

Keynote Address

Intrafamilial Rape and the Law In Australia: Upholding the Lore of the Father.

Dr. S. Caroline Taylor, Post-Doctoral Research Fellow, University of Ballarat, Victoria, Australia

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Intrafamilial Rape and the Law In Australia: Upholding the Lore of the Father.

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Presented at Townsville International Women's Conference,
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ABSTRACT:

This paper presents a detailed summary of central findings of recently completed PhD research undertaken by the author concerning intrafamilial child abuse and the socio-legal construction of alleged victims who underwent trials in the Victorian County Court in Australia during 1995-1996. Fourteen complete cases were examined involving 22 trial transcripts totaling more than 12,000 pages of transcript. The research sought to document and examine the maleness of law and how it discriminates against women and children victims of sex abuse trials by silencing their experiences and eroding their ability for individual agency in such a process. The work showed that the trial process has the ability to reflect the same structural inequalities and abuses of power the victim/survivor experiences in intrafamilial sexual abuse. It does so because the law replicates the same structured male dominated social ethos located across the social stratum (in families and society). Evidence from trial transcripts was used to argue that trials are infused with notions of women and children as liars and fantasiers. Legal trials are conducted in a way that negate and obscure fact-finding and the comments and actions of judges in deciding evidentiary rulings and trial process erode judicial claims of impartiality, neutrality and fact-finding, demonstrating instead the propensity for law, as a locus of social control, to nullify and silence the experience of victims of sexual abuse.

Defence barristers have developed dominant narratives that attribute motives to alleged victims as colluders seeking revenge or financial reward or as emotionally unstable individuals, thus delineating the trial process as a site where masculinist stereotypes about sex abuse victims are promulgated. A victim's statement goes through a process of filtration, modification and exclusion and the remaining 'evidence' from the statement is presented to a jury as 'all the facts' of the case in question. From such a process, the victim is left with what resembles a predetermined legal script that must be adhered to in the courtroom. Defence barristers make use of evidentiary rulings that favour the accused and, with the assistance of excessive latitude afforded them in cross-examination, are able to present legally constructed 'narratives' about victims as vengeful liars and/or unstable and unsavoury individuals. Transcript evidence shows that prosecutors have great difficulty rebutting these narratives by presenting collateral or counterintuitive evidence, thereby allowing defence narratives to take a central role in the trial process. Should a jury conviction result, construction continues as defence narratives minimise harm to the victim and diffuse blame to others in order to exculpate the offender from full responsibility.

The research further highlighted resistance of the judiciary to engage with contemporary feminist and other therapeutic scholarships that have unveiled the reality and scope of intrafamilial sexual abuse. This lack of engagement, or even recognition, continues to maintain a process of discrimination against women and children, and in doing so, harms them. From such an analysis, this work argues that it is premature to cast aside concepts of gender discrimination and patriarchy in law in the Australian legal system.

Introduction:

The paper critically discusses the confluence of dominant masculinist theories around such abuse and their absorption into legal discourse and legal practice. Consequently, legal trials continue to be a site of masculinist reinterpretation of sexual violence whose victims are most often female and the alleged perpetrators, male. Judicial discretion is most often used as a means of excluding and modifying victim and prosecution evidence thereby enhancing the development of defence narratives that project a particular legal construction of alleged victims. This research identified structural and thematic patterns across trials, which demonstrate institutionalised judicial bias against complainants in crimes involving sexual allegations. Within the courtroom, barristers and the judiciary promote legal narratives about intrafamilial sexual abuse. In doing so, trials are structured in a way that silence victim/survivors and reaffirm dominant stock story narratives and stereotypes about women and children that negate their experiences of sexual violence. A feature of these legal ‘stories’ and ‘narratives’ is that they are developed by the powerful in order to subordinate the experiences of the vulnerable and powerless in our society. In this instance, women and children.

This paper is organised in four parts. The first provides a brief discussion of literature pertinent this research. Part two is divided into two sections each providing an overview of the patterned legal construction of alleged victims of intrafamilial sexual abuse. Part three discusses structural and thematic patterns in sentencing offenders convicted by jury verdict and part four makes brief comment about masculinist language around such abuse and is followed by the conclusion.

Part I: The Theoretical Acquittal of the Father

The history of western law and its treatment of women and children victims of sexual crimes is a history of prejudice and neglect. Much non-feminist psychosocial theory across the spectrum of sexual violence against women has developed a discourse and praxis, which sets the parameters to acquit perpetrators. Under the double mantra of law and psychosocial theory, women and children victim/survivors of sexual violence have been rendered silent with their experiences either dismissed as fantasy and/or revenge and ‘proven’ abuse most often results in them being held culpable to varying degrees for the criminal conduct committed against them.

The absorption into legal discourse of patriarchal psychosocial theories of ‘incest’ that proclaim women and children to be liars and fabricators, or, impute blame to women and children and exculpate offenders where such abuse is proven, identify the de-facto relationship between law and psychology. That both are patriarchal institutions and a locus of social control exemplifies the maintenance of non-feminist explanatory theories of sexual violence and their active narrative presence in the legal process.

Feminist critique has long been seen as a process of challenging socially constructed knowledges. The discourse on ‘incest’ is no exception. ‘Incest’ (intrafamilial rape), as a body of knowledge, has been monopolised as the domain of men and masculinist knowledges in medicine, psychology, social theory and law. Connell argues that the construction of knowledge around sexuality has been monopolised by the male in order to secure a structural domination over women.¹ Feminist

¹ Connell, R. *Gender and Power*. Cambridge: Polity Press, 1987, p.183.

scholarship around sexual violence and jurisprudence provided useful heuristic devices for the approach to data analysis taken in this research.

One of the most influential non-feminist theories explaining rape within the family unit has been the family dysfunction model or family systems model. The behaviour of the offender is obscured in family dysfunctional theory as the theoretical spotlight is firmly on the mother and daughter dyad. What brief focus is on the father as offender is always connected to his relationship with his wife and daughter, and hence the reasons for his exculpation from full responsibility for his actions are located with the findings against the mother and daughter. This model recognised the reality of intrafamilial sexual abuse but imputed blame to the mother and child.² As a consequence, the patriarchal imperative of absolving men from their accountability and locating blame with women and children remained predominant theory and praxis.

The exponential rise of family dysfunction theory reaffirmed women and girl children as a negative category of analysis while ‘normalising’ the behaviour of men, even when it related to rape against their own children. Men’s sexual offending against their children was predominantly discussed under the rubric of family dysfunction and the victimized child and their mother were considered culpable. Family dysfunctional literature is replete with gross generalisations and subjective interpretations concerning the mother and daughter’s behaviour. It reinforces dominant gender stereotypes that have been harmful to women and children, whilst negating the sexual offending of the father and minimising the level of harm involved in such abuse.³

Family dysfunction theorists referred to mothers as failing their ‘conjugal duties’ or becoming physically and sexually unattractive to their husbands, thereby making their daughters an obvious recipient of the husband’s sexual needs.⁴ Overt contradictions resonate through family dysfunctional literature, and indeed in psychiatric literature. The mother is considered both frigid and promiscuous, submissive and indifferent. Wives were reported to be sexually and physically unattractive to their husbands and therefore the daughter was considered a natural substitute. The explicit assumption that a wife must be sexually available to service her husband and keep him sexually satisfied at all times reinforces the sex role stereotype of women as male sexual property. These uncritical assumptions in theoretical literature on ‘family dysfunction’ and ‘incest’ quickly became a mainstay for explanations about intrafamilial sex offending.

² Justice, B. & Justice, R. *The Broken Taboo: Sex in the Family*. New York: Human Sciences Press, 1979; Kempe, R. & Kempe, C. H. *Child Abuse*. London: Fontana, 1978; Kempe, R. & Kempe, C. H. *The Common Secret*. New York: W. H. Freeman, 1984; Lukianowicz, N. “Incest”. *British Journal of Psychiatry*. 120, 1972, pp.301-303; Lustig, N., Dresser, J., Spellman, S. & Murray, T. “Incest: A family group survival pattern.” *Archive of General Psychiatry*. v. 14, January, 1966; Maisch, H. (translated by Colin Bearne) *Incest*. London: Andre Deutsch, 1973; Meiselman, C. *Incest: A Psychological Study of Cause and Effects with Treatment Recommendations*. San Francisco: Jossey-Bass, 1978; Tormes, Y. *Child Victims of Incest*. Denver: The American Humane Association, 1968; Weinburg, S. K. *Incest behaviour*. New York: Citadel Press, 1955.

³ Wattenberg, E. ‘In a Different Light: A Feminist Perspective on the Role of Mothers in Father-Daughter Incest’, *Child Welfare*, v.3, 1985, pp203-211; James, K. & MacKinnon, L. “The “Incestuous Family” Revisited: A Critical Analyses of Family Therapy Myths.” *Journal of Marital and Family Therapy*. v. 16, no. 1, 1990, pp. 71-78; McIntyre, K. ‘Role of Mothers in Father-Daughter Incest: a feminist analysis.’ *Social Work*. November, 1981, pp.462-66; Pengelly, B. “A Feminist Critique of the Idea of Incest as a Product of the Dysfunctional Family.” in Hetherington, P. ed. *Incest and the Community: Australian Perspective*. Perth: University of Western Australia, 1991; Mitra, C. “Judicial Discourse in Father-Daughter Incest Appeal Cases.” *International Journal of the Sociology of Law*. v.15, 1987, pp.121-149.

⁴ Lustig et al, *op.cit.*; Tormes *op.cit.*; Maisch, *op.cit.* ch.7; Meiselman, *op.cit.*; Justice and Justice, *op.cit.* & Kempe and Kempe, 1984, *op.cit.*

The perceived failure of the wife to sexually gratify her husband at all times is translated into the language of family dysfunction theory in which the mother is a causative agent in her husband's offending. She is to be regarded as an 'incest mother'. Moreover, dysfunctional family literature situates the mother's sexual performance, as rated by her husband, as abnormal, whilst concluding the husband's sexual demands as normal. Moreover, women who worked outside of the family home; attended social activities outside of the home or who were sick and required hospitalisation were accused of abdicating their wifely role and were 'bad' wives and mothers because they 'caused' such abuse to occur. The implicit assumptions underpinning these patriarchal edicts were that women who strayed from the traditional housewife role would be punished

Victimised children and adolescents were considered culpable for their own abuse. They were portrayed as secretly colluding with their mothers; being seductive initiators of the abuse; deriving pleasure from the abuse and hence, suffering little if any harm from the abuse. Family dysfunction theorists referred to intrafamilial abuse as a father-daughter 'affair'; 'sexual relationship'; and elsewhere used words such as 'lust'; 'seduction' and 'pleasure'. The concept of rape or abuse of a child is subverted through this dialogue and the conduct of the father as offender is sanitized and notions of blame are assigned almost entirely to the mother and daughter dyad.⁵

The theoretical acquittal of the father through the diffusion of blame to the mother as colluder and the daughter as a coagent is the *sine qua non* of family dysfunctional theory. The theoretical pre-eminence that underpinned family dysfunction theory was a regurgitation of patriarchal psychiatric theory with a bitter twist. It was safe for researchers and therapists to accede the presence of 'incest' because the causative coagents were women and children. The two theoretical principles of the colluding mother and seductive daughter were designed to mitigate the actions of the perpetrator leading to his exoneration, whilst castigating the mother and child. This allowed for a theoretical mapping of women and children between a Freudian psychoanalytic and psychiatric framework of reference. On the one hand, children and women had a tendency to fantasise and fabricate stories about 'incest', but those cases that were not child fabricated, led to the child and mother being held accountable for the father/husband's behaviour.

The theoretical mandate is that a woman must provide all of her husband's needs, and be considered by him as sexually interesting, attractive and fulfilling. She must remain in the home at all times fulfilling the patriarchal traditional stereotype of housewife/house slave so as to act as a chaperone for her daughters in their own home. These mandates operate on the sole foundation that men have a right to complete sexual and domestic satisfaction and any perceived failure of this will result in their use of their own child to supplant their wife. They are patriarchal as well as essentialist in foundation.⁶

The emergence of feminist scholarship and activism beginning in the 70s has certainly had some degree of success in disrupting this knowledge. Feminist scholarship exposed the gross power imbalances between men and women and men and children both in the family and public sphere. The exposition of a rigorous critique of intrafamilial sexual abuse discourses has resulted in a

⁵ *ibid.*

⁶ Claims by family dysfunction theorists that insufficient sexual gratification from wives leads men to rape their own children are contradicted within their own research, which identified that some offenders were maintaining sexual relations with their own wives, either through command or consent and some were engaged in extramarital affairs. See for example: Maisch, *op.cit.* Justice and Justice, *op.cit.* Lukianowicz *op.cit.*

significant theoretical shift in the way ‘incest’ has been conceptualised, particularly over the past three decades.⁷ A feminist analysis has exposed the endemic rather than aberrant nature of intrafamilial sexual abuse. As a consequence, feminism problematised intrafamilial sexual abuse in a way which made questions of power, gender inequality, the construction and socialisation of male sexuality, and representations of this crime in theory and law, central to feminist analyses.

Notwithstanding this, there remains an entrenched resistance to feminist theory in male dominated institutions, such as law and medicine, and thus much feminist scholarship is seen as somewhat polemic.⁸ Feminist scholars have provided an excellent critique of family dysfunction literature to expose the patriarchal underbelly of such work. From these and other feminist analyses emerged a cogent and critical body of feminist scholarship that challenged and rebutted entrenched theoretical discourse on intrafamilial abuse with its emphasis on mother blame and victim blame.⁹

The professional acceptance and pervasiveness of family dysfunction theory as a model framework to explain intrafamilial sexual abuse with degrees of culpability being attributed to mothers and daughters, and support for family therapy for ‘incest families’, is evident by its positive assessment and appraisal in some contemporary publications.¹⁰ The concept of attributing varying degrees of blame onto victim/survivors of sexual abuse in a therapeutic setting continues to be espoused in some contemporary therapeutic literature and has much to do with the impact of dysfunctional family literature.¹¹

A diverse body of feminist research and scholarship in jurisprudence has also exposed the maleness of law. Feminist legal scholars continue to engage in a rigorous and most often contentious critique and debate as to judicial claims of objectivity, rationality, neutrality and fact-finding processes in

⁷ Bell, V. *Interrogating Incest: Feminism, Foucault and the Law*. London: Routledge, 1993, p.3.

⁸ See for example: MacKinnon, C. *Feminism Unmodified: Discourses on Life and Law*. London: Harvard University Press, 1987; Scutt, 1997 *op.cit.*; Graycar, R. & Morgan, *op.cit.*, Smart, C. *Feminism and the Power of the Law*. London: Routledge, 1989. Smart, C. *Law, Crime and Sexuality*. London: Sage, 1995; Seddon, N. *Domestic Violence in Australia: The Legal Response*. Sydney: Federation, 1993; Russell, D. *Women, Madness and Medicine*. Cambridge: Polity Press, 1995; Matthews, J. *Good and Mad Women*. Sydney: Allen & Unwin, 1984.

⁹ Powell, M. & Illet, M. “Assessing the incestuous family’s readiness for reconstruction.” *Families in Society: The Journal of Contemporary Human Services*. September, 1992, pp.417-421.

Pengelly, B. “A Feminist Critique of the Idea of Incest as a Product of the Dysfunctional Family.” in Hetherington, P. ed. *Incest and the Community: Australian Perspectives*. Perth: University of Western Australia, 1991.

Wattenberg, *op.cit.*; Herman, J. *Father-Daughter Incest*. Massachusetts: Harvard University Press, 1981; McIntyre, K. “Role of Mothers in Father-Daughter Incest: A Feminist Analysis.” *Social Work*. November, 1981, pp. 463-466; Russell, D. “The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children. *Child Abuse and Neglect*. v. 17, 1983, pp. 133-146; Russell, D. *The Secret Trauma: Incest in the Lives of Girls and Women*. New York: Basic Books, 1986; Ward, E. *Father Daughter Rape*. London: The Women’s Press, 1984.

¹⁰ See for example: Sarantakos, S. *Modern Families: An Australian Text*, Melbourne: Macmillan, 1996, pp.318-320; Celano, M. “A Developmental Model of Victims’ Internal Attributions of Responsibility for Sexual Abuse.” *Journal of Interpersonal Violence*, v.7, no.1, March, 1992, pp.57-69; Conte, 1990 *op.cit.*; Freer, M. “Taking a defiant stand against sexual abuse and the mother-blaming discourse.” *Extending Narrative Therapy: a collection of practice-based papers*. Adelaide: Dulwich Centre Publications, 1999.

¹¹ Celano, *op.cit.*. The author of this work provides a positive appraisal of dysfunctional family models of therapy as well as other therapy models which proclaim that victim/survivors should be held responsible for *their* part in creating a situation in which they were raped and assaulted. She urges therapists and others in the helping profession *not* to ‘reassure’ victims that they are not to blame – but instead to help the victim/survivor understand the blame that they must take for the rape/assault.

law.¹² The gendered nature of legal doctrine, especially with regard to women and children as victims of sexual crime, has been made explicit through feminist jurisprudence. While feminist strategies have led to progressive law reform in several crucial areas of rape law, these are frequently subverted and undermined by a conservative judiciary that is deeply resistant to change.¹³

Legal suspicion against women and children's allegations of rape and sexual assault and the development of a legal parlance that articulated this suspicion has a long history in Common Law (Scutt's work details this area exceptionally well). It is not inconsequential that the evolution of legal doctrine in the area of rape law mirrors the pervasive development and promulgation of patriarchal theories about women, in particular female sexuality. A formalisation of dominant hegemonies about women's sexuality and women and children as victims of rape and sexual assault produced and perpetuated a definitive ideology of women as inherently inferior, incorrigible and inept. It provided a corollary for law, as a locus of social control to absorb these knowledges and to incorporate and reaffirm the inferior, and indeed dangerous sexuality of women. These ideological constructs continue to be a mainstay in legal trials concerned with rape and sexual assault allegations.

Feminist legal scholar Ngaire Naffine argues that law's promotion of an abstract person who is without gender, class or race, and whom the law serves equally, is dismantled through a critical examination of legal principles and legal method. Judicial rhetoric of legal impartiality and neutrality embody such an ideal, and Naffine sets out to demonstrate that such a claim is untenable when analysed and problematised.¹⁴ Naffine proposes that a central thesis in the body of feminist literature on law describes and identifies a male monopoly that is systematically supported through a patriarchal culture. Naffine distinguishes three feminist phases of a critique of law. These phases encapsulate the maleness of law and therefore its discrimination against women; law's claims to impartiality as a masquerade that obscures a partiality that is wholly male; and finally, legal rhetoric and its reflection of a dominant patriarchal social order.¹⁵ McBarnett suggests that legal rhetoric

¹² Edwards, S. *Female Sexuality and the Law*. Oxford: Martin Robertson and Co., 1981; Edwards, S. *Sex and Gender in the Legal Process*. London: Blackstone, 1996; Graycar, R. "Telling Tales: Legal Stories About Violence Against Women." *The Australian Feminist Law Journal*, 7, 1996, pp. 79-93; Graycar, R. ed. *Dissenting Opinions*. Sydney: Allen and Unwin, 1990; Graycar, R. & Morgan, J. *The Hidden Gender of Law*. Sydney: Federation Press, 1990; Kaspiew, R. "Rape Lore: Legal Narrative and Sexual Violence." *Melbourne University Law Review*. v. 20, 1995, pp. 350-382; MacKinnon, C. "Law's Stories as Reality and Politics." in Brooks, P. & Gewirtz, P. eds. *Law's Stories: Narrative and Rhetoric in the Law*. New Haven: Yale University Press, 1996; MacKinnon, C. "Engendering Change." *California Lawyer*. v.40, March, 1998, pp.41-42 & 91; MacKinnon, C. "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence." *Signs: Journal of Women in Culture and Society*, v. 8(4), 1983, pp. 635-658; MacKinnon, C. *Feminism Unmodified*. Cambridge, MA: Harvard University Press, 1987; Naffine, N. *Law and the Sexes: Explorations in Feminist Jurisprudence*. Sydney: Allen & Unwin, 1990; Scutt, J. *The Sexual Gerrymander*. Melbourne: Spinifex, 1994; Scutt, J. "Sexism and Psychology: An analysis of the 'Scientific' Basis of the Corroboration Rule in Rape". in Scutt, J. *The Sexual Gerrymander*. Melbourne: Spinifex, 1994; Scutt, J. "Judicial Vision: Rape, Prostitution, and the 'Chaste Woman'." *Women's Studies International Forum*. v.17, no. 4, 1994, pp.345-356; Scutt, J. "Bias in the Courtroom: The Poverty of the Unchallenged Precedent." in Scutt, J. *The Incredible Woman. Power & Sexual Politics, Vol I*. Melbourne: Artemis, 1997; Scutt, J. *The Incredible Woman. Power & Sexual Politics, Vol I*. Melbourne: Artemis, 1997; Taylor, S.C. "And Now Your Honour, For My Next Trick...Yet Another Defence Tactic to Construct the Mad, Bad, and Colluding Mother and Daughter in Intrafamilial Sexual Assault Trials." *Australian Feminist Law Journal*. v. 14, 2000, pp.121-131

¹³ Kaspiew, 1995, *op.cit.*

¹⁴ Naffine, 1990 *op.cit.* pp.52-53.

¹⁵ *ibid.* pp.3-7.

promotes the legal system as ‘the mantle of a truth-finder’, but feminist critique of legal narratives and judicial bias in legal method and process dismantle law’s rhetoric to claims of neutrality, impartiality, fairness and justice.¹⁶ Research conducted by this author identified the nefarious connection between dominant masculinist theories of intrafamilial rape and sexual assault and legal process and discourse.

Offender and victim Constellation in intrafamilial sexual abuse:

A consistent finding across a diverse body of research on intrafamilial abuse has identified the biological father as the offender in the vast majority of cases and the daughter as the victim. This research reflect that same constellation pattern as the biological father was the offender in 12 of the fourteen cases, the stepfather being reported as the offender in the other two cases.

A note on terminology:

Regardless of whether the accused was convicted, I have used the term ‘victim/survivor’ across all cases in order to respect the reality of lived experience reported by these young adults and children.

I wholly reject the term ‘incest’ as a language to describe the systematic rape and sexual assault of children and young adults by their father or stepfather (or any other relative or parent-figure). Incest has a long anthropological history as a term to describe consensual sexual relations among near kin. The etymological foundation of the term makes for interesting reading and gives further evidence why the term ‘incest’ is a grossly inadequate and unjust language to apply to the sexual violence inflicted on children within the family unit.¹⁷ The term ‘incest’ when applied to intrafamilial rape carries with it concepts of mutuality and consensus with degrees of blame being attributed to the victim. The term carries with it much stigma and I believe that this is part of the reason for maintaining the term – so that others may have power of victim/survivors by forcing them to confine the language of their experience so that it conforms to masculinist ideology. ‘Incest’ and its associated meanings are saturated with masculinist language and meaning. Thanks to the impact of family dysfunction theory which has in effect eroticised the rape of children through the positive promotion of the term ‘incest’, some contemporary theorists and therapists continue to view father-daughter rape as a consensual affair from which the daughter gains some pleasure.¹⁸ A good deal of pornography is

¹⁶ McBarnet cited by Kaspiew, *op.cit.* 1995, pp.352-353.

¹⁷ For sound arguments on this see Taylor, S.C. *The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court of Australia in 1995*. PhD Thesis, 2001, University of Ballarat, Australia; for a specific argument on this point see also Taylor, S. C. ‘A Rose By Any Other Word Does Not Necessarily Make It Merely Another Rose.’ in Mills, A. & Smith, J. *Utter Silence: Voicing the Unspeakable*. New York: Peter Lang, 2001, pp.211-223.

¹⁸ See Taylor, 2001 (PhD thesis chapter 2 in particular).

committed to portraying the rape of girl children by their father in ‘incest’ scenarios, further deploying the term as one that denotes eroticism and pleasure for the child.

I prefer to use the language that victim/survivors use to describe their experience – they use terms such as ‘rape’, ‘assault’ and ‘abuse’ among others. Some victim/survivors I have spoken with talk of feeling pressured to use the term ‘incest’ in order that their language comply with professionals and society. My message to them is that they have the right to name their experience. Some have later reported a sense of taking back some power by being able to use their language and reject the term ‘incest’ and demand that others also not use that term to describe the experience of being raped by a parent or relative. As this paper will demonstrate, the maintenance of the term ‘incest’ provides specific advantages to offenders within the judicial system and the public discourse to the detriment of victim/survivors.

Part II: Men’s lore and the legal acquittal of fathers:

“If in the process of destroying the evidence it is necessary to destroy the child, then so be it.”¹⁹

“It would be considered cowardly not to go for the jugular when cross-examining a child.”²⁰

Section A: Pre-Trial arguments : Defence by obfuscation:

The beginning all criminal trials involves legal argumentation between the Prosecutor and Defence barrister. One of the first tasks of the trial Prosecutor and defence barrister is to seek to have evidence either admitted or ruled inadmissible. In nearly all cases it is the prosecution evidence in the form of the victim/survivor’s statement, and any other corroborating evidence, that is scrutinised and argued with reference to its admissibility to the trial. In the majority of cases analysed there existed, in varying degrees, corroborating evidence that the Crown Prosecutor sought to use. In some instances the corroborating evidence was very powerful and resulted in lengthy pre-trial arguments, with some legal arguments lasting days, and in one case, weeks.

Judges possess a strong degree of individual agency that is referred to as judicial discretion. Judicial discretion allows judges to decide evidentiary rulings on a case-by-case basis by giving them the power to interpret legislation and legal precedents. Pre-trial arguments are a pivotal area for both prosecution and defence counsel because judicial decisions about what evidentiary rules will be applied in the proceeding trial directly affect the case of both the Prosecution and Defence. Delineating evidentiary boundaries can be a central factor in setting the tone for the trial. The impetus for pre-trial arguments of course lies in the adversarial nature of legal trials, as defence and prosecution counsel engage in legal combat to decide what ‘playing rules’²¹ the trial will be conducted under. From the outset, the attitude of the presiding judge towards the trial process, that

¹⁹ Comment made by a defence barrister in an Australian legal survey on child sex abuse cases, and cited by Puren, N. “Lawyers Court Shame.” *The Age*. March 1, 1999, p.13.

²⁰ *ibid.*

²¹ One presiding judge referred to evidentiary rulings as playing rules and immediately prior to the start of the trial referred to the trial as ‘getting the show on the road’. He also referred to the alleged victim’s statement as a ‘magnum opus’.

is, what evidence is admissible and what is not, and how various legal precedents and legal arguments will be interpreted and applied, is crucial to the development of legal strategies, especially that of the defence. Conversely, the attitudes of members of the judiciary towards intrafamilial sexual abuse, and towards sexual crimes in general, are important factors.

This research revealed a structural pattern in evidentiary rulings in which evidence for the prosecution case was most often weakened if not entirely eviscerated. All of the cases in this research corroborative evidence for the prosecution was completely excluded or modified. These evidentiary rulings constrained the prosecution case in a variety of ways whilst clearly advantaging the formulation and articulated of defence narratives used in these trials.

Two cases examined involved DNA evidence that the Prosecutor sought to have admitted. In the first case DNA evidence was via a semen sample taken from the alleged victim who made a prompt report of alleged rape by her biological father. In the second case, the alleged victim claimed long term sexual abuse by her biological father, which she claims resulted in the birth of two children from the abuse. Blood samples were taken from the alleged victim, her children and the accused. In both cases, forensic test results were highly damaging to the accused and in both cases the defence barristers argued vigorously to have such evidence excluded.²² They were successful in both cases. What makes the judges decisions noteworthy is the rationale for the exclusion. The first judge suggested that DNA evidence was 'scientific speculation' and in his opinion lacked credibility. In the second case the defence argued around technicalities regarding the legal 'process' involved in the accused providing a blood sample.

Several cases also involved allegations of sexual abuse by more than one child from the same family. Defence barristers were successful in having these trials severed so that the evidence of each child was isolated, even when some allegations involved the children being abused together. The severing of trials with multiple complainants advantages the defence in a number of ways. For example, they are able to portray the child's allegations as bizarre or improbable in the context of the family unit with no other witnesses or complaints by other siblings. More importantly, defence barristers seek the severing of presentments containing accounts of sexual allegations by more than one child because an acquittal is considered more likely if the evidence of only one complainant is presented in a trial.²³

Five cases from the research contained evidence of various types of alleged admissions made by the accused to two or more other people regarding the allegations of abuse by the complainant. In two of these cases certain admissions were taped and in the other three cases individuals had kept professional notes about the alleged admissions and other witnesses made statements about alleged admissions by the accused. In all five cases the prosecution sought to have this evidence admitted as part of their cases. In three cases the judges excluded such evidence entirely and in two other cases the evidence was modified so that only partial evidence could be given. A consistent and significant factor in these decisions was the rationale employed by judges to support *their* discretion in excluding or modifying evidence.²⁴

²² In the first case the DNA result excluded 96% of the population as possible donors of the sperm sample. In the second case the DNA showed 97.5% and 99.3% probability of the accused having paternity of the children.

²³ Gibson, R. 'Major changes to the Prosecution of Sexual Offences.' *The Law Institute Journal*, v.72, no.2, 1998, pp.49-57.

²⁴ For example, in one case evidence by a social worker about alleged admissions by the accused was excluded on the grounds that the admission was not mechanically taped (notes were kept) and that the social worker acted as an

Of greater significance were the differences in evidentiary rulings between judges who became involved in the same case. In several cases judges were not able to hear a trial to completion for a variety of reasons. Consequently, another judge was appointed and a new trial commenced. One case from the research involved three different judges. Two other trials were retrials following successful appeals against conviction. In some of these cases, newly appointed judges decided evidentiary rulings that were diametrically opposed to those of the previous judge. While judicial decisions about the admissibility and inadmissibility of evidence identify the scope for personal agency of judges, differences in evidentiary rulings by a number of judges in one case, delineate the degree for personal preference and bias among judges to decide trial process.

A good example of how judicial discretion provides a conduit for personal preference to masquerade as judicial process was articulated by one judge from one of the cases researched:

I have generally taken the view in these sorts of cases that it (evidence) ought to be excluded...anyway...bearing in mind that with a *different judge on a different day* all of this evidence might have been let in..²⁵(emphasis added)

Such self-acknowledgement as to the level of individual agency for personal preference in the application of evidentiary rules would seem to negate the self-styled mantle of law as a process of neutrality and of fact-finding. Moreover, judges are only too aware of how their evidentiary rulings can advantage the defence, and can confuse and/or create doubt in a jury hearing such a case. The evidentiary parameters set up by this judge's rulings put enormous pressure on the two children giving evidence in this case, and resulted in the transcript recording that the girl became very distressed during her cross-examination in the areas where her evidence had been limited.

The word 'discretion' was most often invoked to exclude evidence that was often of a very powerful nature that corroborated the evidence of children. Rather than looking for evidence that supports 'truth seeking', the judiciary often create evidentiary rulings and practices that are 'truth defeating'.²⁶ Subsequently, much of the defence narrative enacted for the benefit of the jury is defence by obfuscation, thereby dismantling judicial rhetoric of law as a process of neutrality and 'fact-finding'.

The subterfuge that often results from evidentiary rulings is not a concept foreign to judges. Examples in this research demonstrated judicial awareness of how evidentiary exclusions would 'advantage' the defence case and may even cause 'confusion' for witnesses, especially the alleged

'investigator' because she asked the accused questions about his admission, which the social worker stated were asked to ensure that she was correct in noting that the accused was making explicit admissions about the abuse of his children. Conversely, in another case there were taped admissions and these were excluded after the defence complained that the accused was taped without his knowledge. In another case, alleged admissions by the accused to a therapist were excluded on the grounds that the accused made admissions about incidents of alleged abuse *after* he had divorced his wife. The judge argued that after the divorce his step-daughter was no longer legally his step-daughter (despite having custody of her) and therefore the admissions were not about 'incest' but rather admissions of 'consensual' sex with a girl who was at the legal age of consent.

²⁵ Case B in Taylor, S. C *The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court of Australia in 1995.* Ph.D. Thesis, University of Ballarat, Australia, 2001, (a) p.221.

²⁶ Young, A. "Child Sexual Abuse and the Law of Evidence: Some Current Canadian Issues." *Canadian Journal of Family Law.* v.11, 1992, pp.11-40, p.17 Young discusses the propensity of legal practice and process as one which does not allow for 'truth seeking' but in instead allows for a practice of 'truth- defeating' through laws of evidence.

victim and the jury who would have difficulty following the trial. In one trial the trial judge indicated his understanding of how the defence barrister intended to use evidentiary exclusions to his advantage when he commented that the barristers 'plan' was 'defence by *obfuscation* rather than anything else, it seems to me, the jury won't know what version they're dealing with.'²⁷ (emphasis added) Elsewhere, this same judge suggested that the defence could 'score some big points' if they were able to phrase their cross-examination questions to the victim/survivor in a way that elicited limited information.²⁸

This limiting of evidence can have a detrimental effect on the child, as noted above and it is not uncommon for legal discussion to take place in the absence of the jury so that the child or young adult can be 'reminded' by the judge of what they can and cannot say.²⁹ In a specific example, a defence barrister continued to lament his annoyance that a child witness was not being 'controlled' properly with regard to the 'limiting' of their evidence as set out by the judge. The judge sympathised with the defence barrister, adding that it was always difficult with child witnesses, because regardless of how much one tried to contain their evidence to the set rulings, there was always some sort of 'slipping up on the plan'.³⁰ The concept of 'slipping' up on the 'plan' resonates with the notion that legal trials are carefully scripted dramas designed to appeal to legal sophistry rather than concepts of justice or fact-finding. Alongside this comment, was the judge's statement that evidentiary rulings are 'designed to favour the accused (and) can lead to confusion and an air of unreality in evidence giving...'.³¹

Of course it is precisely this air of unreality that defence barristers seek in order to construct an alternative narrative, and such a narrative relies heavily on evidentiary rulings that favour the accused. Another legal observer has noted the propensity for the judiciary to fragment prosecution evidence so that any legal investigation into a child's allegations of intrafamilial sexual abuse is made extremely problematic. Bates has argued that legal claims of fact-finding in such trials are untenable given the consistent manner in which judges can exclude evidence that may be of crucial assistance in fact-finding in cases of intrafamilial abuse.³² Bates believes that judicial response to the process of fact-finding in child sex abuse cases obfuscates fact-finding rather than enhances such a process. Moreover, the power of judges to disqualify other forms of evidence, that do not accord with their viewpoint, can lead to witnesses being silenced so that fact-finding becomes the mantle of legal viewpoints only.

From this research it appeared that under the shibboleth of 'fairness to the accused' any prosecution evidence that might allow deeper and more relevant scrutiny of the prosecution case was removed

²⁷ Case L in Taylor (a) (thesis) 2001 *op.cit.* p.222

²⁸ *ibid.*

²⁹ See Taylor (thesis) chapter six for a discussion around this. Considering that such a witness is required to swear an oath in front of the jury that they shall give 'the truth the *whole* truth and nothing but the truth' it is ironic that they are warned before hand about what evidence is excluded and therefore cannot be mentioned. This point is all the more disturbing when one considers the predilection for defence barristers to 'remind' witnesses, especially child witnesses, about their 'oath'. This most often occurs when the defence barrister is able to identify a minor inconsistency in the evidence of the child, an example being a child who states that they wore particular color or type of clothing from an incident five years previous and their statement says that they wore a specific type of clothing. Then defence barristers most often berate them and remind them that they may face perjury charges and gaol for 'lying' to the court.

³⁰ Case B, in Taylor (thesis) p.223.

³¹ *ibid.*

³² Bates, F. 'Can We Accept the Acceptable? Evidence and Procedure in Child Sexual Abuse Cases in Recent Australian Law.' *Children Australia*, v.17, No.3, 1992, pp.13-16.

or modified. For the defence barrister, successfully removing or modifying prosecution evidence allows for a narrative that focuses on the narrative of 'character' of the alleged victim while advancing the argument of no corroborating evidence.

Aside from evidentiary rulings that obviate corroborating evidence in support of allegations of intrafamilial abuse another significant structural pattern in judicial rulings was the decontextualising of the evidence of alleged victims. As Feiner argues, defendants in intrafamilial sexual abuse cases, especially long term abuse, are advantaged by being able to construct an alternative storyline that is simple as opposed to the more complex story of the victim/survivor.³³ The distilling of long term abuse into a small number of charges, and the evidentiary rulings that accompany sex abuse cases, allow for 'gaps in the storyline', which the defence seize upon to discredit the victim/survivor by locating her fragmented story into a stock story.³⁴ If a jury were able to hear evidence that the abuse was repeated over a period of time and involved mechanisms that silence the child and create fear and distrust, confusion and distress, then a jury might be more responsive to the evidence of the victim/survivor as opposed to stock stories and narratives presented by the defence.³⁵

A legal precedent exists which provides scope for expert testimony about the impact of long-term sexual abuse, specifically delayed disclosure and trauma related behaviour. This precedent recognises that defence counsel often attack alleged victims for delayed disclosure and other behavioural patterns which may appear bizarre in the absence of other evidence to contextualise the environment in which the abuse occurred.³⁶ Despite this precedent, and more recent changes in legislation, this research demonstrated the strong resistance by judges who refused to accede to prosecution arguments to use this precedent for the purpose of providing expert evidence and allowing alleged victims to give evidence that would contextualise their allegations of long term abuse.³⁷

As the judge in case B stated with perspicuity, evidentiary rules are designed to favour the accused and not the victim/survivor. From such evidentiary formulations, defence counsel are provided with the necessary confinement of the victim/survivor's experience and even corroborating evidence. Thus, evidentiary rules set parameters around the evidence that can be given in the courtroom.³⁸ It also allows the defence to decontextualise the family history, victim/survivor's experiences and the environment in which such abuse occurred. It is these defence narratives, uncircumscribed by context that defence barristers develop and seek to portray to a jury as the 'facts' of the case.

³³Feiner, L. "The Whole Truth: Restoring Reality to Children's Narrative in Long Term Incest Cases." *The Journal of Criminal Law and Criminology*. v. 87, no. 4, 1997, pp.1385-1428.

³⁴ *ibid.* pp.1312-1413. See also Kaspiew, 1995, *op.cit.*

³⁵ *ibid.*

³⁶ This precedent is referred to as 'J's Case' in Australian law and actually resulted from the original trial of one of the retrials examined in this thesis. For a discussion of this precedent and its treatment by judges in this research see chapters 6 & 7 of thesis. See also Freckelton, I. "Judicial Pedagogy and Expert Evidence on Victims' Response To Trauma." *Psychiatry, Psychology and Law*. V.4, no.1, April, 1997, pp. 79-86.

³⁷ See chapter 6 Taylor, (a) 2001. Amendments to the *Crimes Act* in Victoria in 1997 have introduced changes to allow the prosecution to prosecute sex offences involving multiple complainants, therefore avoiding them being severed as occurred in cases A & B, E & F and C. Further, propensity evidence, that is the introduction of evidence to suggest that the accused behaved in a similar way on other occasions, outside of charged incidents, has been amended to improve the processes for making such evidence admissible.³⁷ Despite these changes there is no evidence as to their efficacy.

³⁸ Kaspiew, *op.cit.* 1995, p.373

Finally, allowing defence barristers to cross-examine alleged victims on their previous sexual history and knowledge enhanced the narrative of promiscuity and access to knowledge to fabricate false allegations. Section 37a (herein referred to as s.37a) was introduced into Victorian legislation in 1989 as a means of protecting victim/survivor witnesses from interrogation about their sexual activities other than those that relate to the offences of which the accused person is charged.³⁹ Notwithstanding this legislation there is provision within s.37a for defence counsel to apply for Special Leave of the court to cross-examine the victim/survivor outside of the legislation. This special leave is granted at the discretion of the presiding judge, though the legislation does place requirements for consideration before such leave is granted.⁴⁰ On two occasions, in two separate cases from this research, the presiding judges were very clear in invoking s.37a to protect the victim/survivor against such cross-examination, and refused to accede to defence counsel's arguments seeking special leave outside of this section. Despite this, there is clear evidence in the trial transcripts that, in the majority of cases, defence counsel introduced questions in their cross-examination of the victim/survivor about alleged sexual activities that were designed to damage the character and credibility of the victim/survivor.⁴¹ Such a finding is supported by other research which indicates that judicial inconsistency in the interpretation of what constitutes grounds for special leave to be granted to defence counsel in sex cases, is very much open to loose and wide ranging interpretations.⁴² The rationale employed by some judges for allowing defence barristers to cross-examine alleged victims outside of s.37a clearly demonstrated levels of judicial bias against alleged victims of sexual abuse.

Two particularly disturbing examples demonstrating the propensity for cross-examination about previous sexual history to be unfairly damaging to a witness occurred in two cases where DNA evidence was excluded (as previously discussed in this section). In both cases, defence barristers were granted leave to question the alleged victim about their previous sexual history. In one case the young woman claimed that her father had impregnated her on several occasions resulting in the birth of three children by him. DNA evidence that was certainly damaging to the defence case was excluded, but the defence barrister was able to infer a narrative of promiscuity against the young woman accusing her of having sexual relations with other men resulting in the birth of her children. In the other case, the DNA result which was also damaging to the defence case was excluded, but the defence barrister was able to draw very selectively and very narrowly from the DNA test to argue an obscure point about how long 'sperm' lived for before presenting evidence from a former boyfriend of the girl who claimed that he had unprotected sex with her some time prior to her allegation of rape by her father. The defence also questioned the girl at length about her sexual activities with other males.⁴³

In both of these cases evidence damning to the defence narrative was removed completely from the prosecution case, but drawn upon extremely selectively from the defence to enhance their narrative

³⁹ Section 37a of the Victorian Crimes Act 1958 No. 6246 (legislation introduced in 1989).

⁴⁰ S37a (3) (4) (5) (6).

⁴¹ See chapter 7 of Taylor (a) (thesis) for a detailed discussion around this issue and chapter 7 provides examples from the transcripts to demonstrate the types of cross-examine put to alleged victims and how this evidence was juxtaposed to other themes for the purpose of strengthening or enhancing the story line in defence narratives.

⁴² See for example: Heenan, M. & McKelvie, H. *Rape Law Reform Evaluation Project*. Report no. 2. Victoria: Department of Justice 1997. Section 5.; Henning, T. "Consent in Sexual Offences Cases: The Continuing Construction." *Women Against Violence*. Issue 3, November, 1997, pp.4-14. While Henning's article does not deal specifically with Section 37a it does take issue with the difficulty of judges reinterpreting legislation designed to address discrimination against complainants in sex offence trials in a way that continues to harm victim/survivors.

⁴³ A more detailed analysis of these two areas is covered in Taylor (a) (thesis) chapters 6 & 7.

of the promiscuous female. The exclusion of evidence allowed for a specific legal reality to have domain in a forum that is promoted as a site of fact-finding and neutral investigation. Instead, the narratives reflect what might be termed the promotion and promulgation of legally sanctioned lying.

Deliberate obfuscation and purposeful misleading and confusing alleged victims as they are forced to structure and modify their evidence to fit with a legal reality are considered good ‘forensic skills’; an ‘art form’ and ‘techniques’ by judges and other barristers.⁴⁴ It is as though they are virtues to be admired and nurtured over the concept of fair investigation.

Part II Section B: Thematic Patterns in Legal Narratives of Alleged Victim/Survivors and Mothers

Excluding corroborating evidence and limiting the scope for individual agency of the alleged victim by decontextualising their experiences of abuse, especially long-term abuse, enhances the development of defence narratives.

Defence narratives assumed a storyline quality so that in the majority of cases alleged victims were actually asked very few questions on the allegations themselves or the substance of the allegations. Instead, a great deal of cross-examination focused on the supposed character of the witness and her relationships with other family members or with other males. An in-depth examination of trial transcripts showed thematic patterns in defence narratives which positioned alleged victims around two dominant categories which I describe as the narrative of the ‘mad’ or ‘bad’ daughter and on occasions a mixture of both.⁴⁵

Scutt has argued that the treatment of victims of rape and sexual assault is not linked necessarily to the fact that they are a victim, but is connected to their role as a woman. Scutt further postulates that whether a woman is victim or accused in a trial, her femaleness allows her to be destroyed in cross-examination.⁴⁶ Although the victim/survivors in three of the cases in this analysis were male, it is the contention of this researcher that the nature of the allegations they were making against their biological or step-father situated them as pseudo-female victims as far as constructing them around themes of collusion and vengeance. Such a perspective does not negate their specific location as male victim/survivors, but seeks to situate how a legal construction of them places them in the same structural and thematic context as the eleven other female victim/survivors in this research. It is their allegations that cause them to be cast in the pseudo-female role, and thus defence barristers treat them accordingly.

⁴⁴ *ibid.* see chapters 5 & 6.

⁴⁵ The feminine pronoun is used here as most victims of sexual abuse are female. I fully recognise that males are also sexually victimised and in this research males were cast around the ‘mad’ or ‘bad’ narrative. It is my contention that the nature of the allegations they were making against their biological or step-father situated them as pseudo-female victims as far as constructing them around themes of collusion and vengeance. Such a perspective does not negate their specific location as male victim/survivors, but seeks to situate how a legal construction of them places them in the same structural and thematic context as the eleven female victim/survivors in this research. It is their allegations which cause them to be cast in the pseudo-female role, and thus they are treated accordingly by defence barristers.

⁴⁶ Scutt, J. “Sexual Assault and the Australian Criminal Justice System.” in Chappell, D. & Wilson, P. eds. *The Australian Criminal Justice System*. Melbourne: Butterworths, 1986, pp.57-83

Conjugate with the ‘bad’ or ‘mad’ narrative was the storyline of two sub-categories, which I termed ‘motive’ and ‘means’. *Motive* and *Means* is the nexus developed in the defence construction and narrative that is articulated throughout the trial process. Because evidentiary rulings can have the effect of removing context from the experience of long-term sexual abuse, the evidence of victim/survivors is amenable to an alternative construction by the defence.⁴⁷ Portraying behaviour as bizarre, and as evidence of emotional instability, is not difficult when victim/survivors are objectified through dominant masculinist stereotypes.

Motive relates to the defence portrayal of *why* victim/survivors have made such allegations, and, where applicable, the role of mothers in supporting their child/ren’s allegations. *Means* concerns the development of a narrative to provide explanations as to *how* the victim/survivor came to have knowledge with such explicit detail about the alleged sexual activity. That many of these tactics were recognisable, even in embryonic stage, to some trial judges is indicative of how these patterns of construction are entrenched and well practiced within the courts. When the trial process is dissected the entrenched pervasiveness of masculine hegemonies are clearly present.

While it is true that the defence make everything peripheral central, and everything which is irrelevant relevant, it would not be correct to believe that such a style entails a scatter-gun approach in which cross-examination questions are put forth in any order. This research was able to demonstrate the purposeful development of cross-examination to enable a specific narrative and organised pattern of questions and strategies to emerge. While differences existed to varying degrees in some of the narratives, the structural and thematic similarities were explicit. In several trials defence barristers put identical questions to alleged victims in a way that explicated how these narratives can be repeated across trials because the structure of these legal stories has a ‘ready made fit’ that makes them malleable across trials involving intrafamilial abuse.

Witnesses portrayed around the ‘bad’ daughter narrative were subjected to cross-examination that inferred they were unsavoury in character and capable of ‘lying’ to exact what the defence considered a motive of revenge or greed. The narrative of revenge featured storylines in which children and young adults were supposedly motivated to fabricate false allegations as a ‘pay back’ against fathers who divorced the mother; ‘disciplined’ the child whose character was portrayed as being in need of fatherly discipline; or were not supportive of a supposed unhealthy lifestyle of the alleged victim (inferring promiscuity or illicit conduct involving drugs and/or alcohol). A common defence accusation was that the victim/survivor’s friendship or contact with another child who was supposed to have also been sexually abused provided the *means* by which the victim/survivor came to have *knowledge* about sexual abuse, thereby enabling them to fabricate allegations against their father.⁴⁸ The narrative of greed supposed that the witness was seeking monetary reward, most often because they had successfully received crimes compensation⁴⁹ or had an application for such pending. Receiving crimes compensation or having an application pending at the time of the trial formed a pivotal area of defence cross-examination. Witnesses were often asked about their current

⁴⁷ Feiner and Taylor have noted this point in relation to intrafamilial sexual abuse. Feiner, *op.cit.* Taylor, S. “Court Licensed Abuse and the Construction of the ‘Incest’ Victim.” *National Conference on Sexual Assault and the Law*. Perth: Perth Centre Against Sexual Assault, 1996

⁴⁸ See Taylor 9a) (thesis) chapters 6, 7 & 8 for detailed discussion and transcript analysis around these issues.

⁴⁹ The Victorian Government provides ‘Crimes Compensation’ which victims of crime may apply for the purpose of being awarded financial compensation as a result of the crime. Money is awarded for medical and associated costs incurred as a result of the crime and for pain and suffering. The maximum amount was \$50,000 prior to 1997 after which time the State government introduced changes.

employment status and minors were asked about their mother's financial status and about 'things' the child would like to have or buy which required money. This information was directly juxtaposed to crimes compensation and in a number of cases, the judge reiterated to the jury defence counsel assertions that an application for crimes compensation could be considered as a motive of greed and the fabrication of allegations of abuse. In three cases the current unemployment of young adult witnesses was highlighted and in two cases children were asked about the financial difficulties their mothers were having. In one case the defence barrister described negatively the physical features of the house a teenage girl was living in and suggested that fabricating allegations against her father would be a good way to get money to 'fix the place up'.⁵⁰

Defence narratives of 'greed' were often juxtaposed to narratives of revenge, as though to strengthen the storyline. In one case the witness was asked about her parent's divorce and how the witness was close to her mother as well as the fact that the witness was currently unemployed. A number of examples from trial transcripts expose how well acquainted judges were with defence narratives of greed being juxtaposed with the current financial status or current or planned activities of the alleged victim. For example, in two cases, judges pre-empted defence narratives of greed after defence barristers put only one or two questions about crimes compensation to the complainant, by noting that the defence intended to show the allegations were a 'motive' for 'money grabbing' and financial reward.⁵¹

Cases involving divorce or separation between parents at the time of disclosure by the child contained a strong defence narrative of collusion between mother and child. In some cases the mother was constructed by proxy as malevolent and vengeful as questions about parental divorce or separation were put to the child rather than the mother. In one case a very young child agreed with the defence barrister that his mother was upset around the time that the father left the family home. The boy further agreed that he was upset that his mother cried a lot which led to defence questions that the boy then decided to fabricate 'lies' about his father to exact revenge on behalf of his mother.

In another example the defence barrister put only one question to a witness and that was that her mother 'disliked' her former husband, the accused in this case. The daughter agreed. Denoting how inference can become an unchallengeable fact, the judge in this case noted his awareness that this question would be the springboard for the development of a narrative of collusion. In the absence of the witness and jury the trial judge in this case asked the defence if he would use this acknowledgement by the daughter to suggest that the 'mother and daughter have got their heads together and the daughter will 'really deliver the coup de grace.' The barrister agreed that this was the 'plan.' Hence, in his summing up to the jury at the end of the trial the judge reminded the jury that the evidence of the alleged victim was 'tainted' and her 'attitude' towards her father 'poisoned' because of a 'malevolent' mother, adding that the jury may consider 'motive' as a factor in the allegations.⁵² This particular case was one, which involved evidence of alleged explicit admissions by the accused to more than one other person, and the trial judge wholly excluded this evidence.

Narratives that situated witnesses in the 'mad' narrative relied heavily on inference and selective reference to private counselling and medical records of the alleged victim. In one case the defence

⁵⁰ See Taylor (a) (thesis) chapter 7.

⁵¹ See Taylor (a) (thesis) chapter 7 pp.259-264.

⁵² *ibid.* Case L, p.252.

barrister retained the services of a forensic psychologist who despite never meeting the teenage witness in this case, nor her mother, gave evidence that she and her mother were obviously suffering from a severe rare mental disorder that led the girl to fabricate allegations of abuse and have her mother believe them. One of the most distressing aspects of this particular case is that the girl had a history of proven sexual abuse, which included a brother who pleaded guilty to a variety of offences prior to this trial. The second and third trial judge appointed to this case allowed the defence barrister to subject the girl to hostile and extensive cross-examination about the ‘alleged’ abuse by her brother. Although this evidence had absolutely nothing to do with the case involving the girl’s biological father, the girl was repeatedly accused of lying about her brother abusing her and at no time was the jury informed that the brother had pleaded guilty to such abuse.

Moreover, family members supporting the accused were allowed to give evidence in court that the girl had an untrustworthy character and was regarded as a liar by her family with regards to her history of sexual abuse. It is worth noting here that this case was one in which DNA evidence was excluded from the trial.

The exclusion of collateral evidence, which provided a basis of support for the witness in this case, made the teenage girl’s evidence all the more malleable to the development of a defence narrative of the ‘bad’ or ‘mad’ child. In this particular case the defence applied both the ‘mad’ and ‘bad’ narrative to the girl. She was portrayed as being mentally unstable because of inferences about previous false allegations that were said to be part of a mental illness. Conversely, the defence were able to cross-examine the girl on her previous sexual history and accused her of being promiscuous. The barrister was able to lead evidence from a former boyfriend of the girl, (who was supporting the accused), that he had frequently engaged in unprotected sex with her. In the absence of the victim and jury the defence barrister made the derogatory remark that ‘even a prostitute wouldn’t have sex’ with so many people.⁵³ That the girl had been homeless for a time was also used against her for the purposes of making her a non-person – and to increase possible jury prejudice towards the girl as a person of unsavoury character. In keeping with the ‘bad’ daughter image, the girl was subsequently accused of being ‘motivated’ to make up false allegations against her father to exact ‘revenge’ for his divorce from the mother.⁵⁴

In several other cases, the private medical files of witnesses were used against them. For example, a young girl who was diagnosed with epilepsy and was prescribed daily medication for her condition was accused of ‘faking’ her epilepsy in order to feed a drug dependency. Emotional instability was also inferred by the defence barrister as a ‘reason’ for the girl ‘faking’ her epilepsy.⁵⁵ Two mothers were also accused of faking asthma and epilepsy and migraine, one for the sake of seeking attention and the other to feed an addiction to pain killers. These alleged victims and mothers were portrayed as emotionally unstable individuals whose credibility was seriously in doubt. Two mothers were also accused of colluding with their children to improve their divorce settlement and several mothers were subjected to cross-examination that alluded to them being unfit mothers. This evidence was used to infer both a reason for the husband leaving the wife and for mother-child collusion.⁵⁶

⁵³ *ibid.* chapter 5, p.173

⁵⁴ *ibid.* see chapters 5, 6, for various discussions about this case (Case G) and especially 7, & 8 for detailed transcript analysis about this case.

⁵⁵ *Ibid.* chapter 7.

⁵⁶ *ibid.* chapters 7 & 8.

Conversely, mothers who supported their husbands were portrayed around the traditional stereotype of the good mother and good wife. Mothers who supported the allegations of their children also faced aggressive cross-examination which sought to portray them as ‘bad’ or ‘mad’ mothers and wives. In several cases mothers were portrayed as bad homemakers and bad wives who caused considerable ‘stress’ to their husbands. In several cases the mothers appeared to be strong women who believed fully in the allegations of their children. The defence portrayed them as domineering women who colluded with their children to fabricate charges as a form of revenge against the husband. In particular, marital discord was consistently articulated in defence narratives as a motivating factor for the allegations. In contrast, mothers who chose to support their husbands against their daughter were portrayed around traditional stereotypes of wives who were good ‘homemakers’ who remained in the home and did not seek work outside the home. In many ways, the portrayal of mothers reflected family dysfunction literature in which ‘good’ mothers were those who stayed at home and baked for the family and never sought activities outside of the home, hence any allegations of sexual abuse by the daughter could be discounted on that basis alone.⁵⁷

Lafree and Reskin conducted research on jurors’ responses to victims in rape cases, and found that the evidence of women whose behaviour violated stereotypical notions about ‘proper’ female behaviour contributed to conservative jurors assigning them little credibility.⁵⁸ This point may well be contrasted to the mothers in this case who did not fit the traditional conservative image of the good wife and good mother. Of interest is the fact that those mothers who chose to support their husbands against their daughters occurred in three cases, each of which involved very long term sexual abuse.⁵⁹

Mothers who supported their child/children were also subjected to intense scrutiny regarding any medical or counselling history. Mothers were routinely accused of possessing the kind of personal sexual knowledge to ‘teach’ their children how to fabricate allegations. In several cases defence barristers sought to highlight how mothers were incapable of imposing proper discipline on their children and that the husband had been the one to instil proper discipline on the children. Conversely, several child complainants were asked about parental discipline and were accused of fabricating stories of abuse to exact revenge against the father for disciplining them.⁶⁰

And what of the accused themselves? How were they portrayed? Many of the accused in these cases chose not to give any evidence in their defence. In many cases their defence counsel probably did not see the need for them to give evidence since they were constructed by proxy. By that I mean that they were portrayed as good and decent men by their defence counsel through cross-examination of the alleged victim, the mother where applicable and other witnesses. In many cases during cross-examination alleged victims were asked to identify family photos showing what the defence called a ‘happy’ family portrait. Hence, the concept of a ‘happy’ family disrupted only by the foul and untrue allegations of the daughter or son. Of course the obliteration of evidence supporting the child such as DNA evidence, explicit admissions by the accused and eye-witness testimonies made the portrayal of a particular family structure an easy accomplishment. Moreover, decontextualising the environment in which the incidents occurred and decontextualising the relationship between the father and child so that the child’s evidence in their statement, of threats,

⁵⁷ *ibid.* chapter 8.

⁵⁸ Lafree, G. & Reskin, B. “Jurors’ Responses to Victims’ Behavior and legal Issues in Sexual Assault Trials.” *Social Problems*. v.32, no.4, 1985, pp.389-407.

⁵⁹ In these cases the alleged abuse had occurred over a period of 10 or more years.

⁶⁰ Taylor 2001 (a) (thesis) chapters 7 & 8.

actualized physical violence and coercion is silenced in the courtroom, enables defence barristers to harangue the child for failing to disclose and for appearing to take part in normal family activities. Summit's description of the child abuse accommodation syndrome provides an excellent description of the kind of trauma-specific acquiesce created in child sexual abuse, particularly intrafamilial abuse.⁶¹ As mentioned earlier in this paper, Feiner too has identified the clear advantages to defence counsel when the evidence of alleged victims of intrafamilial sexual abuse is decontextualised in a way that makes their evidence appear fragmented and less credible when contrasted to the defence narrative. Often, child witnesses were made to acknowledge carefully construed defence questions about how their father had helped them with their homework or bought them a bike when they were ten or had given them this or that for Christmas. In several cases alleged victims of long-term abuse were made to read aloud to the court greeting cards they had given their fathers many years ago. When fathers as accused did give evidence they faced very minimal examination and cross-examination. Unlike the victim/survivor, they are protected from having their character scrutinised or even attacked the way defence barristers attack the character of the child or young adult witness. Much of the prosecution cross-examination of the accused is around technical issues relating to charges. Further, the evisceration of much prosecution evidence results in prosecution cross-examination that is constrained by evidentiary rulings and so is most even very brief.⁶²

The supposed 'means' to have explicit knowledge to articulate the various allegations made by complainants also showed a thematic pattern. Quite a number of alleged victims were asked about their contact with friends or acquaintances through school or family who may have been abused with the explicit suggestion by the defence that this is where the complainant got their 'knowledge' from. Mothers were also accused of providing their children with information via sex education that enabled their children to fabricate and invent allegations.⁶³ Several children were asked about television shows they had watched which contained themes or dialogue around sexual abuse. Even receiving counselling for the alleged abuse was targeted by the defence as an area where children and young adults learned information about sexual assault that enabled them to invent 'lies' about their allegations.

Children were also cross-examined about having done 'drama' at school or about their interest in writing poetry and other artistic activities. Agreement with these pursuits was linked to the child's ability to then create false allegations. Predominantly, proximity to others who had knowledge of abuse; television or literature on abuse and counselling (especially at services run by women) fuelling 'creativity' were identified in defence narratives as providing the 'means' by which children and young adults possessed explicit knowledge to articulate their evidence about what they allege was done to them.⁶⁴ Several witnesses had their school and academic transcripts (university) subpoenaed so defence counsel could examine the kinds of subjects or units undertaken by the alleged victim for the purpose of using this information against them. For example, several

⁶¹ Summit, R. "The Child Sexual Abuse Accommodation Syndrome", *Child Abuse And Neglect*. v. 7, 1983, pp. 177-193.

⁶² *ibid.*, Fn7 p.229, chapter 7 provides a breakdown of how many questions alleged victims faced from both legal counsel and the judge as opposed to that of the accused. Despite the accused being on trial, alleged victims faced an average of 1,000 questions as opposed to the hundred or so questions faced by the accused if he chose to give evidence.

⁶³ *ibid.* chapter 7.

⁶⁴ *ibid.*

children were cross-examined about sex-education classes given at their school and about drama and poetry classes (enabling them to fabricate abuse and play the role of the victim). Several young adult witnesses were asked about studies in psychology; sociology and human development units they had undertaken and three young women were asked specifically about certain 'feminist' books they may have read about sexual violence. Access to such information, asserted defence barristers, provided fodder for these children and young women to obtain the necessary knowledge to fabricate their allegations.

Part III: Sentencing: Patriarch Homilies about Minimisation of Harm and Diminished Responsibility

Should the Prosecutor, via the evidence of the victim/survivor succeed in having a jury bring a guilty verdict against the defendant, such a decision is not necessarily binding. Although juries are informed that they are the 'judges' or 'triers' of the facts in a case, deliberations leading to a guilty verdict on any number of charges are open to legal challenge by the offender and his lawyer through the appeal process.

Cases that resulted in a jury conviction did not mean an end to a specific defence construction it simply means a shift in narrative paradigm. A feature of the Victorian legal system with regard to sentencing was the introduction of 'victim impact statements'. These statements allowed a victim of crime to inform the judge how the crime has impacted on them. The victim of crime is able to have qualified professionals such as their counsellor, also provide a report to the courts as to the impact of the crime on the victim. The structure of Victim Impact Statements is problematic for victims of long-term abuse since the statement can only discuss the impact of those charges for which the offender was convicted. Hence, the distilling of long-term abuse into a handful of charges and the reality that juries often convict the accused on a number of charges but not all of them, adds another layer of distress and difficulty for victims of long-term sexual abuse.

Notwithstanding this, most victims in this research did submit a Victim Impact Statement written either by themselves or by a professional and in some cases a report by the victim accompanied by another report from a therapist or counsellor. However, in each of these instances judges consistently modified and excluded all or part these reports after defence barristers argued their irrelevance. In one example, a qualified therapist who had worked for some time with the victim/survivor had submitted a Victim Impact Statement on her behalf, detailing the degree of trauma and distress the girl suffered, which included an abortion when the girl was barely a teenager, as result of the abuse. The defence barrister in this case argued that the report was 'couched' in language that was designed to 'paint a much worse' picture of the girl's suffering and urged the judge to reject the report. This point made in the absence of any other evidence to challenge the therapists report and is accepted as a *fait accompli*. In sentencing the judge noted that *he* accepted that the girl suffered some distress but added that *he* 'was not prepared, on the available evidence, to find that these offences had identifiable adverse consequences' for the victim.⁶⁵ Thus, the discretionary power of the judge is such that he may disqualify the opinion of a professional, outside his own professional realm, so that his legal view becomes the only view when deciding the degree of harm to a victim.

⁶⁵ *ibid.* chapter 10, Case L, p.363.

In several other cases judges sought to ameliorate notions of harm to victims by minimising their pain and trauma. Mothers who supported their children may find themselves included in the narrative of mitigating factors in creating their husband's offending. Comments about wives contributing to the circumstances in which the abuse occurred by not being in the family home or being incapacitated in some way were used as part of a vocabulary of excuses to mitigate the conduct of the father as offender.

In some cases continuing to denigrate victim/survivors after successful conviction continued, whilst heightening a narrative of the father/offender, as a 'good citizen' was a consistent element in sentencing. In one case the fact that the father as offender enjoyed the full support of his wife and other children (who had ejected the victim from the family) was treated by the judge almost as though such evidence proved the good character of the offender. Although several Appellate Court judges who later reviewed this case noted 'an abundance of evidence that other members of the family had closed ranks against the prosecutrix' (victim/survivor) the familial rejection and isolation victim/survivors endure when they disclose, at the behest of the offender, is most often ignored by the judiciary.⁶⁶

In another case, the judge accepted as mitigating factors reports by the offender that his wife was a causative agent in the abuse and further took into account the man's bad back, current financial problems and incredibly, the fact that the man had been a former government child protection worker, were all considered mitigating factors in his favour.⁶⁷

Aside from minimising harm the concept of victim culpability was referred to in two cases.⁶⁸ In one case the judge suggested that the daughter partially consented to her own abuse. No evidence was ever proffered to support this assertion and at no time during the trial was any such concept articulated or suggested. In fact during this trial, prior to a jury verdict, and other trials analysed in this research, it was not uncommon for judges and legal counsel to discuss 'incest' as a crime in which the victim was 'equally culpable'. In fact in several trials defence barristers attempted to have victim/survivors co-charged with their father's since the current Victorian *Crimes Act (1958)* allows for victims of 'incest' aged 18 years and over to be co-charged for their own sexual abuse! The language of judges and lawyers in the sentencing and appeal process denote the linguistic complicity in which intrafamilial rape is located as a consequence of family dysfunction rather than a form of systemic male violence.

From the trial transcripts analysed within the courtroom at sentencing there appeared to be little offering of a dialogue to contrast the patriarchal homilies, which punished victims and mothers where applicable, through a vocabulary of excuses that impute blame to them. Defence narratives suggesting a type of family dysfunction caused by the offender's wife or other external factors is most often accepted without any real dissenting views. Moreover, it is interesting to note that whilst the judiciary are keen to confine any impact on victim/survivors to only those charges the offender was convicted of, the expressed life history of the offender prior to, and following the cessation of the offender's behaviour, as well as the acceptance of carefully constructed mitigating factors, were uncritically accepted.

⁶⁶ *ibid.* p.383.

⁶⁷ *ibid.*

⁶⁸ In one case this culpability was confined to a report from a psychiatrist who had never met the victim but was asked to provide a professional opinion on trauma in long term abuse. This psychiatrist suggested that the victim was culpable for allowing the abuse to continue.

Ostensibly, the law prohibits the rape and sexual assault of one's own children. In reality, the law behaves towards such children in an unconscionable and punitive manner. The privileging of the father's story, via defence narratives, over the experience of the child; the process of rendering children silent and eviscerating prosecution evidence delineates a legal process where sophistry replaces principled investigation and legal deception through the concealment of facts is, according to a number of judges from this research, considered 'good forensic skill'. Even deliberately seeking to confuse a jury and witnesses is considered a virtue placed higher than the concept of seeking to enhance fact-finding. In essence, trials promote a legal reality infused with artificial morality that amounts to legally sanctioned lying as a virtue to be admired.

As legal ethicist David Luban has asserted, lawyers often 'check in their morals at the courtroom door' prior to a trial.⁶⁹ Luban is critical of the legal method of humiliating and attacking the credibility of witnesses, who lawyers know are telling the truth, but are unjustly attacked in order to advantage the opposition. He described such conduct as 'unconscionable', saying that in a different context, such behaviour would be regarded as immoral, but within the adversarial system, such conduct was considered a legal skill.⁷⁰ A senior Victorian judge acknowledged that very often victims of crime face trial by ambush.⁷¹

Part IV: Speaking in Tongues: the language of complicity

Legal discourse on intrafamilial rape further entails an entrenched ideology that the rape and sexual assault of one's own children is less serious than other forms of sexual violence.⁷² Seldom do judges express condemnation of a man's predatory sexual behaviour towards his own children, as opposed to offenders who rape and assault non-familial victims.⁷³ The unspoken view seems to be that a father who rapes his own children commits a violation against his own property, whereas the man who rapes or assaults the children or wives of *other* men has violated the property of another man.

Mitra's research on appeal decisions in father-daughter rape cases endorses such a perspective, as do comments by trial and appellate judges in this research, who suggested that the offender posed no threat to the community, as though such argument lessened the offender's crime. In other words, his crime was kept within the family unit, and therefore posed no threat to the property of other men.⁷⁴

⁶⁹ Taylor (a) (thesis) chapter 3

⁷⁰ *ibid.*

⁷¹ Waldron, G. "Criminal Justice Responses to Victims of Crimes." In *Bringing It Together – A Victim Support Strategy*. May 1995, Published proceedings, p.27. (This point is discussed further in chapter 5).

⁷² See discussion on minimisation of harm in Chapter Two of Taylor (a) (thesis) and see also the work of Mitra, C. "Judicial Discourse in Father-Daughter Incest Appeal Cases." *International Journal of the Sociology of Law*. v. 15, 1987, pp.121-148, p.139 and Scutt, J. *Even in the Best of Homes*. 2nd ed. Melbourne: McCulloch Publishing, 1990.

⁷³ Taylor, (a) *ibid.* See also Taylor, S.C. "Betrayal of the Innocents." *Women Against Violence*. 3, 1997, pp. 31-37.

⁷⁴ Refer also to the comments in particular to cases E and F with regards to the offender being considered a man who posed no threat to the community. A recent newspaper report revealed the extent of rape and other sexual crimes in South Africa. Intrafamilial rape was also highlighted, and a case identified in which a man convicted of raping his daughter was treated with leniency by the sentencing judge on the basis that a mitigating factor was the lineal relationship between the offender and his victim. The judge believed that because the attack happened within the *family unit* the man posed no threat to the wider community. See Vera Haller "The Republic of Rape." *Sunday Herald Sun*. January 2 2000, p.46.

Concomitant to this point is the permeation of language between family dysfunction theory and judicial utterances around intrafamilial abuse.⁷⁵ At all levels of a trial, judges and barristers constantly discussed the alleged abuse as a ‘relationship’ and at times as an ‘affair’; of father’s having a ‘guilty passion’ towards their daughter, with one judge suggesting that a father showed ‘lustful inclinations’ towards his daughter. This research noted the proactive terminology used by judges and legal counsel from both side of the bench when both talking among themselves about incidents of alleged abuse and when putting questions to the child or adult witness. The child or adult was asked about the ‘sex’ they ‘gave’ their father or ‘sex’ they ‘engaged in’ with or ‘had with’ the father. At all levels the language was one of mutuality and complicity – there was an absence of any connotation of violation of the child or young adult. It is my contention that both judicial and family dysfunction literature have a specific predilection for this vernacular as it conceals the reality of intrafamilial rape. In one trial the defence barrister successfully argued that the alleged victim be stopped from using the term ‘rape’ to describe what her father did to her. The judge agreed saying ‘incest’ is not ‘rape’ and went to the degree of having the alleged victim ‘warned’ as to the legal consequences if she continued to use the term ‘rape’, further arguing that ‘incest’ could be ‘consensual’. In two other trials judges agreed that the word ‘rape’ should not be used in any documentation or dialogue to describe charges of ‘incest’ with one judge adding that ‘incest’ was a ‘joint crime’. Both of these examples exemplify a legal view of intrafamilial abuse as a consensual crime.⁷⁶ Moreover, the term ‘incest’ is most often used in a pejorative manner and defence counsel know how to make the most of this unpalatable term that is so heavily weighted with stigma, myth and ignorance, especially towards victims. The language used by alleged victims to describe their experiences (rape, abuse, assault) is silenced and made subordinate to the dominant male viewpoint which prefers a stigmatic language that invokes notions of complicity and mutuality.

At the level of sentencing the language of minimisation of harm and degrees of blame attribution to all but the offender identify the nefarious link between family dysfunction theory and its patriarchal nomenclature around describing the rape of children in the family unit and judicial discourse. In spite of research demonstrating the use of physical violence and threats against victims of intrafamilial sexual abuse, some professionals dealing with intrafamilial sexual abuse maintain beliefs about ‘incest’ as being a ‘loving relationship’ between father and daughter, rather than a form of sexual violation.⁷⁷ In almost all of the cases examined in this research, police statements by victim/survivors detailed the offenders multiple forms of physical violence against them; threats to harm them, their pets or other family members; constant surveillance by the offender leading to heightened feelings of constant fear and hyper-vigilance by the child/young adult; continually telling them that no-one would believe them; limiting their social interaction and emotionally abusing them. This evidence was almost always excluded at the trial level and even if a jury conviction resulted, this evidence remained excluded from consideration at sentencing since it did not form part of an official guilty ‘charge’ or was considered peripheral to the crimes of which the offender was found guilty. The charge of penetrating a child’s body is treated as an act removed

⁷⁵ For a more detailed discussion on this point see ‘Taylor, S.C. (b) “A Name By Any Other Word Does Not Necessarily Make It Merely Another Rose.” in Mills, A. & Smith, J. eds. *Utter Silence: Voicing the Unspeakable*: New York: Peter Lang, 2001, pp.211-228.

⁷⁶ See Taylor, (a) (thesis) chapter 5 pp.166-170. See also Taylor (b) 2001 *op.cit.*

⁷⁷ Conte, J. & Berliner, L. “The Impact of Sexual Abuse on Children: Empirical Findings.” in Walker, L. ed. *Handbook on Sexual Abuse of Children*. New York: Springer, 1988, pp.72-93, p. 73; Glaser, D. & Frosh, S. *Child Sex Abuse*. London: Macmillan, ch. 2; Blume, E. S. *Secret Survivors*. New York: John Wiley, 1990, p.111.

from any context or even from any degree of great harm. As one judge in Australia commented, when sentencing a man for the long term abuse of his teenage daughter, the child was ‘merely a substitute’ object used to ‘replace the dissatisfying’ sex the man was having with his wife.⁷⁸ The trauma and other forms of violence accompanying the abuse were summarily rejected – as also occurred in case L and in case J.

The patriarchal meaning of ‘incest’ is saturated and infused with notions of consent, mutuality and no harm, so that in the trial process the judiciary are given linguistic latitude to replicate and reinforce masculinist notions of intrafamilial rape and assault that abrogate the experiences of victim/survivors.

CONCLUSION:

Throughout the trials what remained disturbing was the notion of impartiality articulated by judges as they informed juries at the beginning of trials that this is a case where there is an ‘absence’ of any corroborating evidence for the complainant and is therefore one word against the other and at the other end of the spectrum, judges rejecting evidence of trauma to individuals and suggesting instead minimal harm and even partial culpability. Under the mantra of neutrality and impartiality judges continue to tell juries that the trial process is about fact-finding so that an ultimate decision of ‘truth’ can be made. Jurors are told that they are the judges or triers of fact. However the obliteration or removal of facts from the jury means that judges are effectively taking ‘facts’ away from the jury on the basis that questions of fact have become questions of law, and thus they can be removed from legal consideration.

Consequently, judges have the power to decide who can speak and what they can say. Pre-trial arguments determine the ‘playing rules’ as one judge called them and the process of modification, exclusion and sanitisation of the alleged victim’s evidence results in a legal script that is proffered in court as the ‘truth whole truth and nothing but the truth’ of the alleged victim. Further, that judges can modify and monitor the evidence of other witnesses demonstrates the artificial reality within the courtroom and concomitantly, the artificial morality as trials are promoted to juries as a process of fact-finding.

The legal narratives that dominated these trials could not occur without the complicity of the judiciary. The judiciary legitimate stock story narratives by colluding with their development and dissemination in trials. Judges appear satisfied to sit and listen to defence lawyers articulate narratives that they know to be grossly misleading and at times absolutely false. At the level of sentencing the affirmation of a different type of narrative, but one no less which again negates the reality of the victim, is given credence. At the level of appeal, judges once again reaffirm these stock story narratives by accepting uncritically defence narratives and strategies that extirpated prosecution evidence. At every level of legal discourse, uncritical assumptions about the lying nature of women and children who alleged sexual violence are voiced without credible challenge. The unfettered right of defence barristers to attack with impunity on a most personal level those

⁷⁸ Wightman, M. “In Limbo: Young Women, Sexual Assault and the Rest.” *National Conference on Sexual Assault and the Law*. Melbourne, 1995. Published proceedings, pp.251-266, p.251.

victim/survivors courageous enough to confront our legal system continues to be a pivotal concept in Anglo-Saxon law.

The construction and dissemination of defence narratives reinforces men's lore in the legal domain. The privileging of the dominant story or narrative over the subordinate 'story' (read 'story' as the victim/survivor's experience) allows legal process to create what Scheppele and other legal narrative theorists have termed a 'legally sanctioned reality' and is truth-defeating rather than truth-seeking.⁷⁹ The treatment of alleged victims situating them as liars and fabricators, colluders and unstable and unsavoury characters who cannot be believed is the *tabula rasa* of legal trials involving sexual allegations. The development and mobilisation of these narratives is enacted in the courtroom with frightening precision. The presentation of an almost uninterrupted defence narrative as opposed to evidence that is fragmented and uncircumscribed by context, provides a natural conduit for the regurgitation and maintenance of masculinist stock stories about intrafamilial sexual abuse that accord to judicial attitudes rather than to the actual facts of the case.

Judicial discretion allows judges to decide who can speak and what they can say as well as delineating the framework around the language used to speak. An important question to consider when debating evidentiary process is to ask who is advantaged in such a process. Clearly, an abundance of evidence would suggest that victims of sexual abuse are severely disadvantaged in our legal system.

While judicial discretion is an important feature in Anglo-Saxon law and should be retained, the arguments in this research around judicial discretion focus on the exercise of that discretion. A number of feminist legal scholars have identified the application of judicial discretion to enact personal bias against complainants in rape and sexual assault trials.

Judicial claims about impartiality, neutrality and fact-finding are difficult to sustain under the weight of evidence presented in this and other research discussed in this paper. As a locus of social power, the institution of law is promoted as a system of fair justice, where all citizens are treated equally and where truth is valued and is investigated through trial process. Thus, the system of law is considered a normative structure of our civil and democratic society. Such claims are considered axiomatic while ignoring cultural, social and gender dominance; the disempowered and vulnerable; and the evolution of legal discourse that contributes to these structural disadvantages. They ignore the fact that normative structures very often have an historical basis of oppression, of which legal discourse both reflects and maintains.

A contention of this researcher, is that the legal response to intrafamilial sexual abuse not only reflects the institutionalisation of patriarchy, but also that the legal system is based on notions of sophistry and artificial morality. As such, law fails to reflect the very standards of truth, fact-finding and moral integrity that it so earnestly articulates through judicial rhetoric.

This research is replete with examples that conform to structural patterns of institutionalised judicial bias and prejudice against women and children. The research further reveals how critical understandings of intrafamilial abuse and sexual violence per se articulated through feminist

⁷⁹ See Scheppele, K.L. "Foreword: Telling Stories." *Michigan Law Review*. v.87, 1989, pp. 2073-2098; Graycar, R. "Telling Tales: Legal Stories About Violence Against Women." *The Australian Feminist Law Journal*. 7, 1996, pp. 79-93; Kaspiew, 1995, *op.cit.*

scholarship has not permeated legal discourse. Small achievements in legal reform are slow to filter into the legal process or are actively resisted by the judiciary. Moreover, this research has shown that the trial process has the ability to reflect the same structural inequalities and abuses of power the victim/survivor experiences from the perpetrator in intrafamilial abuse. Despite its own rhetoric, law remains a self-referential system that is underpinned by masculinist hegemonies that disenfranchise women and children from accessing 'justice'. The legal representation of intrafamilial sexual abuse in Australian courts is truth defeating, not truth seeking, a fact that has been documented in other judicial systems, thereby delineating the maleness of law.

This paper is based on PhD research undertaken by the author titled 'The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court of Australia in 1995.' This thesis was co-winner of the Jean Martin Award, a national award presented for the Best PhD in Social Sciences from an Australian University 2000/2001.

A book based on this research will be forthcoming: S. Caroline Taylor 'Court Licensed Abuse: Reading the Legal Response to Intrafamilial Rape' Peter Lang: New York

© Dr. S. Caroline Taylor
Post-Doctoral Research Fellow
University of Ballarat
c.taylor@ballarat.edu.au

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