seek to put this young girl through the ordeal and the psychologically distressing experience of having to give evidence in court in relation to the matter'.⁸²

(DPP v O'Sullivan [2002 CCA])

A year later this attitude is confirmed:

'..Of the mitigating factors by far the most important is the plea of guilty. It is perfectly clear from the Victim Impact Reports and the evidence that it would have been a devastating experience for most of these boys to have had to give evidence in court of what actually happened'

(DPP v G.McC [2003] CCA unreported⁸³)

The argument therefore is that the system itself inherently operates inadequately as a system of justice and it is imperative to examine afresh the concept of dealing with this issue in a 'more principled, conceptually more coherent' way (Ashworth 2000: 255) so that secondary victimisation does not occur.

With striking honesty, the outgoing DPP admitted that some 'appalling mistakes' had been made in prosecutions due to the lack of co-ordination and cohesion between the DPP's office and that of the Chief State Solicitor. '*... If we had a tabula*

⁸¹ DPP v WN [2003 CCA], unreported, 4201-4206

⁸² DPP v O'Sullivan [2002 CCA], unreported, 4380-4383

⁸³ DPP v. G.McC. [2003 CCA] , unreported 4030-4053

rasa and we were asked to design a criminal justice system, the one we have would be the last one you'd design' (Coulter: Irish Times 16 Sept. 1999).

8.7 Victim Impact Statements – a challenge to the system?

'Adversarial' implies that there are two sides to the argument, but until the introduction (via the Criminal Justice Act 1993) of the Victim Impact Statement, the voice of the victim was never heard directly in the court room. When imposing sentence for a violent or sexual offence, Section 5 of that Act requires judges to take the impact of the offence on the victim into account. Section 5 states:

'In determining the sentence to be imposed on a person for an offence [of violence or sexual violence], a court shall take into account, and may, where necessary, receive evidence or submissions concerning, any effect (whether long-term or otherwise) of the offence on the person in respect of whom the offence was committed.'

The characteristics of the criminal system that we inherited involve a relationship between the State and society. The state is vested with the authority to inflict punishment on the perpetrator on behalf of society. In an adversarial process that pits an individual against a greater and more powerful state. It was deemed necessary to procure a set of rights for the accused that would offer him/her adequate protection in the name of justice.

By allocating responsibility to the state to provide them with security, citizens surrender the freedom to do as they please. Security implies risk and in a society increasingly haunted by risk the victim and victim's rights have moved to the fore in criminal discourse. This occurred through a combination of factors:

- The growth of crime victimisation surveys which were undertaken because of a lack of confidence in official criminal reports. This necessity to identify risks,

to pin down numbers, to assess the 'dark figure' of crime in the city, had to take the victims' account of criminal activity into the orbit of knowledge.

- This was accompanied by a broadly based change in punitive objectives. Rehabilitative measures were not seen to have any effect on crime statistics and, especially in America and Britain, a punitive 'just deserts' policy was more attractive to the electorate. Being seen as "tough on crime" became politically desirable. As a corollary, expressing concern for the victim is a relatively easy way to accrue political benefit.
- The establishment of victim support groups, women's refuge homes and rape crisis centres; using media exposure to seek state funding meant that individual stories were highlighted and the profile of 'victim' was established in public consciousness. Feminist exposure of the position of victims lay behind this social movement. This was accompanied by changes in the substantive and procedural laws of rape and sexual assault, especially in relation to child witnesses. Feminists, in short, have challenged the focus on the offender and the offender's rights.

The literature on 'victimology' is concerned at the effect of the victim's emerging presence on the structure and practices of the legal system. The debate is ongoing. Following the new Legislation in 1993 the Department of Justice in Ireland published a 'Victim's Charter' in 1999. Accordingly, the judiciary always acknowledges, to some degree, the effect of the crime. But this does not mean that the acknowledgement has any *practical* effect. In fact, most striking in the sentencing data reviewed is the lack of effect derived from the victim impact statement. The Justice system must hear the subjective voice of the victim if it is to understand the issue of child sexual abuse and its impact fully. This would allow for a necessary balancing of voices within the system resulting in a fairer system of justice. If it cannot do this, then perhaps this system is not the appropriate forum to deal with this issue. Research by Erez and Rogers (1999) concludes that organisational forces, legal occupational culture and work-group dynamics militate against the individualisation of crimes. At the heart of the issue is the challenge to the objective process that is deemed necessary for the operation of the present justice system. There is concern that the insertion of a subjective narrative will alter the dynamics of the institution and that the balance of power between prosecution

and defence, state and criminal, will be affected. Perhaps they have good reason to be concerned. Individual judges are indeed capable of speaking in emotive and passionate language about the suffering of the victims. In the case of DH⁸⁴, which we have outlined above, the victim presented at the court accompanied by two psychiatric nurses from the residential psychiatric care facility where she now resided. The judge declared that:

'The grim and tortured existence of this girl who is now a woman stands out quite clearly from the book of evidence....The effect of these offences on this victim is clear... one can see from her demeanour and from her words the dreadful psychological trauma, the pain and suffering, the emotional turmoil under which she now exists.....When Garda...was giving her evidence she indicated to the Court that the initial statement from the Complainant took four and a half hours to complete and during the course of that statement the Complainant got physically ill'

(DPP v. DH [2000], CCA, unreported).

Objectivity is a normative ideal in law. It is the legal shield that militates against the deployment of emotion in the perception and construction of legal decisions about truth. The complexity of mixing emotions with pure reasoning may have the effect of disrupting legal proceedings as we know them. This is most likely to occur if the victim's subjective experience is taken into account.

In the case of M⁸⁵ the judge makes it clear that the victim is not a factor in the sentencing process:

'Sentencing is neither an exercise in vengeance, nor the retaliation by victims on a defendant. However the general impact on victims is a factor to be considered by the court in sentencing.'

There follows a list of effects on five children that includes terms such as 'disturbed, damaged, psychiatric problems, guilt burden' but finishes with the stern reminder that the case is not between the victim and offender. It belongs to the State. (DPP v M [1994]).

⁸⁴ DPP v DH [2000 CCA], unreported, 2591-2606

⁸⁵ DPP v M [1994] 3.I.R. 514-525.

Victim Impact Statements are an important source of data. However, it is the judicial discourse on victims that is of most relevance to this chapter: how the knowledge of the victim is processed and managed by the judiciary in such a way that the victim's voice does not appear to inform sentencing decisions.

Erez claims that in the process of typification (whereby something belongs to a 'type' after an initial novel period) 'prosecutors and judges become acquainted with the typical features of cases and their associated impact'. This knowledge is evident in the judicial discourse.

*'.....she has classic symptoms of severe chronic post traumatic stress disorder and very typically as in cases of this nature marked levels of self loathing that is a recurrent feature in cases of sexual abuse.'*⁸⁶

(DPP v DH)

The judge uses phrases that are typical of and reflect the 'psy' terminology:

'The act of forcible rape not only causes bodily harm but is also inevitably followed by emotional, psychological and psychiatric damage to the victim which can often be of long term, and sometimes lifelong duration

(DPP v Tiernan [1988] 253)

(This is the rape case on which much of the rationale of the Appeal Cases are based)

Using this knowledge the judge is capable of identifying factors that have not necessarily been enunciated during the trial, broadening the role of merely recapitulating the facts of the case: In the case of W.N.⁸⁷ the accused pleaded guilty to offences against two girls, who were thirteen and fourteen years of age. After describing the offences the judge notes:

'It is all too easy to imagine the horrific effect of those alone on innocent, ignorant young girls of thirteen and fourteen years of age.....It is also easy to configure the well-known long-term consequences of loss of capacity for intimate relationships, ability to love and to trust and can develop a variety of adult problems from the trauma by way of sexual

⁸⁶ DPP v DH [2000 CCA], unreported, 2591-2606

⁸⁷ DPP v WN [2003 CCA], unreported, 4201-4206

dysfunction, marital difficulties and difficulties and problems in parenting children’.

(DPP v WN [2003 CCA], p4204)

The judge goes on to analyse the suggestions of the defence team and explain their significance to the jury:

‘There was also the insinuation that they ought to have confided in one another, which misses the point in such abuse, which is typically insidious and sly...’

(ibid. p.4204)

The stereotyping of victim characteristics is achieved through experts, media and victim impact statements. The stereotype becomes the *‘means for categorising persons and the complement of attributes felt to be ordinary and natural for members of these categories’*, the product of which is to allow us *‘to deal with anticipated others without special attention or thought’* (Goffman 1963: 2). Stereotypes not only guide the judge but also guide the choice of those who are to be so defined. When JM⁸⁸ was convicted of indecent assault on eight girls in the school in which he was a teacher and then a principal, victim impact statements made it clear that the girls had suffered serious consequences, *‘making them distrustful of the opposite sex and creating significant difficulties for them in entering into intimate relationships of a sexual nature..... one girl attempted suicide....’*. However,

‘The exceptional case was that of a lady who said, that while the accused engaged in this behaviour towards her a schoolgirl, she eventually stood up to him and told him to stop one day in front of the class She felt that her refusal to accept the accused’s behaviour enabled her, in some respects at least, to deal with it even at that early stage in her life.’

(DPP. v. JM [2002] CCA)

Victim Impact Statements have had very little practical effect on the sentencing of offenders. The focus of courts remains on the offender and the crime and integrating victim reports into these perspectives has not occurred. On the other hand the victim’s

⁸⁸ DPP v J.M. [2002] 1 I.R. 363–371

voice is being heard and the knowledge imparted by these statements is accumulated by the listeners, so that their credibility is more readily accepted in general in the judicial process.

8.8 Conclusion

Sentencing is at the heart of the criminal process. It is here that the operating and ‘animating objectives’ (O’Malley 2006: 226) are present. This chapter has shown that the victim of abusive practices plays no meaningful part in the criminal system. The state acts primarily on behalf of the community in the pursuit of justice. There is a wider community and societal brief for the state. The state, therefore, does not primarily act as an advocate for the victim. Consequently, the victim is frequently rendered powerless within the legal process. The prosecutor makes all decisions about whether to take charges, what charges they should be, etc. Further, it is not answerable to the victim. In this Chapter, I have argued that the lack of victim voice and presence is apparent in three key discourses. First is the focus on the individual offender; this relates to the second which is the discourse of rehabilitation and finally the third dimension is the domination of legal rule. This is not to argue that perpetrators of sexual abuse are not punished, but through these discursive strategies there is no meaningful effort to include the victim’s perspective in the process.

The modern concern with disciplinary punishment was corrective, to find the gaps that prevent normalisation of the individual. By taking into account the personal circumstances of the convicted man, the judge has ample room to excuse the perpetrators’ responsibility for conduct and/or to lighten the severity of the sentence. Using age – whether too old or too young – or a concern about his standing in the community ‘he has suffered enough’, or by focusing on the mitigating factors – all these

have the effect of appearing to favour the perpetrator. Underscoring the concern of the judges however, we have shown the way this discourse is derived from the overriding male understanding of the issue.

Within the Irish system there has been a turn towards a more punitive and expressive form of justice in Irish punishment philosophy (Ryan: 2008:119) but in sentencing perpetrators for abusing children these cases show that the philosophy of rehabilitation remains dominant. The retributive mentality, (which embraces a notion of justice where the sanction imposed is proportionate to the harm done by the offender) was eschewed by the courts until the last two decades. This 'eye for an eye' frame of mind was not acceptable in criminological circles for some time, associated as it was with the death penalty issue. It is true that there are distinct problems associated with the retributive motive as it can easily incorporate or slide into a system of revenge. With the rise in the victim's movement a policy of retribution has the effect of shifting the focus on to the victim for it calls for meaningful punishment for harm done. Because victims insist on being heard and on their voices being taken into account, this promotes a tension within the sentencing process. The policy of rehabilitation is now somewhat discredited in western punishment ideology but this study shows repeated incidents where the concept of 'retribution' is absent. While the offenders are mostly punished through imprisonment the length of sentence is determined by the notion of rehabilitation and the concern is with the offender. It must be implied, therefore, that the issue of child sexual abuse is dealt with in a specific way, one that runs counter to other crimes. Although O'Donnell (2001) argues that the absence of statistics impedes a true analysis of the comparison between sentences for sex crime and other crimes, this study can show that the widely reported concern about a change to a retributive mentality is not the case.

The argument derived from this analysis is that in the case of this crime the judiciary remain rooted in the notion of rehabilitation because it understands the practise of sexual abuse in terms of ‘he yielded to temptation’, or ‘he knows he was wrong’ or ‘in all other respects he was of excellent character’. This construction of the abuse as less of a criminal offence than a crisis of behaviour points to the place the practice of abuse occupies in the hierarchy of crime.

Finally, I have argued that the system of justice has been hardly affected by the much heralded promotion of the status of the victims of sexual abuse. The concern with safeguarding the rights of the alleged offender drives much of the reasoning and analysis of the decisions. For instance, it largely ignores the assessment of the possible future danger posed by the offender to society, or the severity of the crime which has been perpetrated. These factors are aligned with procedural ones; precedent, the guilty plea, legislative changes etc. which together dominate the ‘legal event’ of the court case.

It is refreshing, initially, to hear the victim’s voice in the proceedings, through the introduction of the Victim Impact Statements. While the issue of victim impact statements will be dealt with in more depth in the next chapter, the most salient feature that emerges is how the presence of these statements serves a fundamentally different purpose than that designed by the legislators. Victims are granted rights and benefits from the State in a clear trend in western society towards improving the position of those hurt by crime. The Irish adversarial system as we know it is based on procedural formality and legal ritual yet it *has* made space for victims’ emotive narrations and invites empathy into the frame.

Victim Impact Statements, however, have little practical effect. When women are treated as objects in need of protection this discourages them from engaging in public discourse, i.e. at the end of the trial they are relegated to a framework of victimhood but then consigned to irrelevance. The result of this 'is to perpetuate traditionally male ways of thinking that offer only limited views of the world, boiling choices down to black and white and imposing universalisms where context is more appropriate'(Pope 2002). The victim impact statement *as it is structured* has the potential to distort their experiences into conformity with the very system they seek to change. By emphasising anger and punishment on the one hand it corresponds to male experience, and by emphasising suffering it reinscribes the victims in the status of 'other'. Neither of these approaches may be appropriate nor tell the full (and usually complex) story. The result is the continued silencing of the experiences that do not fit neatly into this paradigm.

Chapter 9: Constructing legal knowledge discursively

9.1 Introduction

The main argument in this thesis is that the Irish courts are not structured in a way that promotes a progressive or emancipatory resolution of the issue of child sexual abuse. We have already seen how judicial decisions are rooted in patriarchal traditions and in the conventions derived from scientific knowledge.

This chapter will show that traditional characteristics of justice are still prevalent in the decision-making process. The previous chapter argued that the reasoning of the judiciary presented a solid resistance to new knowledge and only reluctantly admitted new perspectives into the legal arena. This chapter focuses on the discourse and language used by the judiciary and the way this shapes the reality of child sexual abuse. The legal construction of child sexual abuse can be ascertained from the judiciary's reference to the key actors involved. Language is powerful and active; it plays an important role in conveying social experience, as well as constituting social subjects and their relations (Purvis and Hunt 1993). Legal language reinforces existing knowledge but it can also shift social relations and the balance of power therein. Here I will demonstrate how the offender and the victim in child sexual abuse cases are constructed through the language of the law.

Speech is an event (Ricoeur 1981:167). This is especially so in appeal decisions where there are designated speakers and designated hearers. The judges are the authoritative speakers; they are also authoritative interpreters of the stories that have been narrated in the court. This discursive activity has the effect of inscribing the 'truth' that emerges from the judicial knowledge into the hegemonic structures of

patriarchy that exist in Ireland. Foucault argues that a ‘discourse’ can be said to set out not what is true and what is false but what can have a truth-value at all (Foucault 1971: 216). In Foucault’s account of discourse/s he refuses to attribute its ultimate features to the conscious intentions of speakers. However judicial discourses are anything but accidental or unconscious. True, they exist in relationship to a structural regularity i.e. ‘law’, and they must then be guided, constrained and organised by the rules of that structure. Nonetheless this argument is weak as we shall see that change and choice are possible but seldom availed of. Using the theoretical lens of social construction and the methodological tool of discursive analysis this chapter demonstrates how legal authority uses a variety of discursive repertoires to resist the challenge of new knowledge about the responsibility for and the effects of, child sexual abuse. Although judicial discourse is often carried out in an interactive context this does not mean to imply that it involves *interactional discourse*. Rather my analysis shows how all the actors enter into the domain of the judge who is in a position to assess them, to construct and represent them and to reconcile the different perspectives as s/he moves toward the legal resolution of the case.

9.2 Legal framing of the offender

In the context of sentencing men who have been found guilty of sexually abusing children we seek to understand the key discursive constructs that judges employ in sentencing the offender. Do they see the offender as a victim? How do they account for the abuse of power exerted by the offender? In their efforts to be socially ‘just’ do they minimise the crime of sexual abuse and reduce the level of culpability? Or are the judges acting out from a patriarchal mindset, that enables them to minimise the ‘harm’ to young children? Who is the offender and how is he legally constructed?

Within the framework of child sexual abuse there are two main actors, the offender and the victim. In the context of the Appellate court, anything that is known about the offender is seen through the statements of the victim, except in the case of sentencing and while every case in the data set was examined, it was the appeals relating to sentencing decisions that produced the major discursive constructions of offenders. Thus, the construction of offenders lies largely with the legal personnel, counsel for the defence, the prosecution and the sentencing judge. The strategic use of language is central to these constructs. Using the format devised by Coates (Coates and Wade 2004) I identify discursive practices that work to conceal the level of the crime (and therefore the harm) or that mitigate the offenders' responsibility (or culpability).

There are six ways in which the offenders' culpability is diminished by the legal personnel in the Appeals cases studied: minimising crime, the guilty plea, normalising perpetrator, dysfunctional family, character and offender as victim. These are discussed below in order of importance as they feature in the appeal cases reviewed.

Minimising crime is achieved by framing the offender as less 'bad' than he could be. For example, suggesting that 'He was not a paedophile'; 'This is a one-off incident'; 'There was only one victim' are ways of constructing the offender as not committing a 'serious' crime. This occurred to some degree in 48% of the 191 cases reviewed. For instance, when D.H.⁸⁹ appealed to the Court of Criminal Appeal against the severity of his sentence his counsel pleaded that although he had a control over this abused daughter he did not have a similar relationship with other members of the family. They argued that there was no evidence that he was a danger to others, or that he was likely to re-offend. In other words, this offender had not committed a crime that was problematic for society in general. The trial judge had noted that 'he was *just an*

⁸⁹ DPP v DH [2000 CCA], unreported, 2591–2606

abusive man who took advantage of a situation’, implying that ‘an abusive man’ cannot be categorised as negatively as a paedophile or a child sexual abuser.

Although this offender had physically and violently abused his daughter for years during her childhood, this particular crime took place when she was twenty five years of age. It was perpetrated without violence. The judge acknowledged that the victim ‘was still caught mentally in a web of control’ but noted that in the case under review ‘there was no physical violence’. This ability to minimise the crime of the offender, by focusing on certain aspects of the case and away from others, is a feature of judicial decision making in the appeal cases. The offender had been violent and abusive to this girl throughout her childhood. Yet she submitted to his sexual coercion as a learned response as an adult. The case was argued on the adult incident of abuse, without reference to the history of the relationship. The strategy employed is to acknowledge the offender as violent and abusive but then to present the case largely in terms of single separate incidents. The linkages between incidents and the overall context within which the abuse evolved are sidelined.

In another case⁹⁰ the trial judge determined that ‘*The video evidence produced has been so disgusting that I...couldn’t go through with watching ten minutes of it*’, but the appeal court did not ‘discern any additional factor over and above what emerged in the facts outlined to the court’, implying that the facts themselves were not quite so ‘disgusting’, albeit the offender had raped one boy and committed different types of offences with different degrees of depravity on five young boys. The strategy here is to appeal any attempt to construct the act or acts of abuse in terms of revilement. The terms used are passive and have the effect of distancing the offender directly to his actions:

⁹⁰ DPP v. G.McC. [2003 CCA] , unreported 4030–4053

'the accused drove into a laneway in Dublin and had sexual relations with the injured party in his car and it would appear that it was as a result of this act of intercourse that the injured party became pregnant'

and

'He fondled the complainant in an indecent fashion; this was done outside her clothes' ⁹¹

The use of such linguistic devices as the euphemism 'fondled'; the introduction of doubt - 'it would appear' - and the recourse to the nominalisation 'act of intercourse' has the effect of downplaying the assault. It conceals the abusive nature of the actions, the harm that is being perpetrated and thus the severity of the crime. In this way, it can be seen as potentially mitigating the enormity of the crime that has been committed by the offender.

When an individual is accused of perpetrating abuse he has the option to **plead guilty** or to dispute the charge. Judges have no option but to take a plea of guilt into account, and a guilty plea is cited by the judge in forty five per cent of the cases reviewed. To benefit from the maximum discount on the penalty imposed by the judge a defendant must have admitted his guilt at the earliest opportunity. The rationale is that the offender has the welfare of the victim in mind when acknowledging guilt. This benefit to the victim is hugely increased when the case is about a sexual offence. 'It is settled law that an early admission is a mitigating factor in the offence of rape...'⁹² *I have no doubt that in cases of this kind such pleas (of guilt) are probably more valuable to a victim than would be the case in other types of offences*⁹³. Although some of the offenders immediately accept responsibility for their crimes many may do so because of the benefits that accrue to themselves. This is easily identified:

⁹¹ DPP v. Z [1995 CCA], unreported, 2198-2216

⁹² DPP v M. [1994] 3.I.R. 514-525

⁹³ DPP v O'Dowd [2002 CCA], unreported, 4311-4314

‘It has to be born in mind that this comes before the Court on a plea of guilty...’ yet he continues ‘it is clear from the evidence that I heard that during the course of the assault on the injured party in this case she resisted,I do not believe the assertions that were made at different stages by the accused to the effect that at some stage he thought that what was going on was mutually agreed consent....I cannot believe that that aspect of the statement is true’ .(DPP v. O’Connor [2002])

Obviously, although the offender did supply a plea of guilty, this would appear to have been at variance with other aspects of his testimony cited in court. Judges understand the difference and distinguish between the two types of plea: *‘as someone said he put his hands up and he completely surrendered from the very beginning: it was not like a late tactical plea of guilty’*⁹⁴. Judges have an option as to the interpretation they can make of offenders who plead guilty - *‘his plea of guilty came very late in the day’*⁹⁵. When this case came to the Appeal Court, the Appellate Judge noted the difficulty that the trial judge had had in accepting the belated recognition of his guilt on the day the sentence was about to be imposed. Nevertheless, a guilty plea of whatever provenance is almost invariably accepted as a mitigating factor. It becomes clear in the next case⁹⁶ I discuss why this might be so. In this case the judge is furious with the offender for pleading guilty at the last minute. The jury had been gathered and the two girls and their families were in court. The defence team withdrew, returning with a, now changed, plea of guilt.

‘The upshot in this case is that the two girls and their family had no knowledge, much less assurance in advance....Nevertheless, the accused must get credit for the plea, in saving the state, in addition to, of course, trauma for the girls and their family - twenty three witnesses and what could have been a protracted trial’.

(DPP v. W.N⁹⁷.)

⁹⁴ DPP v Charles O’Connor [2002 CCA], unreported, 4295–4298

⁹⁵ DPP v. Karl Heinz Grummer [1999 CCA], unreported, 2409–2410

⁹⁶ DPP v WN [2003 CCA], unreported, 4201–4206

⁹⁷ DPP v WN [2003 CCA], unreported, 4201–4206

The offender is acknowledged for accepting his responsibility even belatedly. Scant regard is given to the victim whose complaint is simultaneously reframed in terms of effacement, and whose rights to the validation of her claim are perfunctorily reframed as unnecessary. The victim is denied her day in court and moral vindication in favour of the pragmatic resolution of the case.

The deployment in court of factors such as psychological problems, physical infirmities and of the possibility of **normalising the offender** all have the effect of shifting the focus away from the wrong done to the victim and on to the psychological and physical shortcomings of the offender or his potential for rehabilitation:

‘the learned trial judge failed to give adequate consideration to the mental disorder of the applicant induced by alcohol abuse’. ‘The applicant had an alcohol problem in the 1980’s (when the crime was committed) but has dealt with the problem and used the experience to develop himself’⁹⁸.

In this representative case, the judge implies that the crime was not a deliberate choice of the offender; rather that alcohol caused a non-deliberate action. Framing the offence within the domain of sexual compulsion and the offender as a man with psychological difficulties as the judge does in the next case also removes responsibility from the perpetrator, and ameliorates his offender status:

*‘It is said of him by a psychiatrist that his psycho-sexual difficulties have a compulsive undertone which his rational facilities are unable to control, but that this could be significantly diminished if he were to obtain appropriate treatment’*⁹⁹

The offender is not held responsible for his crime; he is only to be penalised for possessing inappropriate sexual urges that are no fault of his own. Even the language that judges use in this construction: *‘The appellant was unable to control his instincts*

⁹⁸ DPP v RB [2003, CCA], unreported, 2871–2891

⁹⁹ DPP v JD [1997] IEHC 133 [Online] Available <http://www.bailii.org/ie/cases/IEHC/1997/133.html>

*and allowed himself to commit very serious acts of abuse against his sister'*¹⁰⁰ puts the action as a complex interaction between the offender's psyche and himself obscuring the true nature of the crime. In another case, the offender is seen as being confused about his own sexuality which exonerates him to some degree of his crime:

*'...at the time the offence was committed, he was only 15 years of age and was understandably in a state of confusion over his sexuality... (The judge) had to balance the undoubted fact that there was violence involved in this crime with the fact that this was an isolated event committed by a 15 year old who was trying to come to terms with his homosexuality'*¹⁰¹.

This kind of reasoning is reminiscent of biological determination that simultaneously releases him (and all men) from responsibility for their crime. Lynne Segal (1987) proposes that the problem is particular frames of masculinity; that male sexual violence is not about innate violence, or uncontrollable sexual urges; rather it is about social roles and gender. This is confirmed by Scully and Marolla (1993) who studied convicted rapists and found that men who abuse women and/or children exhibit a range of motivations, from wanting to control women to the excitement of impersonal sex, thus revealing that the cultural roots and attitudes towards sex and aggression are embedded in some discourses of masculinity. These then are inadvertently supported by the judiciary.

In forty per cent of the cases reviewed the social context of the offender was cited as a mitigating factor. The abuse was seen to stem from the offender having come from a **dysfunctional family** background, as the following excerpts from cases reviewed indicate:

¹⁰⁰ DPP v JR [2001 CCA], unreported, 4281-4287

¹⁰¹ DPP v GD[2004] IECCA 17, [Online] Available <http://www.bailii.org/ie/cases/IECCA/2004/17.html>

*'His first wife died of cancer in 1956 and he was left to care for three young children'*¹⁰²

*'he came from a home where violence was prevalent and where he was systematically victimized by his own father'*¹⁰³

*'Tensions developed when the Applicant became unemployed. This may have been aggravated by the fact that he and his wife had different interests. Certainly she had a greater wish to socialise than he did'*¹⁰⁴

*'The applicant himself suffered from a violent father and unhappy home life when a child. He repeated this violent behaviour within his own home...his behaviour echoed that of his own father...this case illustrates learnt abusive behaviour being repeated down through the generations.'*¹⁰⁵

*'The accused is a farm labourer and the complainant is his youngest daughter. Her mother died in January, 1989, after suffering from multiple sclerosis for approximately 10 years. Towards the end of her mother's life, when his daughter was approximately 9½ years old, the accused began sexually abusing her.'*¹⁰⁶

The offender's actions are judged to have been determined by his past and he is therefore not an active agent, capable of choice. Imputing elements of blame to the wife who dies; the wife who doesn't sit at home and the violent father serves to rationalise at some level the actions of the offender. I do not mean to argue that young boys, when abused as children themselves are not more prone to repeat this behaviour, although if there is a cycle of violence, it is gendered, and that in turn requires explanation. My point is that the judiciary, while acknowledging the social context, uses this knowledge in an inappropriate way when constructing the offender. Judges are frequently concerned with the determining factor of the past on an offender. In this case, the judge sought to frame the problem in terms of addiction. He says:

¹⁰² DPP v PH [2002 CCA], unreported 2088–2099

¹⁰³ DPP v JD [1997] IEHC 133 [Online] Available <http://www.bailii.org/ie/cases/IEHC/1997/133.html>

¹⁰⁴ DPP v. R. [1999 CCA], unreported, 2117

¹⁰⁵ DPP v DH [2000 CCA], unreported, 2591–2606

¹⁰⁶ DPP v T.B. [1996], 3.I.R. 294–299

‘Without detracting from the seriousness of the offences, the nature and the violence of these offences show a pattern of addictive behaviour in a dysfunctional family. This jurisdiction has been considering a new jurisprudence in Drug Courts to treat certain drug addicted offenders. As yet there has been no relevant scheme to address issues of addictive patterns, or learnt patterns of domestic violence, through a system of restorative justice’. (p11)

Defining abuse as an illness that has developed from past experience constructs the offender in a quite different light. It also raises questions as to whether rehabilitation is possible. The judges place themselves in an uncertain situation when they are asked to make decisions in this regard:

‘Whether one is ever cured of these propensities; whether it is ever possible to be sure that a person is cured is questionable. However, he has undertaken to stay away from the area of these misdeeds and one hopes that he will have learned his lesson and will not re-offend’¹⁰⁷.

The judge navigates a line between illness and agency creating the anomalous situation (from the point of view of the victim) where responsibility may not be fully laid at the feet of the perpetrator.

In many cases, certain **character attributes** are deemed highly relevant to the processing of the case and the apportioning of punishment. For instance, remorse is considered very important. Once the offender expresses remorse the seriousness of the offence is reduced in the eyes of the judge. Unlike a crime that occurs in an instant- a crime of passion, for example- if abuse has continued for many years it is more difficult to accept that expressions of remorse are genuine. In fact, abusive behaviour must be seamlessly integrated into the life of the offender- it must be normalised- in order to secure the non-disclosure of the child victim. Nevertheless, judges look favourable on expressions of remorse even by serial sexual offenders, and use their power to mitigate sentences in such cases.

¹⁰⁷ DPP v Quinn, [1998 CCA], unreported, 2114–2116

When a judge sentences any offender he has to take into account the character of the individual. In many cases, many years have passed since the crime was committed. This allows the court to assess the impact of the crime on the victim and it also gives a broader view of the character of the offender. In other words, unless the perpetrator has been involved in indictable crime in the interim period the judge can truthfully assert that he (the perpetrator) ‘only’ committed crime during one period of his life. It is not uncommon for the judge to note that there was ‘only’ one victim or ‘one’ incident many years ago and nothing since:

*‘The fact that the applicant now falls to be sentenced for these events thirty-four years after they ceased...this is an immense.....fraction of the lifetime of an individual...we **are entitled to presume** that (the applicant) appears not to have indulged in activities of the same sort over the twenty-seven years for which he continued as a school teacher’¹⁰⁸.*

This constructs the abuse as an anomaly, out of character, with little to no chance of reoccurring. Judgements invariably reflect this principle of a ‘once off’ in terms of the severity of the sentences given.

It is noteworthy however, that judges are sensitive to the duplicitous nature of many perpetrators of child sexual abuse. For this reason, they may exercise a healthy scepticism in regard to character references that come before the court for consideration. In one instance, a number of character witnesses gave testimony in defence of an offender:

¹⁰⁸ DPP v O’Connor [2003 CCA], unreported, 4299–4306

'Temptation seems to come to him rather than he looking for it'

'I firmly believe his actions, although mischievous, had no sexual intent and were misconstrued'

'a jolly, funny, witty guy'

*'A sound character and no threat to society. I hope this can give you some insight into his character'*¹⁰⁹

The judge replied: *'all those are worthy people but plainly they didn't know the half of it about this secret, private, other life this man was leading, ...debauching these girls in the way I have mentioned'* (p7). The Appeal court upheld the decision of the trial judge, showing that it is possible to make decisions that reflect 'common knowledge'. However, this is more likely to be the exception rather than the rule, as in many of the cases reviewed judges tend to operate within the constraints set by the principle of corroboration, the patriarchal cast of the judicial system as a whole and their own traditional biases. It is my contention that the system of justice would connect more closely to the norms and values of the society in which it operates, if legal reasoning reflected a broader body of social and experiential knowledge. In general, invoking good character as a mitigating factor serves to maintain a relatively low level of judicial sanction against the crime of sexual abuse.

Finally, the offender himself can be portrayed as **a victim**, as happened in one quarter of the cases reviewed. Constructing this identity for the offender has consequences. The sentence is generally reduced as a result and low sentences give a message to the victim that the crime is not serious:

'He is a married man with a wife and family. He has no previous convictions of any sort. He is somebody who had an occupation to support his family which he

¹⁰⁹ DPP v WN [2003 CCA], unreported, 4201–4206

*has now obviously lost. On any view, being convicted of this offence will have the most serious and permanent effects in his lifetime.*¹¹⁰

*'he has suffered enormously in his character and reputation....he has lost most of his opportunities of a social outlet...the phrase 'virtually a prisoner in his own house' ...his participation in his family's life, which seems to be very considerable has been interrupted and gravely impaired'*¹¹¹

*'He has suffered grievously. He has lost his business and, therefore, his livelihood. There was a time when it looked as if his family life was over as well. This man has lost nearly everything, his reputation, the respect of the community, his livelihood; almost his family'*¹¹².

The concern about the impact on the 'family man' is ironic. In most cases where the offender is constructed as a victim the notion of protecting the family unit is central to the decision of the court. These offenders abused young children and abused the trust invested in adults in these relationships. The hallmark features of the 'family man' are one who is responsible, rational and protective of those in his care. Constructing the offender primarily as a husband and father who has already suffered reveals a predilection on the part of judges to privilege the notion of the 'family man.' They seem more comfortable employing fixed rather than nuanced categories of identity.

An examination of the factors taken into consideration in sentencing the offenders shows that in general judges tend where possible to use such knowledge to tone down the offence. As with all discursive events the judgements are influenced by the dominant ideology of power (patriarchy, gender, sexuality). My analysis shows that the court readily accepts guilty pleas as warranting mitigation, and that judges where possible, reduce sentences when a dysfunctional background can be proved. The strategy of using the most abusive and violent cases as a 'straw man', allowed judges to

¹¹⁰ DPP V. O'Sullivan, [2002 CCA], unreported, 4380-4383

¹¹¹ DPP v O'Connor [2003 CCA], unreported, 4299-4306

¹¹² DPP v Z [1995, CCA], unreported, 2198-2216

determine that most abusive relationships ‘were not at the top end of the scale’ and this was used as a powerful mitigating tool. Where offenders are concerned the decisions made by the Appeal Court support the patriarchal power that feminists have identified as the root cause of sexual abuse.

9.3 *Legal framing of the victim*

I do not wish to be overly critical of the judiciary in my analysis. To do so would create an ‘us and them’ framework which would be inappropriate since the judiciary see themselves as pursuing a quest for truth and justice. The objective is to understand how they frame the issue of child sexual abuse discursively in their legal deliberations, and in this section, I do so in relation to their framing of the victims of abuse. Given the bureaucratic and often impenetrable nature of the criminal justice system victims have become alienated from the process, present merely as witnesses rather than as participants. In recent years, however, this has changed. Perhaps one of the most obvious factors in raising victim profiles relates to role of the media. Not only do they cover the investigation and trial of offenders they provide continuing exposure to the victim or the victims’ families, providing them with a platform to voice their opinions about the sanctions which should be imposed on the offenders and about broader criminal justice reforms, (Dignan 2004:15). The media also plays a significant role is constructing the ‘ideal victim’. The stereotypical ideal victim is vulnerable, innocent, powerless, and unable to fight back. Crucially, these characteristics construct the victim as someone who deserves sympathy and help (Christie 1986). The social and political consensus has changed to allow adult victims who report historical abuse to be accommodated within the ideal type, but only when they are perceived as ‘upright’, ‘rational’, and ‘blameless’. Frequently reported long-term effects of childhood sexual

abuse include depression and self-destructive behaviour, anxiety, feelings of isolation and stigma, poor self-esteem, difficulty in trusting others, a tendency toward revictimisation, substance abuse, and sexual maladjustment (Browne & Finkelhor 1986). Sometimes victims do not appear in 'ideal' mode; they have often led destructive lives and can be bitter, angry and frustrated. When the adult children of Joseph McColgan appeared in Court in 1997 the daughter was presented as a determined and 'brave' individual. As Senator O'Meara states:

'She was unable to confront her father until such time as she had built a life for herself, got a degree and gained a measure of self-belief and self-confidence. It is not unbelievable that a person would be so traumatised and damaged by the experience of childhood abuse as to be unable for many years to confront it sufficiently to take a legal action' (Dail Debates: 2000).

Sophie McColgan herself believed that she could only challenge her father if she was as educated as the professionals who had failed to protect her. Ideal-type victims like Sophie, who emerge from their experiences as though fired in the kiln of adversity, are rare. Generally adult survivors of child sexual abuse have been negatively affected by their experiences to the degree that they find it very challenging to act as advocates for themselves. How does this impact on the relationship between the judge and the victim?

In a study on judicial attitudes to victims Bumby and Maddox (1999) found that nearly all of the judges recognised the difficult nature of the victim testifying in a sexual offence trial, and the majority appeared to be implicitly supportive of protecting child victims during the trial process. A substantial percentage reported a belief that more attention needs to be directed toward addressing victims' rights, which is one of the key arguments I have made in the preceding chapters. Further, the judges tended to avoid holding child victims responsible for their victimisation, and they generally recognized

the comparable impact of victimisation by either female or male offenders. This finding reflects the rise in victim-rights advocacy that is also evident in Ireland. Concerns about the lack of state control of crime results in a lack of confidence in the system of justice and consequently a drop in reporting crime.

The trend towards moving the victim more centre stage within Court proceedings occurred towards the end of the twentieth century. In the preceding years, the situation was quite different. Then judges tended to operate in one of two predominant roles – either as accuser or as paternal protector, that is, they viewed the victim as either dangerous or dependant. I will here draw on a number of historical cases to illustrate this point.

When Maura Coogan, 14 years of age and living with foster-parents, went with her uncle to collect firewood in Powerscourt Wood, she claimed that her uncle ‘had carnal knowledge of her by force and against her will.’¹¹³ She did not tell her foster mother about her uncle’s behaviour but subsequently became unwell. At this stage she disclosed the rape; her pregnancy was confirmed by the local doctor. The uncle denied the claim and it was up to the jury to decide on the credibility of either the girl or the offender. The appeal was based on the judge’s charge to the jury regarding corroboration, as it was equivalent to the rule of practice which decided that a jury should be warned of the danger of convicting on the uncorroborated evidence of an accomplice:

‘In cases of rape the prosecutrix is not prima facie a discredited witness, as is an accomplice, nevertheless it has been recognised since the time of Hale that the jury should consider her evidence with particular care...’

(AG v Williams 1940)

Seven times, over the next ten years, this case is cited in support of the danger of uncorroborated evidence and the inherent *danger of believing the victim*.

¹¹³ AG v Williams [1940] I.R.199

Several times in the proceedings of the case of Maura Coogan, whether by defence, trial judge or appeal judges, there is an insistence that the young girl is not to be regarded as an accomplice, yet the ruling declares that she must be treated as one, belying the protestations to the contrary. In this and other cases, the judge's attitude is tantamount to blaming the victim as much as the offender, accusing her/him of colluding in the crime. This notion of 'mutuality', that children and young women 'want' sexual relations with an older man, was strongly critiqued by feminists, beginning with Brownmillar in her 'rape classic' publication *Against our Will* (1975). She rejected the term incest, because it implies mutuality, and this attack became the driving force behind the moral critique of accepted constructions of victim and offender.

In a second case, Eileen Frances Glynn became pregnant as a result of a relationship with Denis Dempsey. He however refused to accept liability for the paternity of her child. As she was under 17 years of age he was charged with two counts of unlawful carnal knowledge. At the trial Eileen maintained that they had had sexual relations 'twenty times or more' and that he was the only man she had ever slept with. While Dempsey was found guilty Glynn was the target of moral opprobrium:

*'Evidence shows that this girl, young as she was, was just as much to blame as the accused, if not more so, for the criminal manner in which their relationship culminated. She obviously welcomed his attentions; on some of the evidence it was she the applicant ...was obviously a willing participant in the acts of sexual intercourse'*¹¹⁴

The youth of the girl, in this case, was not cited as a cause of her 'victimhood', but instead was a cause for scandal. The judge declared that she was more to blame, although he did not explain why this should be so. Victims who brought their case to

¹¹⁴ AG v Dempsey [1966] I.R. 288–295

Court could not fail but to glean from rulings such as these that the shame they experienced would be reinforced rather than ameliorated in the court of law.

Questioning the sexual activity of the victim is a means of reducing the gravity of an abuse charge because it has the potential to construct the abuser (rather than the abused) as the primary victim. When the defence put the question, '*Certainly the girl was wronged. The question is 'Who did it?'*'¹¹⁵, they situate the young victim in a different frame. In a similar vein, the popular discourse of 'protecting girls from themselves' which implies that young girls act in tandem with their abusers, may also undermine charges of sexual abuse. The very point of the law is that older (i.e. more responsible and accountable) individuals persuade young girls to act as they do. Inherent in abusive relationships is the asymmetrical knowledge and power between the two parties. Yet, in an important judgement the Supreme Court subtly shifts sole responsibility from the older party and onto the potentially complicit victim:

*'The effect of the section (Section 2 of the Criminal Law Amendment Act, 1935) was not only designed to protect young girls against men who attempted to have carnal knowledge with them, but also to protect girls against themselves'.*¹¹⁶

This interpretation was endorsed in 2004 when a case dealing with three young men came before the Court. The case dealt with the issue of whether the men knew the age of the young girl:

In Coleman's case -- the Complainant says she told him she was under 13. He says she told him she was 16 years old.

In Molloy's case -- the Complainant cannot remember telling him her age. He says Coleman told him the Complainant was 17 and he thought she was 17.

In Grace's case -- he says the Complainant told him she was 17 years.

¹¹⁵ AG v Dempsey [1966] I.R. 288-295

¹¹⁶ AG v Ryan Cormack [1960] I.L.T. 165-168

The judge rightly noticed that the issue of age was discussed; therefore the men were obviously prepared to take the risk. However he argued that:

'The offences in issue in the present proceedings have nothing to do with vicarious liability (that is, was the victim responsible) -- they are concerned with the stated actions of the Applicants -- actions prohibited by law for the protection of young girls from themselves and from lustful men'.¹¹⁷

Beneath a discourse of protection lies a discourse of blame. The issue of age is a vexed one for the judiciary and a source of ongoing confusion. The law is seen as problematic by judges, and may lead (unintentionally) to oblique criticism of the victim.

Feminist advocacy has been effective in changing judicial discourses about victims. Combining child protection with anti-rape knowledge has allowed a new framework to emerge for the understanding of child sexual abuse. As narratives of abuse became more common, the shared experiences created a collective story which validates and reproduces a grounded knowledge from the perspective of the survivor of abuse. For victims to achieve any objective presence in the court they must firstly establish a collective identity as 'innocent' and as victims of external forces rather than as colluders in the practice of child sexual abuse.

In contrast to the accuser role, the judge may adopt a protector role toward the victim of child sexual abuse. This is particular so in cases where the victim is a young child i.e. does not appear as an adult. Michael Coughlin was convicted of raping Geraldine in 1955:

'She was sore and could hardly walk'..... The mother slapped her to let her know that she had done wrong and then examined her. The Doctor who examined her found that: the child 'was frightened, a kind of shattered, that is the word I would use to describe her demeanour'...It was quite obvious, metaphorically speaking that the life had been frightened out of her, to put it in a popular way'This Court is of the opinion that prosecutions in cases involving the carnal knowledge of young girls should seriously consider the possibility of being able to

¹¹⁷ Coleman v. Ireland & Ors [2004] IEHC288 [Online] <http://www.bailii.org/ie/cases/IEHC/2004/288.html>

*sustain a conviction without the necessity of calling such young girls as witnesses and thereby exposing them to the ordeal of having to recount in Court what must have been for them a terrifying experience.*¹¹⁸

In this case, the judge was aware of the trauma that ensues from recounting a shocking experience. He took the time to show compassion to the young child, concerned about the suitability of the procedures in place. This judge considered the possibility of new modes of operation. However, the judge's empathic response to the victim was not supported by the Appeal Court. In the course of the case, the trial judge refused to allow the defence team to badger the 11 year-old victim on the stand. The offender, she claimed,

'took her down a lane, and there assaulted her, putting his hand under her clothes, pulling down her knickers and scratching her.....she got away from him and got to the top of the lane; he came after her and caught her;...she was crying as she went towards the shop. She saw a girl named Kathleen Doyle in the shop. When she came outside she made a complaint to her, telling her the story of what had happened to her.....

The young girl got mixed up about who she told, when she told them etc. and the counsel wanted to press her recollection, but *'the learned Judge disallowed the question on the ground that it was not fair to the witness having regard to her age'*. The Appeal Court rejected this view arguing that *'it is proper for counsel.....to press the witness.....and the propriety of such a course is not affected by the tender years of the witness'*. The Appeal Court took the position that the victim was a witness, and not an individual with particular characteristics. In another case, however, having decided that a trial was incorrectly handled, they had the option of ordering a re-trial. This time they gave priority to the victim. They declared that:

'The young child was very young at the time of the trial and is still very young, and it is quite clear from the transcript that she suffered an unusual degree and extent of trauma by virtue of the trial itself and,

¹¹⁸ AG v Coughlan [1968] 326-332

indeed, counsel on behalf of the accused felt obliged, in the interest of humanity, to cease in effect his cross-examination of her.¹¹⁹

The accused man ‘was a person without previous conviction or bad character’ and it was deemed in the interests of justice not to order a re-trial. The concern of the Court is rooted in both altruistic and organisational reasons. In this case therefore the sympathy for the child benefited the offender as much, if not more than the victim. This subversive aspect of judicial concern is evident again in the next case. This case concerned a teacher and member of a religious order who pleaded guilty to a number of counts of buggery, indecent assault and sexual assault. The victims, six young boys, ‘*have been disturbed and damaged and will require continued psychiatric counselling*’. Outlining the effects of the assaults on the young boys and detailing them allows the Court to give extra ‘points’ to a guilty plea. Noting that:

‘one child is very disturbed and is a damaged child and will require longterm and regular counselling and it is feared that he will have longterm negative effects resulting from the abuse; one child has serious continuing psychiatric problems and will need regular on-going counselling with a fear that he will have long term negative effects resulting from the abuse; and one child has equally serious problems requiring long term counselling together with a serious guilt burden associated with a long period of abuse going into years’¹²⁰

The plea of guilty that followed acquired a high value.

‘...many victims of rape endure considerable worry about the prospect of giving evidence in Court and refuting allegations that they are not telling the truth’

Paternalistic attitudes to young victims can be somewhat dismissive. In the case of ‘Z’¹²¹ the accused pleaded guilty and was sentenced to seven years penal servitude on each of three counts and these were to be consecutive sentences. The severity of the sentence

¹¹⁹ DPP v Patrick Anthony Synnott [1992 CCA], unreported, 4583–4590

¹²⁰ DPP v M [1994] 3 I.R. 306–320

¹²¹ DPP v Z [1995, CCA], unreported, 2198–2216

was appealed. The victim was fourteen years of age, pregnant and suicidal. The offender and his family lived very close to the victim and her family. He had a wife, an adult son and teenage daughter (who was a close friend of the victim) and a baby girl. The victim's family consisted of her father and mother as well as a brother. There had been a very close relationship between the two families. The case provoked massive media attention because it involved the contentious issue of abortion. The offender had pleaded guilty at the last minute, initially denying that he was the father (thereby imputing that the victim had sexual relations with more than just him). The Judge insisted on referring to the offender as 'the accused' rather than 'the offender' even though he had acknowledged his guilt. The judge noted that

'The complainant had moved from the address that they had resided at the time. (She) had moved from her school, as indeed so had her brother. It had a very bad effect on the schooling of the complainant and the distress that she endured had a knock-on effect on the family at large.....She needed psychiatric help, also needs a course of medication. To enable her to regain a normal healthy joie de vivre to have the confidence to enjoy games and dancing and progress academically'

He then juxtaposes her problems with those of the offender:

'The accused was about 41 years of age at the date of the offences; he had come from humble origins and had progressed well in his business as a self-employed trader (He was a taxi driver) ...There was placed before the learned trial judge, as well as before us, a probation officer's report as well as a psychiatric report in respect of the accused. Nothing emerges from these except to give a portrait of a hard-working, good family man who had never been in trouble before and who had surfaced from humble origins to a position of some affluence'

The victim's problems involved school and dancing and games, the offender's concerned serious issues such as work, business, wealth; the hard-working good family man versus the young and frivolous girl. The paternal protective judge identifies with the offender, in the sense that he understands the ramifications of a harsh sentence; at the same time views the problems of the girl as relatively minor. Habermas believed that 'communicative rationality underlies action that is aimed at mutual understanding,

conceived as a process of reaching agreement between speaking subjects to harmonize their interpretations of the world' (Deflem: 1996). There is no sign here of understanding, of recognising that the actions of this offender affected the victim to the same degree, and crucially, with significant consequences for her life path.

The Victim Impact Statement was analysed in Chapter 8 in terms of how it was reasoned about, and the concerns about introducing emotion into the rational field of play. Here it is examined in terms of how it helps to construct the victim him or herself within the court room. The victim impact statement (VIS) in Ireland was given statutory footing in the Criminal Justice Act 1993 – designed to describe the personal impact of crime on the victim's life, physically, emotionally, psychologically and financially. It was largely the outcome of the advocacy described above - social movements building new knowledges and changing the culture that had hitherto prevailed in law. Judges, however, were of the opinion that victims already had a voice. Mr. Justice Flood insisted that

*'It was formerly the practice of the Courts, in the course of the sentencing phase of a criminal trial, to enquire of the member of An Garda Síochána giving evidence for the prosecution as to the effect of the crime to which the accused had pleaded guilty, or been convicted by a jury, upon the victim. This evidence was, in general, taken into account by the Court in sentencing that accused'*¹²²

Justice Flood is at pains to point out that new legislation will allow the subjective view of the victim to be heard along with '*a medical report from a consultant psychiatrist ...an independent expert.....*'(P.2071). These reports, he declares, will be presented as documents unless the Court decides that the victim should appear in person. Here, the judge retains his power of control. In this particular case the victim asked that his

¹²² DPP v M.C. [1995 CCA], unreported, 2061–2081

statement be kept confidential and the judge firmly declares that *'it is for the individual trial judge to determine the nature and extent of the disclosure of any matter contained in a victim impact statement'*. In theory the victim was given power of voice. In practice, that power remains under the control of the judge.

When Mr. Q. was withdrawn from a social studies course because his history of familial abuse was disclosed to the V.E.C. (City of Dublin Vocational Education Committee) he brought the V.E.C. along with the Eastern Health Board to Court. In the contestation of his rights the circumstances of a dysfunctional family came to light. It also showed how different institutions operated separately, not using the interdisciplinary model that was advised by the Kilkenny Incest Investigative committee. It has been acknowledged that a key factor in the identification of children who have family and behavioural problems is a formal liaison between schools and health boards at local level, (Kilkenny Incest Investigation 1993:108) The recording of accurate, comprehensive and relevant material was also emphasised, which would necessitate systematic co-operation between officials of the Departments of Health, Education and the Gardai. However, communication between professional staff in child protection was acknowledged to be a complex issue, and many recent reports, including The Kilkenny Incest Investigation 1993 and The Interim Report on the Joint Committee on the Family 1996 found that the sharing of information on these cases left a lot to be desired. (South Eastern Health Board Kilkenny Incest Investigation 1993:110). In this particular case

'many complaints were made to the fourth respondent (Health Board) and various matters came to its notice about the alleged conduct of the applicant towards his own children and also towards two of (partner's) older children. Although some of the complaints are of a grievous nature, none appear to have been put to the applicant at any time prior to 1996; no complaints were referred to the police...for investigation

*not did the fourth respondent seek to take any of the applicant's children into care by reason of his alleged misconduct towards them*¹²³.

Subsequently it became clear that Mr. Q was known to the Eastern Health Board because they had received 'numerous allegations.....relating to the physical abuse of children, child sexual abuse, rape and the failure to co-operate with services in the best interest of his children'. Thereafter a long and disturbing list of problems are filed, including physical, sexual and emotional abuse and neglect, some of which are known because of police reports and reports from the ISPC. In spite of **20 years** of such allegations, no concrete action was taken to protect the children. While the action is ostensibly about the father's ejection from his social studies course, the judge seems inclined to give him the benefit of the doubt regarding the abuse of his children. The judge notes that:

...when K. was about 18 years of age, frequently living rough and leading an immoral life, she was brutally thrashed by her father with a buckled belt. There is a photograph taken in hospital immediately afterwards which shows imprints of the buckle on her back and arm. The applicant has admitted having seriously beaten his daughter and has expressed regret for his conduct. In doing what he did, he may have been motivated by two factors. First,(there was) severe on-going provocation arising out of K's behaviour which caused him to lose control. Secondly,(there was) his misplaced belief that his daughter required physical chastisement for her persistent wrongdoing. If true, this does not justify the applicant's brutality, but it would offer a credible explanation for it which is relevant to an assessment of his culpability in that regard'. (p.106)

He also excused the father from any responsibility regarding his other daughter's sexual abuse:

¹²³ M.Q. v Gleeson, CDVEC, Chance and EHB [1997] 4.I.R. 85-114

'There is medical evidence that A-M was sexually abused. It is credible that the abuser was a man with a record of sexual crime who occasionally 'baby-sat' in the G. home. He is likely to have had ample opportunity as well as the propensity to do so.' (p.106)

No criticism of the father was forthcoming for allowing a 'man with a record of sexual crime' to baby-sit his children. The court found that the father should not have been removed from the course which would eventually lead him to be a professional social-worker.

'There is a reasonable argument to be made that the removal of applicant from the play centre in his final week of instruction, was in the circumstances unjustified and that whatever his past history with children may have been, it has also been established that the children at the play centre were at no risk from him'.

Having dealt with the matter of compensation the judge insists that the man should be allowed to finish his course and then, with remarkable understanding for this man he declares:

'Those from more privileged sectors of society who are cushioned from many of the problems which were part and parcel of the applicant's life, should be hesitant in condemning what appears to be his laudatory ambitions in very difficult circumstances. However....the applicant's history as a family man since 1974 has in it numerous incidents which in all probability can never be either proved or disproved, but collectively point to a reasonable conclusion that he may not be a suitable person for work involving care of children'.(p.113)

This final concession by the judge was made only after the applicant won a moral victory, which undermined all the work of the institutions involved in the protection of children. Here again, the rule of law is not geared towards the protection of children; indeed the judge was clear that the eldest daughter (who had lived a life in a desperately dysfunctional family) severely tried the patience and control of the father. This case shows how patriarchal understanding operates allowing for the judgement of a man's abilities and rights differently in the public and private spheres:

'The institutionalization of oppression is facilitated by the bifurcation between public and private. This justifies the law's protection of

individuals in their business affairs and other 'public' settings, while it shields private violence that harms mainly female victims'

(Bartlett: 1999)

Critically, however, the framing of the victims here play an important part in supporting the judicial consideration of this man as a victim of social forces. He was 'provoked' by the child's behaviour, which seems a credible explanation to the judge. While there were '*numerous allegations.....relating to the physical abuse of children, child sexual abuse, rape and the failure to co-operate with services in the best interest of his children*' these were dismissed as not likely to ever be proved or disproved and so they of necessity disappeared from the judicial analytical equation. The patriarchal value system is structured around the issue of control. All women are not subsumed into victimhood, even in a patriarchal society. However, when the man's daughter rebelled against his control her resistance was the factor that comes to justify or at least mitigate her father's abuse. While male violence against women is carried out by individuals, such individual acts are part of a pattern of male understanding about their roles and their rights. In this case we can see how the system supports such unequal relationships and particularly how it is assumed that men ought to have total authority within their own families.

9.4 Toward a more victim-centred legal approach

Notwithstanding the persistence of patriarchal values there have been developments in the legal system in terms of the awareness and treatment of victims. Stemming from The United Nations Convention on the Right of the Child, [1991], legislation was enacted in Ireland, following the example of the courts in the United Kingdom, USA and Australia. This was also due, in part, to the rise in victim awareness outside the Courts. Technological advances were harnessed to allow child witnesses to

give evidence via a live television link. Advocates for child victims claimed that the child was vulnerable, intimidated and, in some sense, in an unequal position when they stood as witnesses in the court. The Law Reform Commission recognised that: *'in an imperfect world, there will always be defending advocates who will seek to harass or bully a child witness in a way which is not only psychologically harmful to the child but may also be damaging to their own client's case'*(LRC: 1990). Children now were treated in a special way. Their presence in the legal conflict became significant, i.e. the Courts attempted to accommodate them rather than bracket them within the system. For example, in one case reviewed the usher who accompanied the child in the video remote witness room was directed not to speak to the child about the case but:

*'These instructions also apply during any interruption due to the witness becoming distressed or unable to continue giving evidence. However, if during any such interruption the child begins to talk about the case, there is no reason why you should not listen to the child and make comforting gestures to ease the child's distress. While you must at all times maintain a neutral role, a sympathetic manner will provide comfort and reassurance to the child, and help him or her to give their evidence clearly and with a minimum of stress'*¹²⁴

The significance of reports such as this and of the new legislation was that a divergence occurred in the attitude of the judiciary toward young child victims and adult survivors. From this point (1995) onwards all the Appeal cases that deal with children reiterated the vulnerability of the child in the legal process. There was now a recognition that care must be exercised during proceedings when the victim was a child; that the legal prosecution and defence counsels must act to a higher ethical standard because the judiciary acknowledged the difficulties for children inherent in court procedures, especially in the issue of sexual abuse.

¹²⁴ Algernon White v DPP [1995] 2.I.R.

After the passage of the 1992 Act cases involving young victims were seldom appealed, indicating a new reluctance on the part of all legal parties to drag the child through lengthy legal processes. Three of the cases that do make the Appeal Court involve Health Boards and the appeals are based on conflicts between the parents or the accused and the Health Boards rather than questioning the credibility of the child. This does not mean, of course, that no cases regarding the abuse of young children come to the Courts; rather it means that the issue is resolved firmly at one sitting. The only case we have where the judge comments on the credibility of the child is that of the DPP v Leacy¹²⁵. This case was brought because *'a lady called Pauline Fallon, a girlfriend of a brother of the appellant had had a conversation with the mother of the child complainant in which allegedly the mother conceded that the appellant (offender) was not guilty of the offences)*'. The other ground of appeal was that the Judge should have directed the jury to bring in a verdict of not guilty. However the three-man Court of Appeal asserted that although some of the evidence was inconsistent (from the child) the trial judge was correct in saying that almost always credibility issues were peculiarly matter for the jury. *'It was for the jury to work out in this case whether the complainant was telling the truth as to the essential elements and in that connection as to whether any of the inconsistencies destroyed her credibility'* (p.7). This judgment represents a significant shift in judicial attitudes. Rule-bound discourses that had predominated previously were replaced by a willingness to look at the broader picture, to allow the voice of the child to be heard, albeit not in perfect pitch. This shift can be explained by the popularisation of child-centred discourses in the broader society that then diffuse into legal knowledge.

¹²⁵ DPP v Leacy [July 2002 CCA], unreported, 2136–2143

Until the last decade victims did not have a statutory role in the criminal process. They were therefore powerless in how they were constructed by the judiciary and legal actors. This construction was frequently of a child who was both complicit and colluding, or as a powerless victim. Discourses of collusion have all but disappeared but there remains a discursive framework that constitutes ‘victim’. If the victim fits this framework exactly the judiciary know how they fit into legal knowledge. As knowledge of the effects of child sexual abuse on victims and as the experience of child sexual abuse cases (‘the modern avalanche of child sexual abuse cases’)¹²⁶ grew, the boundaries of legal knowledge expanded.

By constructing the victim as powerless through a paternal discourse the child takes on that identity and then can be understood. ‘Paternal’ today, invokes a guiding and supportive relationship, rather than the earlier one of a more severe and judgmental character. A shift has occurred in the position of the judge allowing him to understand the victim, and to appreciate what it means to be a victim of sexual abuse. This shift has occurred because of the knowledge that has accrued through victim impact reports, media reports, expert knowledge and the sheer volume of cases that have gone through the courts. Judges have come to see the victim in a different light. While the judiciary is empathic with the child, there is still some way to go in terms of the framing of the adult survivor of child sexual abuse.

9.5. Conclusion

In this chapter the theory of social construction, viewed through a discursive lens, has been deployed to show how concepts of patriarchy, gender, institutional knowledge and power are connected in judicial discourses of sexual violence. In the analysis of

¹²⁶ Eastern Health Board v. M.K. [1999] I.R. 99–148

judicial statements from a range of representative cases I have striven to understand the effect of discourse and the way it constructs the key players: offenders and victims.

Throughout the chapter the spectre of the victim is always present. Although the cases have the offenders as their focus all discourses are made in relation to the victim. The constructions analysed above paint a picture of individual men, often pillars of society and good family men, who act the way they do because they are casualties of external or psychological problems. It is the combination of these discourses that cements the construction of the problem of child sexual abuse as a problem for everyone, except the child. By this I mean, it is a legal problem because of the way it is difficult to categorise, it is a social problem because of the extent to which it occurs and the way it challenges the power of the family; it is a psychological problem because it is difficult to 'cure'. Yet it is only when the victims are listened to, when their voices are heard through victim impact statements and through their personal narrative accounts, that any change is possible. Little by little new knowledge *is* restructuring the legal reality.

Chapter 10: Lost in translation: the legal appropriation of the experience of child sexual abuse

This study explores from a multi-theoretical perspective the way in which child sexual abuse has been framed within the senior levels of the judicial system. Drawing on an analysis of cases from the Irish Appellate Courts I have demonstrated the essentially patriarchal nature of the judicial system and the consequences of that for victims of child sexual abuse. In particular, I have demonstrated the divergence between the way sexual abuse is related by those who have experienced it and how it is constructed within the parameters of the legal system. The approach and design of this study provide both theoretical and substantive contributions at two principal levels. First, developing a multi-faceted critical framework allows for the interrogation of the relationship between the judiciary and the issue of child sexual abuse. The study highlights how the combination of relatively closed traditional knowledge, a patriarchal mindset and a rule-bound legal focus, contribute to the silencing of victims' voices. Second, the conceptual framework contributes to critical legal theory specifically and to a theory of knowledge more generally. I provide a framework within which the ongoing legal processes and strategies, both visible and invisible, may be understood. The integration of insights from Foucauldian, Feminist and Subaltern theories gives a unique depth and breadth to the analysis. The application of this framework to the large body of cases under review allowed me to disentangle seemingly disparate factors and to reformulate them into a series of patterns and knowledges which underpin the process. The significance of this work, however, is that it provides tools of analysis that

enable the identification of what is necessary for the effective participation of all parties in the search for justice. These contributions are elaborated upon below.

My main task has been to hold up to question the ways in which the ways in which the issue of child sexual abuse is talked about, thought about and processed within the legal system. In challenging society's choice of the legal institution as its mediator to 'solve' the problem I seek to raise the question of alternatives. There has been a huge growth in research about the issue of child sexual abuse. Generally this is centred in the domains of the prevalence of abuse, the testimony of child witnesses and the long-term effects of such abuse. Yet there has been little change in the instance of abuse or in the way victims experience the resolution of this problem. This study has endeavoured to make a contribution in this regard through a critical examination of the present and the absent voice in the Appellate Court, and of the way legal processes disempower victim's voices.

A key argument made in the analysis chapters (6-9) is that the focus of judicial concern is the law; that law has a natural scepticism about the value of other knowledges; that legal knowledge is derived from tradition and in particular a patriarchal tradition; that unless the judiciary is open to critical reflection about its practices the legal institution must be deemed unequal to the task of dealing with child sexual abuse. All of this is predicated on the argument that victims' voices, child or adult, are lost in the translation to legal truth.

I have analysed the role of Appellate opinions throughout this thesis and conclude that the Courts, as they are presently structured, do not work optimally for the victims. Victims in search of justice and their desire for resolution need to partake in the legal processes in a significant way, particularly in terms of voicing their experiences. I make this argument on the basis of three main arguments.

The child victim of child sexual abuse is positioned as 'other'. While the concept of otherness can be quite an abstract concept, I have shown how the child is a specific subject experiencing concrete domination and injustice. The 'otherness' of the abused victim places the child outside the parameters of judicial knowledge. Further it maintains the focus of judicial concern on the perpetrator. Secondly, maintaining judicial and institutional power is the inherent objective of the law. This is accomplished, principally, by translating victims' knowledge into legal knowledge through key strategies, with serious consequences for victims. Frequently, victims' voices are effectively silenced and the wealth of their knowledge and experiences is disregarded. This bracketing of the victim is carried out strategically by invoking tradition and by deploying a range of discursive practices which are inherently resistant to change. Law's currency is language; the judiciary controls this resource. The analysis has shown how the players within the process are discursively constructed by the judiciary to reflect patriarchal concerns. Further, concepts within abuse experience were appropriated and translated into legal rules and language in ways that changed the essence or the seriousness of the experience.

Thirdly, legal knowledge is deemed to be superior to all other knowledges. As such, knowledge which is not scientifically based is rejected. Emotional knowledge is devalued. It is considered as unstable knowledge that is the provenance of (non-rational) women and children. However, I have shown that emotional or empathic concerns can be taken into account at the will of the court when sentencing offenders. Other expert knowledge systems, such as psychologists and social workers, are also drawn upon by the court. By analysing judicial opinions which are made over a long period of time we can show how expert knowledges have come to be heard, appropriated and/or discarded as desired. The ultimate power, the control of knowledge, always lies in the

authority of the court. Victims occupy a subaltern status within the present legal system. However, when we pay attention to their voices in their personal narratives a real understanding of abuse is possible. I have argued that it is only within the practice of voicing experience in a democratic forum that victims will be able transfer from a subaltern status to a secure subjectivity with agency. Below I reflect on some of the key lessons from the analysis.

10.1 The Child's Story

Although the focus of this thesis is on the law and on the way it deals with abuse it is appropriate to put the spotlight on the children who are at the core of this issue and to show why it makes sense to centre the child in the discussion, a factor that law fails to do. If the judiciary began its deliberations by taking the position of the child into account it may be less likely to take an attitude of resistance. Judith Butler, using psychoanalytic knowledge, positions the child as beginning existence in a 'founding' subordination, i.e. the foundation of its being. She argues that 'no subject emerges without a passionate attachment to those on whom he or she is fundamentally dependant' (1997: 7). A passion generated from dependence constitutes the vulnerable subject who is now open to exploitation and abuse. It is this power relationship that renders the child dependent that is at the core of the 'domination' that characterises many Appeal cases. In Chapters 6-8, I demonstrated the way the emerging awareness of the dependency/domination relationship was initially resisted by the judiciary. It confounded traditional legal knowledge about the adult subject who disclosed abuse, which assumed that any harm suffered would be reported instantly. Such an understanding took no account of the relational factor, grounded as it is in inequality, which is always present between children and adults. Manoeuvres resisting victims'

knowledges were generally successful. As we have shown, the centering of 'domination' meant that there was a simultaneous exclusion of all the other elements that are present in abusive adult/child sexual relationships. A consequence of this was that when the legal construction of 'domination' could not be shown to be present, the DPP was less likely to prosecute because it was likely to be dismissed, further silencing the claims of the child.

A voice can be silenced without ever having to resort to violence. The cultural effects of participation in groups, especially the kinship group, impacts on the kinds of identification and dis-identifications' a child adopts. Many of the adult survivors who disclosed abuse did so at the risk of losing the whole family. Butler predicted this:

'If existence cannot be undone without falling into some kind of death, can existence nevertheless be risked, death courted or pursued, in order to expose and open to transformation the hold of social power on the conditions of life's persistence?'

(Butler 1997: 30, 28)

So how could this victim-subject exercise agency to achieve transformation? The challenge of developing subjectivity is in enabling subjects to identify with particular cultures (including the culture of family) and with discourse practices while avoiding total subjugation to those same ideologies and discursive regimes. The struggle between love/attachment and separation/selfhood is intensified in young children who are abused by an adult, trusted simply because they are adult. If the relationship has not been successfully negotiated then entering into a mirror relationship with an authoritarian/protective law can be traumatic. The adult once more becomes the subaltern child, who must be represented (spoken of, spoken for) and whose voice becomes assimilated into the legal structure. In the analysis presented above I have demonstrated how this subordination of the victim was achieved, through the discursive practices of the judiciary and other expert systems it deigned to draw upon. Thus,

another layer of knowledge was laid over that of the victims who experienced the abuse, further enforcing their subaltern status and deepening their silenced voices.

Disclosure is difficult and often delayed until the subject can dissociate from the dependency. The survivor struggles with subordination until finally a resistant subject emerges. The resistant subject is one who has found a way to bring voice into play in a way that allows it to be heard. It is my argument that this subject is not present in court. Given how legal reasoning and the demands of the rules of legal engagement are presently constructed, this voice cannot be heard in our courts to a degree that fulfils the aspirations of the United Nations Convention on the Rights of the Child (UNCRC). In my view, it is imperative that we politicise the problem of the legal adjudication of child sexual abuse.

The UNCRC has three main objectives; provision, protection and participation (Hickey: 2002). It is fundamental to all children's rights as it guarantees them the right to life (Article 6), the right to have their best interests regarded as the primary consideration in all proceedings (Article 3), the right not to be discriminated against (article 8), and the right to be heard (Article 12). The Convention on the Rights of the Child begins with the need to promote children's current and future fulfillment of 'an individual life in society'. Those who framed this Convention emphasised the need to develop structures for children's participation throughout society, and they recognised the broad array of domains that must be addressed to enable development of the child's personality and acquisition of skills needed for full participation in community life. My analysis shows that Ireland has not adequately implemented the aims of the UNCRC in the legal arena and particularly when it comes to dealing with cases of child sexual abuse. The legal system in the main resists victim participation in any meaningful way.

Socialising children into legal consciousness is possible and can be achieved through enabling their participation in a deliberative process. Allowing children to speak about their concerns and taking their opinions seriously will be useful in constructing an agenda for advocacy in law. It will help to shape a different legal discourse about children's knowledge and about their personhood, challenging their status as 'other' in the process. The opportunity to transform the relationships of children and adult survivors can be located in the voice of those who experience or have experienced sexual abuse.

10.2 Discourse and strategies that silence

There were three main issues upon which the Appellate Court cases reviewed were based. These were: (1) the length of time taken between the commission of the offence and the prosecution of the offender. The concept of 'Delay' was central to appeals, (2) the manner in which individual judges managed the issue of corroboration in evidence or witnessing of the offence and (3) the length of sentence decided by the judiciary.

Various strategies were employed to resist the voice and stories of the victims. Invoking tradition and using legal language and discourses are the principal means by which this is accomplished. As I have shown legal knowledge is largely traditional knowledge. Its reference points are in the past. This has implications. Discourses of tradition – '*it is well settled law*'¹²⁷ invariably call forth factors of reliability, consistency, objectivity and truth as a measure to secure authority and acceptance.

The issue of **delay**, in particular, draws on the traditional rhetoric of objectivity and fairness. If a long period of time had elapsed since the alleged commission of the

¹²⁷ M.K. v DPP [1993 No. 55 J.R.], 1 I.R. 514–524

offence and if the accused would suffer undue stress and anxiety at this remove from the experience, the focus of concern shifts towards the rights in law of the alleged perpetrator. I found that concerns about how much time had elapsed and the general resistance to new knowledge about child sexual abuse and the trajectory of a typical abuse victim are entwined with a long-established judicial fear and suspicion of women. Women (and children) were discursively constituted as 'other' through the man/woman binary. This entailed a construction of the victims as emotional, hysterical and 'imaginative'. In contrast, the accused were frequently characterised by their role as valuable members of society. Thus the perpetrators were often framed in terms of their contribution to society, their 'respectable' standing in the community and, if they admitted their crime, as 'morally responsible' citizens.

The findings in Chapter Seven demonstrate that legal knowledge is predominantly male in how it understands human behaviour and the rules are structured to accommodate this understanding. In the protection of male knowledge there is no recognition of a child's 'childish' understanding of the inappropriate sexual nature of adult/child abuse. Some of the instances of abuse were accompanied by physical violence and this factor did trigger a censoring response from the judges. Physical interaction is an acceptable topic for discussion for males. Physical confrontation happens, in varying degrees of intensity, right throughout their lived experience. When it exceeds permitted boundaries it is vulnerable to criticism and censorship and finally to the criminal process. This is a world that is known and understood *and voiced* by men. Arnot (1984: 46) suggests that proving masculinity 'may require frequent rehearsals of toughness, the exploitation of women and quick aggressive responses'. Such a gendered socialisation of physicality explains the dearth of judicial understanding of victims' delay in reporting or talking about abuse. However, the

analysis also demonstrates judicial resistance to acknowledging the *victims'* explanation and incorporating this into their understanding of the truth of such abuse. The age-old fear and suspicion of sexual complaints is deeply engrained and is difficult to eradicate.

I also identified the issue of **corroboration** as an important factor in the way legal knowledge shuts out the voice of the child. Juries must be warned by the judge that the prosecution of 'this man' is dangerous if there is no corroboration. I have argued that knowledge can be viewed as a commodity, used by those in power to uphold their position and the issue of corroboration bears this out. It is unreasonable to expect that all sexual activity between the adult and the child can be corroborated. However, if there is a significant suspicion that the victim's story has been fabricated one way of confronting the allegation is to insist that the act be evidenced. Further, the possibility of such nefarious allegations means that the adult male perpetrator must be afforded some rule of protection. Thus, embedded in the rules of law, are traditional myths about women and children which give rise to grave suspicions about the motivations of victims and the stories they tell. Before the process even begins the voice of the child (possibly now the adult) is challenged. Feminists have recognised the significance of corroboration rules in cases of sexual violence as the proof of the gendered power of law. Interestingly, although the corroboration warning was abolished, it was still used consistently by members of the judiciary. Its continued use provides perpetrators with a broader canvas for challenging judicial decisions

The analysis of the discourses around **sentencing** demonstrated the centrality of knowledge, particularly male legal knowledge, to the decision-making process. I found evidence of an overriding concern with the rehabilitation of the offender. Frequently, the impact on the victim of the sexual abuse seemed peripheral or even irrelevant to the sentencing reasoning of the. It can be argued that a just society favours the principle of

rehabilitation above that of retribution. However, when judicial knowledge about sexual violence is constructed within the parameters of a patriarchal culture, it is unlikely that a balanced consideration about sentencing can be made. I have shown how judicial discourses draw on a gendered understanding of this crime and frequently see it as an incident in the life of the offender – a crisis of behaviour - rather than as a harmful practice. When individual judges see and listen to victims in their courts, they are inclined to increase the length of sentence but this is firmly resisted by the Supreme Court judges. The principle of rehabilitating offenders is a valuable endeavour, but for a balanced system of justice it must be grounded in a knowledge base that pays more attention to the voice of the victim in the legal deliberative process.

In a very strong sense legal power resides in language and in discourse. Thanks to the work of Michel Foucault we now recognise the distinction between the two. Power resides within law and legal language and it is realised through the verbal and written word. In the examination of judicial opinions and, through them, a glimpse into the courtrooms, we have seen how language is used strategically to silence victims, to position the players so that the outcome plays out as a deterrent to bringing this issue into the court. A considerable number of these cases take place many years after the crime occurred and many of the offenders have taken the normal male life-path towards social success and respectability, a fact which is appreciated by the judiciary. However, these same judges have demonstrated reluctance in taking the harmful effects of abusive actions against child victims into account; effects that directed victims directed towards a different path.

By combing the Appellate Court judgements I discovered the precise mechanisms which allowed a range of strategic and discursive practices to work against giving voice to the adult survivor of child sexual abuse. I found that while the legal

system is designed to block the prosecution of innocent persons (mostly men), in the case of child sexual abuse the standard of proof is impossibly high and crucially also operates as a means of deepening distress for the victim.

Although discourse overlaps with language to a degree, the way we understand the term here refers to a broader and more abstract social phenomenon. It involves the language used, but it is more about *what* things are talked about and *how* things are spoken of. The power behind such actions is readily shown in the decisions the judiciary make in its constructions of the social actors within these cases, the offenders and the victims. The characteristics most often attributed to offenders minimised their responsibility, and downplayed the harm of the abuse.

In the early cases covered by the research, judicial discourses concerning the children who were victims of adult sexual crimes constructed the victim as either devious or as one who needed their paternal protection. Victims were questioned about their sexual history, judgments situated them as accomplices, collusive in the abuse and there was rhetoric on protecting them 'from themselves'. These same strategies have also been exposed through research on rape victims. As new knowledge seeped into legal discourse emanating from expert systems and victim impact statements, a shift in the construction of victim occurred. However, this new knowledge was inconsistently applied and overall it appears that legal reasoning proves stubbornly resistant to change. In a world populated by child-centred discourses and by the undeniable reality of men abusing children, the judiciary appears willing to adopt a paternally protective attitude to child victims of abuse. However, since many of the complainants appear in front of the judiciary as adults (because of delayed disclosure) the traditional *modus operandi* frequently becomes the default judicial position.

The discourse of an institution shapes not only how people speak to each other in the institution but also how people, both within and without, relate to the institution itself. It shapes how they develop their roles and the type of relationships they have. Control of the discourse is therefore important for those in pursuit of power. Because the discourse in an institution is amenable to change, it is therefore a desirable resource; knowledge, expressed in discourse, produces power, as the analyses of the texts in this study have demonstrated. The legal institution recognises the power of the word, against which it has sought to protect itself by such strategies of exclusion and limitation. Importantly, as Foucault explains, it was not just momentary instances, but a *system* of power that reinforced itself with each utterance in the discourse (Foucault: 1972). In the legal institution, total power can only be obtained by total control of the system of discourse.

10.3 Knowledge and theoretical considerations

The sociology of knowledge was the starting point for this critical examination of judicial opinions in cases of child sexual abuse. In this context knowledge means how we know what we know and how this is related to the social context within which it arises. The argument behind this branch of sociology is that knowledge is socially constructed and is bound up with relations of power. The research used this critical perspective to examine how we might interrogate the way child sexual abuse has been constituted as a legal problem and to explore the problems to which this constitution gives rise. The research also sought to provide a substantive analysis of the ways in which the judicial and auto/biographical narrative accounts address the problem, and how this reveals the way that knowledges derived from different sources do not coalesce unless they willingly interact. How then do the conceptual parts of the theories

and the substantive analysis of the data, inform each other? To reflect on this I would like to return to some of the theoretical arguments within the thesis to consider what the analysis exposed and to argue the significance of this work for understanding the rule of law in the judicial opinions on cases of child sexual abuse. The theorisation of knowledge was discussed through three key perspectives, namely Feminist, Foucauldian and Postcolonial.

The Feminist perspective on knowledge insists that the scientific, and therefore legal, notion of knowledge is incomplete. It argues that context must be taken into account because this recognises and includes the element of relativity in what we know and how we can know. Put another way, feminists argue that what we know is relative to us, both as individuals and as women, and that our perceptions are garnered from experience. This is argued in contradiction to the legal belief that objective reasoning forms the base of its existence. Legal practitioners argue that the method of legal reasoning achieves a just resolution for those involved in the process. However, throughout this research it was shown that a distinctly male-biased jurisprudence prevailed in the judicial opinions formed. The system developed from within a society that is driven by a patriarchal mindset, and thus male characteristics were presented as the 'norm', and by implication the female (who is *not* male) was considered deviant, a consideration which informed the rationale for the corroboration warning. The consequence of such thinking was that law itself has reproduced and reinforced the patriarchal society in which these appeals were heard. Without a woman's or a child's understanding or experience to inform law, to define what truths and harms are valid for women in a particular way that men do not experience, it was men who delineated legal definitions of what it means to be sexually besieged, to be a mother, to be a child, to

define relationships of 'domination', to make rules about disclosure and to decide what is 'just'.

While the critique advanced relies on insights from experiential knowledge I do not argue that standpoint feminism (where the legal interpretations would need to reflect more of women's experience), provides the answer to the problem. Because of the political and institutional element in the legal construction of child sexual abuse the prospect of replacing, or hugely influencing this, with experiential knowledge is unrealistic, principally because such knowledge is realised at the point of production rather than at the point of dissemination, which is crucial (Smart 1995:5). Postmodern feminism, on the other hand, destabilises the notion of the 'individual' with a fixed identity. It concentrates on knowledge and language and approaches law as a discourse rather than an institution. Legal discourse - 'a structured way of knowing.....shot through with power...' (Ransom 1993:123) - provides both a rich source of legal knowledge but also a target for change. By taking this approach I have been able to demonstrate how the present legal method of 'doing business's locks judicial discourse into the very discourses that feminists eschew. Given its explicit rejection of universality and singularity and of dominant discourses and transcendent rationality, the postmodern feminist theoretical adapted in this study holds out the prospect of transformation through the reformulation of language and discourse around child sexual abuse. The search for gender equality has broadened to a new consciousness of the possibility of multiple ways of analysing and deducing justice and morality and truth. Here I call for multiple ways of speaking and of listening which holds out the possibility of transforming legal systems.

Feminist legal theory is at the heart of this work, yet I do not want gender *per se* to be the only focus. Knowledge could be applied in a broader sense to the way our

judiciary interprets the law concerning child sexual abuse. Feminist work has helped us to understand the patriarchal nature of law, yet it still seeks a reform of the legal institution within a patriarchal social order. In spite of the inherent contradiction between this critique and that objective, a significant feminist insight is the considerable and enduring importance of law's role in society. It is through law that reforms can be brokered and transformed into action; a gender-based justice would provide heightened social awareness of the inequities that women endure and the legal structure has the potential to provide a ready-made platform for transformation of the patriarchal order. However, this transformation depends on a large measure of creativity within the power-knowledge nexus that presently exists.

In scrutinising the data it was obvious that the knowledge of individual affective and personal experience was largely considered irrelevant and out of place. Categorising this knowledge in these terms effectively diminished its power. The implications of this for victims of abuse are important. To prioritise the concerns of the victim within the adversarial legal system would mean making major structural and ideological changes. As we have seen the power of the system lies in its use of legal language and in the way forensic reasoning is applied so that context is marginalised. This process, through which the legal account was put together, provided only a compromised space for victims' voices. This is an important finding because it is possible to reflect on and modify these practices if the state requires, or if the legal institution is determined, to continue its involvement with this problem. Trying to adjudicate on the 'harm' of abuse is deemed to be extremely complex. I have shown that the judiciary is reluctant to recognise shame as part of that complexity. Emotional knowledge is consistently set to one side.

In recent years there has been an outpouring of anger from victims and victim organisations about the physical, sexual and emotional abuse that was inflicted on thousands of Irish children as part of everyday, normal life. Within these cases, however, there is a surprising absence of expressions of anger. Where it is present it is controlled. We have shown how the woman/child is constructed by the judiciary as someone to be feared, because they seek to extract vengeance and therefore cannot be relied upon to tell the truth. In the endeavor to procure a successful prosecution, expressions of anger were suppressed so that the complainant would appear as an 'ideal-type' victim. Legal courtroom convention reinforces victimhood and means victims lack agency in how they manage their experiences of abuse and achieve change.

I have shown, however, that personal narratives are an important strategy for achieving change. Within these narratives there were fewer restrictions on describing the experience of abuse. Personal narratives can more successfully produce a complete knowledge. It is important to note that although emotion was very present within these stories this did not preclude rational discourses and judgement about the situation. As we have seen these narrations employed a variety of resources through which stories were told. This method allowed each individual to be individual, to experience and express that experience in this/her own way. Such disclosure is largely absent in the court setting and this means that the legal truth is a partial truth. The knowledge within these narratives, when combined with the legal practice of justice and imposition of sanction, could broaden and deepen our understanding of the issue of child abuse and its consequences. Change is unlikely unless the gaps in judicial knowledge and in the quality of the relationship between the victims and the judiciary are addressed.

Finally, I turn my attention to the relationship between legal knowledge and expert knowledge. Psychiatrists and psychologists were brought before the court,

usually at the behest of the prosecution, to explain why complainants delayed their disclosure of abuse. Two different sets of relationships emerged from this procedure, the link between the judiciary and the 'psy' professions and the connection between the victims and those who spoke on their behalf. The legal profession at all times retained control of the knowledge within its courts. It decided on the limits and rules within which the medical profession was allowed to perform, constraining them to confine their knowledge so that, once more, only a partial truth emerged. In their concern to maintain the hierarchy of legal knowledge judges resisted the new knowledge and challenged it, so that at times the evidence from the psychologists, counsellors or psychiatrists became the critical focus of the judgement, leaving the victim powerless in the battle between the contending disciplines. In spite of this, however, new knowledge has entered the legal domain, albeit in fits and starts. Experts learned what was needed and began to adapt their knowledge to fit into the required format, perhaps compromising victims' experiential knowledge in the process.

At the same time experts were the link between the victims and the law in that they were reinterpreting the experiences and translating them into legal discourse. Experts, from other disciplines understood that they must adhere to the doctrine; that their methods of attaining truth must be the legal method, their way of speaking about abuse must be the legal way and the terms they use must be translated into legal terms. They could not simply, in spite of their training, believe the victims of abuse, because the victims' truth sits outside legal doctrine and has no validity. We can see a shift in the terminology used by the experts as they began to conform to legal discourse in their efforts to attain some level of power within the system. Thus the legal system dominated at all times. This finding supports my contention that legal knowledge shuts

out knowledge a) that supports the victims voice and b) that has the potential to enrich the relationship between the victim and the law. It need not happen in this way.

10.4 *Victim as subaltern- theory and colonised voice*

The judiciary has a tendency to speak but not to listen. The issue of multiple identities and differences, the importance of the way language and discourse is connected to power and the need to recover the silenced voices of abused children are core to both feminist and subaltern concerns. Through their participation in the legal process the voices of those targeted by sexual violence have the potential to offer more relevant policy solutions to the law than many of the so-called legal and other professional ‘experts’. In turn the fact that voices *are* listened to will develop the notion of agency which has the potential to transform victims’ status from passive recipients of the sanctioning process to becoming partners in the construction of a complete social system of knowledge of this experience.

While acknowledging Foucault’s contention that law is vulnerable to colonisation by expert knowledge – particularly to knowledge from the ‘psy’ disciplines – I have shown that in terms of subjugation the law plays the role of coloniser. The ‘colony’ marked out by law is the voice of the abused victim, whether child or adult. My argument is grounded in the reported judgements where the judiciary sought a translation of experience into legal knowledge, notwithstanding the fact that the essence of that experience may be lost in that process. Moreover, the subjugation of other expert systems to the legal system cemented the colonising role of the law.

The ultimate aim of domination is not to establish a radical opposition between coloniser and colonised. Colonialism “seeks to dominate by inclusion and domestication rather than by a confrontation which recognises the independent identity

of the ‘Other’” (Spurr 1994:32). Thus the discourse in these legal texts did not speak in derogatory terms about victims; rather they spoke about the importance of rules, of traditional knowledge, of fairness and balance and of objectivity. Therefore, a number of voices are silenced: the voice of this young girl who complained of abuse to her father was not heard because her father did not report it; the voice of that girl was not heard because the case was predicated on an incident that occurred when she was *not* a child, even though it was at the end of a long life of abuse; the voice of this boy was interrogated because his story was too similar to other boys and must have been fabricated.

Law asserts its superiority as a source of truth; hence it justifies its practices of authority. Cases can be selected to show how well the system works, but selecting individual cases is not a true representation of a system of justice. A systematic review of cases in the Appellate Court reveals overall lack of space for victims’ voices.

Postcolonial theory helps us to understand how individual cases can be used to legitimate the rule of law, even as the system as a whole short changes the victims. A system must be seen to be fair and to do this it must follow rules and ‘due process’. At the same time, the legal presentation of exemplary cases conceals many pertinent background facts regarding all of the cases that are initiated: many cases were reported and dismissed by the Gardai, many cases were reported and not prosecuted by the DPP. Finally, postcolonial theory identified language as a crucial strategy to restrict participation and inclusiveness. Spurr points out the conceit of the idea that ‘where the Western style of speaking is not present, there is no language at all’ (Spurr 1994: 107). It was this attitude that pervaded the legal view of children’s voice. Viewing law as the coloniser of the voice of victims allowed us to see how this idea works. Legal language

and judicial discourses are a powerful means of producing an appropriated text of what sexual abuse means and its place of importance in society.

‘Translation as a practice shapes, and takes shape within, the asymmetrical relations of power that operate under colonialism. What is at stake here is the representation of the colonized, who need to be produced in such a manner as to justify colonial domination’

(Niranjana 1992: 124)

The argument here is that the victims’ access to legal discourse was tightly controlled and access to discourse is a major asset for the exercise of power (Van Dijk 1996). On the other hand the law appropriated the narratives of children who were abused and disrupted and distorted their meaning by translating them into legal knowledge. By controlling the reading and interpretation of its own texts, the meaning of the issue of abuse was also controlled and the authority and power of law was maintained. This tight control of legal discourse is a further strategy to repel challenge to authority. If challenge is possible at all, it can only be effected through those on the inside and we have seen how the individual judges are controlled by the Appeal Court. Judicial decisions are open to challenge but only through an appeal to a higher court. Only a higher court can overturn a judicial decision.

In summary, I have focused my analysis on the relationship between child sexual abuse and Irish law. My contribution to sociological knowledge is made through the development of a socio-political approach to the understanding of the problem of child abuse and how it is legally processed. My study has shown the way in which legal power is used to de-center the subject. The legal domination of the issue of child sexual abuse has literally appropriated the knowledge and the voice of the abused child. The theoretical framework I adapted helped to uncover the voice of the victim. The dataset interrogated is unique because it includes all the Appeals in the Irish Courts system,

rather than a representative sample and through this a comprehensive understanding of the problem has been made possible.

10.5 Areas Requiring Future Research

While the study has uncovered the dynamics underpinning the legal processing of child sexual abuse, time and resources have necessarily limited its parameters. As I reflected on the dataset and particularly the earlier cases before the Appellate Courts, I noted how practice and procedure has forged a system deeply resistant to assimilating knowledge or understanding of what it means to be a child, and in particular a child who has been sexually abused. In a hierarchy of knowledge law's position is supreme yet in its present structure and practice it is unable to cope with the complexity of child sexual abuse. It is necessary to be creative in deploying 'different ways of legal knowing' as in the case of Restorative Justice Programmes, Truth Forums etc. in other jurisdictions (Europe, Australia, USA, Canada, New Zealand, and South Africa). One area for further research would be to examine such templates for transforming legal practice and assess their applicability to the case of child sexual abuse.

The implications of the findings in this study are important. Whereas the objective is to empower victims and make space for them in the legal process, I have shown that to achieve this victims have to translate their experience within a legal framework. Within the legal setting space for victims is tightly bound and controlled by rules, processes, judicial assumptions and judicial concerns. Currently, the victims' affective and special knowledge come a poor second to the higher valued legal knowledge. To have this knowledge take its proper place, as a democratic ideal, would entail a major shift in the conceptual foundations and discursive practices of the legal system. Without such a shift, however, effective reform is unlikely.

Legal 'truth' is a contentious issue. Relying on rules and tradition to achieve a resolution that can be rationally justified is not always the perfect resolution in the case of child sexual abuse. It depends on where the values are placed and whether particular values are in competition with one another. Research into legal values systems and the normative understanding of achieving justice would be very valuable. To this end, I consider that the notion of a 'common knowledge' (Valverde; 2003) would be the most fruitful direction for future work. The sociology of knowledge combined with critical legal studies ties two disciplines together in a particular way. While very little work has been carried out through this combination it appears to me that bringing together scientific expert knowledge, common sense knowledge, experiential knowledge and legal knowledge has huge potential for resolution. Gramsci (1971) calls on 'organic intellectuals', individuals emerging from each set of knowledges, who are acceptable to all as translators of experience and who are able to relate the subaltern experience to the theory of law. The question is, of course, whether this can be carried out within the legal institution? Certainly, as it stands, this does not seem possible, but with further research the potential for change could make this an attractive proposition.

Appendices

Appendix 1: Relevant section of Irish Constitution

CONSTITUTION OF IRELAND – BUNREACT NA hÉIREANN

The Family

Article 41

1. 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
1. 2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.
2. 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
2. 2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.
3. 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.
3. 2° A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that
 - i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the five years,
 - ii. there is no reasonable prospect of a reconciliation between the spouses,
 - iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
 - iv. any further conditions prescribed by law are complied with.

3. 3° No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.

Education

Article 42

1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.
2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.
3. 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.
3. 2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.
4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.
5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

Religion
Article 44

1. The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.
2. 1° Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
2. 2° The State guarantees not to endow any religion.
2. 3° The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.
2. 4° Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.
2. 5° Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.
2. 6° The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation

Appendix 2: 2 Cases from Different Decades

Appendix 3: Data Method

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