

**The Examination for Discovery
In cases of Sexual Violation:**

A Discourse Analysis

Master's Thesis
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**The Examination for Discovery
In Cases of Sexual Violation:**

A Discourse Analysis

By

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B.S.W., University of Victoria, 1999

A Thesis Submitted in Partial Fulfillment of the
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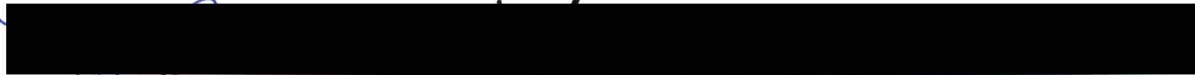
MASTER OF SOCIAL WORK

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We accept this thesis as conforming to the required standard

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Abstract

This quotation illustrates the spirit in which this analysis has been conducted:

Look for the deepest meanings in the least elevated places. Be more radical than anyone has ever been about the unknown, because what has never been asked is probably what we most need to know. (Catherine MacKinnon, *Feminism 9*)

There are very few rules governing the discovery process in cases of sexual violation in Canada. Coincidentally, there has been very little research conducted on the discovery process in Canada (Pirie, 2001)¹. I question why, in the legal system which is a rule making body, there is an absence of rules governing the discovery process in cases of sexual violation. I also question why there has been very little research conducted on the discovery process when it is a powerful step in the legal process that has the potential to influence outcomes in legal cases, as well as the power to intimidate litigants and/or their lawyers into abandoning their cases. I question who benefits from a lack of specific rules regulating the discovery process, who benefits from the blocking of research about the discovery, and the lack of public critique and debate. I also question whether women have wanted to publish their experience in the discovery, or if they have been blocked from doing so. I am not suggesting the usual blocks women experience, such as lack of access to resources and opportunities. I am suggesting a block in regard to what Michel Foucault describes as "the intersection of the excess of armed justice and the anger of the threatened

¹ This is supported by Lessard, 2002, and Perks, 2002.

people,” (*Discipline*, 73) Bureaucratic repetition and the institutional perpetuation of the law’s power blocks women from telling the stories of their experiences. The blocks may not be recognizable by any one named power, but they exist nonetheless. I encountered several challenges while attempting to publish my experience of the discovery. These are discussed in the final chapter.

My research into law, feminist law and psychology indicates that although thousands of women are sexually violated in Canada each year, very few of these women file reports with authorities or pursue recourse through the justice system. The primary reason found for these profoundly small numbers, concerns women’s perceptions of the way they are treated by the justice system. In one study by the Solicitor General of Canada² women gave the following reasons for not reporting incidents of sexual assault: 50% of sexually violated women believed that the police could do nothing about it. 44% were concerned about the attitude of both police and the courts towards sexual assault. 33% were afraid of another assault by the offender, and 64% reported fear and shame prevented them from reporting. In conclusion the report stated, “Women who have been sexually assaulted often fear that if they report a sexual assault they will be re-victimized by the justice system.” (15) In another study of women who did report sexual violation, “seventy-three per cent of civil litigants indicated that they had great difficulty with their hearing; both the pre-trial discovery process and the trial” (Feldhusen, et. al. 83).

What transpires in a discovery process remains virtually unknown to the public. In a case of sexual violation, only the lawyers involved and the woman

² “Canadian Urban Victimization Survey,” Bulletin 4: Female Victims of Crime, Ottawa, 1985

who is questioned in the discovery are privy to the events. This research is about my experience in a discovery process, in a case of sexual violation. The sexual violation and the legal action that followed, including the discovery process that this research is based upon, occurred in Canada during the past 10 years. All names, dates and places have been removed for protection of the parties involved. Any resemblance to known events is purely coincidental. The opinions included in this research, unless cited as a reference, are strictly those of the researcher.

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Executive Summary

This research is an attempt to unpack what is known about the legal practice of the discovery process, together with the subjective experience of the sexually violated victim, in an effort to disrupt what we think we know about the legal system. The purpose of this research is to conduct a feminist discourse analysis to examine, understand and make explicit the context, relationships of power and allocations of privilege that perpetuate inequalities in the civil discovery process, specifically in cases of alleged sexual violation.

Through a discourse analysis, questions are asked to determine who speaks, who does not, and under what conditions and limitations. What are the points of view of the speakers? Is there an institution prompting, storing and distributing what is being said? Further, what do the answers mean in relationship to the literature and research that pertains to law, sex, and notions of “truth” and power.

My perceptions of the strategies and tactics used by the questioning lawyer in the discovery examination are identified and analyzed. Three methods of analysis are used: coding of the transcripts into categories based upon my subjective thoughts and feelings, alignment with historical and current literature, and the application of empirically tested discourse analysis techniques to determine types of language.

Conclusions are drawn and the effects of these conclusions upon society are discussed. Proposed directions for research and implications for education

are presented. According to Michel Foucault, power is everywhere in varying degrees. This thesis is an act of resistance against the dominant discourse of the discovery examination. By revealing victim's experience in a discovery process (a process that is hidden from public view), another discourse, another form of power, emerges.

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THIS THESIS IS DEDICATED, WITH DEEP APPRECIATION,
TO MY PARENTS:

In Memory
Of

John and Elspeth Slaven

To my father,
who survived the poverty of the “old country,” the Great Depression, and
the Second World War to create a life and a family in Canada.
His pioneering spirit will be with me always.

To my mother,
who took me out with her on a cold winter night in Ontario, in the 1960s,
past the fire barrels burning in the street,
to deliver coffee to women wearing bandanas, as they picketed at the factory
where she worked for over 30 years.

Both helped to instill in me
a sense of social justice
at an early age.

CHAPER ONE: INTRODUCTION

Introduction

This thesis is a discourse analysis of a civil discovery process. It is aligned with Foucault's theory that relationships are constructed, sustained and re-created in relation to their connection with power. Foucault believes that power exists everywhere, to a greater or lesser degree. One mechanism of power is discourse. Discourse is more than language. It is a political practice produced from within a social and ideological context. Political practices include the pursuance of social and economic interests. Discursive practices are created, maintained and perpetuated by social institutions. Historically produced ideologies contribute to the formation of discourse. This thesis is concerned with identifying the ideologies, as well the discursive practices within the discovery process. (For legal definitions see Appendix 2). The goal of this thesis is to determine: What is the social purpose of the discovery, in sexual violation cases? This may explicate some of the concerns about a lack of reporting and the discontent women feel about the way they are treated by the legal system. Andrea Dworkin writes about such concerns:

What breaks the heart about violence against women is that people, including women, do not know it when they see it, when they do it or collaborate in it, when they experience it - even as victims of it.

Male domination is a system of social institutions, sexual practices, economic relations, and emotional devastations. At the same time, it is something men do to women through commonplace behaviors... We are treated as if we are worthless in how we are talked to, looked at, in common social interchanges. The acts of violence and the acts of insult are justified by the nature we are presumed to

have: an inferior nature, specially marked by its compulsive need for force in sex. (172/175).

Discovery is a pretrial legal process by which one lawyer can question the opposing party for information. In my case, the defendant's lawyer questioned me as the alleged victim. (In this research, I will commonly use the word "victim" and not "alleged victim" when referring to myself or another woman who has experienced sexual violation. This does not imply that the woman in question was determined to be a victim by a court of law. Women who have been sexually violated generally think of themselves, and identify themselves as the "victim." They do not identify with such legal terminology as "alleged," and this research is about women's experience.) Only the defence lawyer (whom I will refer to as the Questioning lawyer), my lawyer and myself were present. (A stenographer was also there but had to remain silent and could not participate.) Rules and expectations of the discovery process were not explained to me. I was simply told to answer all the questions. I was told that evidence gained in the discovery process could be used against me later in the trial. I could not find any literature concerning how to (or how not to) question during an examination for discovery. Only loose and unspecific definitions of questioning in the discovery process are available.

Law is shaped by society, and shapes society. Within the sociology of law it has been a challenge to understand this relationship. (Comack 11). There have been recent changes in law which have helped to reduce the problems women face in reporting sexual violations, in enduring the legal processes, and in

attaining convictions for sexual offences. However, current feminist literature suggests that although the legal system can appear reasonable on paper, in practice it operates to a large extent in response to a fear of false accusations being brought against men, and not for the purpose of protecting women who become victims of sexual assault (Cornell).³ (This thesis is based upon an alleged sexual violation; however, most of the literature on the subject, most women who have been sexually violated, and sexual assault centers generally refer to a sexual violation as a “sexual assault.” In these instances, the words “sexual assault” will be used. It does not necessarily mean that a sexual assault was determined in a court of law, although in some cases it was.) The term “sexual assault” is discussed in detail throughout this research

Most of the existing research into the legal language used in sexual assault cases has been conducted on written trial judgments. It appears there has been little research conducted in Canada on the legal language used during the discovery process. This could be because the documents pertaining to a discovery examination are not available to the public without an application to the court. In addition, most women who suffer sexual violation and undergo the discovery process do not choose to publicize their experiences. I am guessing this is because further disclosure of their personal life would be painful, or like my experience, the discovery process makes the victim appear complicit or like a liar or both.

Women suffer various forms of legal discrimination, and as Boyle writes, “it is important to remember that sexual assault is almost completely a crime

³ This is supported by MacKinnon, Comack, Busby & Dworkin.

committed by men against women” (vii). I am interested in the relationship between these two points.

In the literature reviewed, the terms sexual assault, rape, sexual violation and sexual violence are used interchangeably depending upon the author’s expression of sexual violation of women. Whether the literature on sexual violation pertained to civil court or criminal court is not crucial to this thesis. The purpose of this analysis is to form a composite of the situations women find themselves in because of being victims of sexual violation, and in consequence of being participants in the legal system. It is not significant at which level of law women experience dehumanization; what is significant is that dehumanization occurs. Supposedly there are benefits in the way of protections, provided for sexual assault victims in criminal court procedures that are not afforded to sexual assault victims in civil court procedures, because of a lesser standard of proof. However, civil procedures are supposed to be less rigorous than criminal procedures.⁴

To date, discourse analysis of legal language used in sexual assault cases has focused on two questions: How is sexual assault described in the legal system? What is the effect of how it is described? (Prevost 9). This thesis asks a third question: What are the social purposes of the discovery process in cases of sexual violation in Canada?

⁴ Source- Prof. David Turner, professor of social work law, University of Victoria.

Sexual Violation / Sexual Assault – The Social Problem

Sexual assault is a crime that occurs frequently, is underreported, and is not adequately supported by investigative or legal processes (Boyle 134). It should be noted that there has been a substantial increase in the number of sexual assaults reported in the past two decades, about 12 percent between 1983 and 1992. The percentage of convictions increased as well, from 43 to 50 percent (Busby 287). Yet, according to Statistics Canada's National Violence Against Women Survey, "Only about 6 percent of all incidents of sexual assault – including only 11 percent of more serious assaults, such as those involving a weapon are reported to the police" (Roberts 6).

There are many reasons why victims may be reluctant to report a sexual violation. Boyle suggests some of the main reasons include fear of the offender, fear of being accused of provoking the rape, fear of harsh treatment or not being believed by police, feelings of shame (particularly in certain cultures), and a desire to protect her reputation. Boyle adds that in many cases victims do not report sexual assault in order to protect the offender, particularly if he was someone she knows (153). In my case, I did not report my violation for a considerable length of time because of feelings of shame and guilt. This is a common phenomenon in sexual violation survivors. It was only after I had received extensive personal counselling, that I was able to realize that I had been manipulated and taken advantage of. Understanding that I could be so vulnerable led to feelings of self-doubt and despair. I could not trust myself or anyone else for a long time. Since the violation, I have gradually regained trust

in myself; however, it was many years before I was able to enter into an intimate relationship, and I still avoid locations and people that I associate with my experience of violation.

I consider sexual violation, sexual assault, unwanted sexual invasion through attack, manipulation or coercion all to be “crimes against humanity.” The United Nations Convention on the Elimination of all Forms of Discrimination against Women affirms the dignity and worth of the human person (13). The reality is however, that sexual violations continue, and there are few reports, and even fewer convictions. Further, of those men who are convicted, even in cases of extremely violent sexual assault, many receive minimal sentences. Such sentences are contrary to the claims made in the UN Convention and devalue women. The Canadian Charter of Rights and Freedoms was established for the protection of individuals and particular groups, and to guide the actions of institutions,⁵ and the UN Convention serves a similar purpose.

This thesis is particular to the discovery process, in combination with the woman’s experience of sexual violation. I am concerned that the legal process designed to help women obtain a measure of justice in cases of sexual violation is re-victimizing. The UN Declaration appears to have been drafted in consideration of such a possibility:

The U.N. Declaration on the Elimination of Violence against Women, Article 4, f. states “....promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions;

⁵ David Turner, Social Work Law, University of Victoria.

In this thesis, the discourse analysis of the discovery process reveals a larger social message about how the Canadian Government fails to support women who are victims of sexual violation because of the behaviors it condones and sanctions in legal processes. The text upon which this analysis is conducted contains a dialogue between the defence lawyer (the questioning lawyer) and myself, during an examination of Discovery. This analysis is an attempt to look for what Catherine MacKinnon refers to as the “deepest meanings” and the “unknowable” in this discourse.

Sexual Assault – A Problematic Definition.

The concept of sexual assault was introduced in January 1983, in response to concerns that the emotional and political baggage carried by the term rape was a serious impediment to the reporting of, and conviction for, the crime of rape... the change in terminology, [was] and still [is] highly controversial. (Boyle 1)

The definition of “sexual assault” includes an act “...which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated” and “Sexual Assault is an offence of general intent.” “Intent” is defined “A state of mind wherein the person knows and desires the consequences of his act that, for purposes of criminal liability, must exist at the time the alleged offence is committed. (*Barron’s Law Dictionary*)

It is my experience that the term “sexual assault” remains controversial. In my attempts to publish this research, I was instructed by my academic institution's legal advisor that I must not use the term sexual assault to describe my own experience in this thesis because to accuse someone of a "sexual assault" is defamatory and, without a criminal conviction or civil verdict

establishing the truth of the claim, the defence that the claim is true would be very difficult to prove. Thus the institution would be at risk for a damage claim. My case, like most women's cases, did not continue to court. For this reason, the term "sexual violation" is in heavy use throughout this research.

The law has difficulty finding a word for women who have been sexually violated: "Some defence lawyers, academics, and journalists have recently started using the inflammatory term 'accuser'" (Busby 286). Busby points out that the term "accuser" is only used in sexual assault cases and does not appear in other areas of law. "Complainant" appears to be the least problematic term for the legal system; however, to be a "complainant" removes the notion that the woman is a victim, when in fact the reason that she is a "claimant" is because she is a victim.

Sexual violations are often reported as "sexual" instead of "violent." To sexualize violence is to distort the profound aggression of the act. The choice of words in this context can have serious consequences. In a 1974 study by Loftus and Palmer, people who witnessed a car accident were questioned. The words used to ask the questions strongly influenced the witnesses' descriptions of the severity of the accidents. When asked if the cars bumped into each other, contacted each other, hit each other, or smashed into each other, people responded differently. The word "smashed" increased a witness's perception of the severity of the accident. Those who responded to the word "bumped" or "contacted" perceived the accident to be less severe. Retested one week later, participants were asked if they saw any broken glass at the accident site. Those

who responded to the word “smashed” recalled the accident as being more serious than it really was, and imagined seeing broken glass, even though there was none. Prevost summarized that “How the participants interpreted what they saw was altered by the use of one word rather than another” (4). In cases of sexual violation, people’s perceptions of an act are influenced by the words that the legal system chooses to use to describe it. I believe that by calling my experience a “sexual violation” instead of “sexual assault” the severity and legitimacy of my experience may be minimized. The language used in a trial judgment or discovery examination text can distort the reality of a crime:

Their [Loftus & Palmer, 1974] finding that words can manipulate reality could also apply to sexual assault, which a judge might describe either as rape or intercourse. In the former, the term rape implies a nonconsensual criminal act that was committed by someone upon another. The latter term, sexual intercourse, implies a mutual, non-criminal sexual act between two participants. These words imply two different situations and the choice of one over the other may influence how severe a judge believes a sexual assault actually is. (Prevost 1)

It appears that lawyers are not sure what to call cases of a sexual nature. My allegations were officially named “allegations of sexual misconduct.” To call what I experienced “sexual misconduct” is to minimize and distort my experience. It carries the weight of a minor infraction comparable to an unwanted pinch on the derriere, making rude sexual comments like “hey baby, have some of this,” or brushing a woman’s breasts deliberately when passing by her. Sexual misconduct refers to inappropriate, improper or unprofessional conduct. Being sexually violated is not just “inappropriate.” The circumstances that created and followed the sexual violation were not just “inappropriate” either, but these events

are made insignificant by the official naming, making a devastating set of circumstances sound like a singular isolated moment in time, which could not have been *that* bad. I consider this legal classification an understatement of the (alleged) violation that I experienced. Because of recent amendments to the legal system, my “sexual misconduct” case would be considered a “sexual assault” case if it were to occur today. I question who benefits from minimizing the sexual violation of women? It is not women.

Purpose and Objectives of the Research

The purpose of this research is to use feminist discourse analysis to examine, understand and make explicit the context, relationships of power and allocations of privilege that perpetuate disadvantage and inequality in a civil discovery process in a case of alleged sexual violation. The discourse of law has tremendous power to construct and shape ideologies. Ideologies are notions that individuals harbour about the world around them. Ideologies influence how people think and interact with the world. This research is designed to provide an interpretation of the underlying ideologies within legal practice, in a case of sexual violation, by a woman who has experienced the civil discovery process.

As the questioned party in the discovery I have access to the discovery transcripts. There is a law known as the “implied undertaking of confidentiality;” however, this law was designed to protect the information revealed by the questioned party from being used by other parties. The following excerpts by Brian Vail describe the potential uses of discovery transcripts.

The undertaking does not apply to prevent a party from disclosing or using *its own* litigation information outside of the litigation – only from making collateral use of another *party's disclosure*. Protection of the disclosing party's privacy does not preclude him or her from choosing to disclose.⁶ (Vail 10)

Transcripts can be awarded to third parties for purposes outside of the litigation in question [with] leave of the court or the discovered party. (Vail 9)

The implied undertaking does not preclude lawyers from reporting misconduct to the Law Society or the Law Society from using discovery information in investigations and disciplinary proceedings against lawyers... or where the public interest requires disclosure. (Vail 10)

This research is being conducted in the public interest by the litigant or discovered party. There are any number of reasons why a victim of sexual violation might choose not to give permission to expose her discovery transcripts. She might feel embarrassed or ashamed to expose herself in this way. Furthermore, it could be very painful for her to read these documents herself because of the way she is framed. I chose to conduct this research precisely because the discovery process was very distressing for me. The legal forum disqualified my experience and silenced my voice. Foucault states, "There is not one but many silences, and they are an integral part of the strategies that underlie and permeate discourses" (*History* 27). This research is being conducted to illuminate the discovery process, and to present an argument for its social purpose in regard to sexual violation cases.

⁶ Brian Vail, 1999, *The Lawyers Weekly*. Article titled "Can information obtained on discovery be used in other proceedings?"

Discourse creates and reinforces ideologies. The term ideology means “social (general and abstract) representations shared by members of a group and used by them to accomplish everyday social practices” (Jaworski & Coupland 1). A discourse analysis of the discovery helps to explain the process I experienced, and the ideologies that the discovery process sustains, recreates and reinforces.

Feminist literature will be drawn upon throughout the analysis to illuminate the treatment of women in the legal system and to show how women are discouraged from seeking justice, particularly in cases of sexual violation. The goals of this thesis are to identify and to reveal what one woman experienced in a discovery examination, to add to the existing body of research in this area, and to validate the experiences of women who have had to undergo a discovery after suffering a sexual violation.

The Research Questions

In this thesis the primary research question is: “What are the social purposes of the discovery process in Canada, specifically in cases of sexual violation?” To determine these social purposes through a method of discourse analysis, the following questions are addressed:

- What “order” is law reproducing?
- Whose interests are reflected in law?
- Is law divorced from the play of politics, as the Official Version of Law would have us believe?
- Does law live up to its claims of fairness and equity?

- Does it, in practice, dispense justice?” (Comack 68)

This research is conducted to determine the following information:

1. what kinds of language are used, and by whom;
2. whose language is sanctioned by the power's that be;
3. whom does this language affect and what are the effects of the language?
4. whose voice is disqualified from the discourse;
5. what are the effects of disqualification from the discourse?

A brief history of law, and philosophies and ideologies contributing to law, illustrates how the present discourse in discovery examinations developed, how it is sustained and how it is perpetuated.

Conceptual Framework

The conceptual framework of this study centers on how the legal system and its processes incorporate transparent and latent social objectives. These are explored through the discourse analysis of a legal transcript of a civil discovery process, generated for a case of alleged sexual misconduct. Pivotal to this framework is the espoused claim of equity and fairness made by the Official Version of Law in Canada, and the subsequent latent outcome of legal reality as it impacts victims of sexual violation.

This framework includes concepts of the social and textual construction of sexuality, the historical development of law, and the legal and textual construction of sexual assault. Furthermore, this framework includes how legal language subjugates women, and the effects of subjugation, in cases of sexual violation.

This framework allows for notions of truth and power to be examined in regard to the way they are created, sustained and perpetuated through legal language. An examination of such language takes into account properties of dialogue, the need to reconstitute the self (or to tell your story), the differences between direct, indirect and neutral language, minimizing and consensual language, positive versus negative language, grammatical attribution or avoidance of agency, as well as the effects of erotic and affectionate language.

The following are my values and beliefs, to assist the reader in understanding the lens through which I view my experience, and through which I examine the text.

- Language is not neutral but value-laden.
- The legal system is socially constructed.
- Lawyers, judges and lawmakers, as well as women who are sexual violation victims, function within a socially constructed reality that strongly frames their thinking.
- There is not one “truth”; there are multiple ways of perceiving the world.
- Women have a right to describe their experience of sexual violation in ways, and through language, that is meaningful to them. (This includes being able to use the words “sexual assault” to describe their own experience.)
- The word “victim” is not a negative term, nor a legal term. It is used to indicate that the woman who is sexually violated has been hurt or injured.

- The majority of sexual violations are committed by men against women.
- Sexual violation is not about sex; it is about violence.
- There is no neutral action; all actions are inherently political.
- The issue of sexual violation is a social problem.
- In order to change the way sexual violation is dealt with by the legal system, we need to understand sexual violation from the perspectives of its victims.
- Women are not a special interest group and women's issues or interests are not subordinate to men's issues or interests, or to those of other groups.

The above stated beliefs and values will facilitate my critical analysis and guide my examination of the discourse.

CHAPTER TWO: PERSONAL CONTEXT OF THE RESEARCH

My Permissible Story

The following represents less than one quarter of my original story. My story is my reality. To protect my academic institution from potential legal consequences the identities of all parties involved have been changed. In protecting my academic institution, I feel like I became complicit in protecting the alleged assailant as well. As I removed all of the details surrounding the sexual violation that I experienced, including reports and supporting documentation, I felt strangely responsible for the perpetuation of patriarchy, and in my own silencing:

Women are awash in doubt, but ours has never had the credibility of Descartes'. It is our *reality*, even before our knowledge, that is in doubt. Thus I think that the indeterminacy that arises in discourse theory, and in the social text, describes something that, as genders, we are unequally situated in. If you don't determine reality, its indeterminacy – its *unfixity* – is a good deal less apparent to you. Your [women's] world is *very determinate*; it is *all too fixed*. It *can't* just be any way at all.

Catherine MacKinnon, (Feminism, 58)

MacKinnon suggests that to be able to doubt something is to consider that maybe it doesn't exist. To believe that something may not exist is to have the luxury of seeing the world anyway you please. Before I was sexually violated I shared the belief that gender was a difference and not a hierarchy. My experience of being sexually violated, plus my experience in the discovery have been somewhat reinforced in my experience of publishing my account of reality. It has been a painful realization that gender *is* a hierarchy and not a difference.

When I experienced sexual violation I was vulnerable and manipulated. At the time, I was unaware of this. I did not suspect that I could fall prey to another human being. The effects of the sexual violation on my personal life were devastating and some are permanent. It was during extensive personal counselling that I learned not to blame myself for the sexual violation that shook the foundations of my life. It took me a long time to understand and to accept that I had been skillfully and intentionally deceived.

It took me two years to find the strength and courage to take legal action. My motivation to start a legal action was to expose what seemed to me to be the predatory behavior of one individual. My hope was that I would protect other women. I believed that I was not that different from other women; if anything, I thought I was stronger than some. I was concerned that if this individual could sexually violate me, then he could also violate other women.

I learned that lawyers who specialized in sexual assault required a \$10,000 retainer fee. My resources were slim. I searched for a lawyer who would take my case on contingency. This meant that s/he would recover payment from whatever sum I was awarded. Several lawyers said that they believed in the merit of my case, but could not afford another contingency case.

My case was accepted on contingency by a law firm. Because the legal process moves very slowly, it was not until years later that I learned my lawyer claimed to have no experience in sexual violation cases. During this discovery I first witnessed what appeared to me to be my lawyer's ineptness. In my opinion, my lawyer not only failed to protect me from what seemed to me to be the

questioning lawyer's inappropriate inquiring, he addressed my complaint about the questioning by telling me to "go scream in the bathroom if you need to." Immediately after his comment, I phoned an outside source, a professor of social work law, for advice as to the appropriateness of what I was experiencing in the discovery.⁷ I was informed that what I was experiencing did not sound acceptable. Immediately following the discovery examination, I dismissed my lawyer. His firm later agreed to terminate the arrangement with minimal charges,⁸ under the condition that I signed an agreement stating "that I would not sue the firm for poor advice."⁹

I eventually retained another lawyer. This time however I spent over \$10,000 only to have him quit my case before my case went to court. Coincidentally I had exhausted my financial resources at exactly the same time. (Had I have known I would have ended up paying this much, I would have retained a firm that specialized in sexual assault cases in the first place.) My remaining options were to represent myself, or to abandon my case. I reluctantly chose the latter.

⁷ I phoned my professor, David Turner, at University of Victoria, who confirmed that this was an inappropriate response.

⁸ This firm charged me approximately \$2,300.00, most of which they claimed pertained to the costs of the discovery.

⁹ I later learned from lawyers that my case had been put in the wrong court. This had a potentially detrimental effect upon my case.

My Silent Story

In many ways this thesis has been difficult to write, not only because it concerns (alleged) sexual violation, and what I consider to be an experience of re-victimization by the legal system, but because as I attempted to write of my experiences, I was blocked from using the language that held meaning for me. As I attempted to write of either the (alleged) sexual violation or my feelings of re-victimization by the legal system, I was instructed that I must not use the language that I logically use to describe these events, because it may offend (my alleged assailant or the legal system) and may consequently invite legal consequences. In describing my experiences, I had to protect my alleged assailant and the legal system, for fear of legal repercussions. It seemed to me that this was a perfect example of how the legal system recreates, reinforces and perpetuates its power.

Consequently, constructing this thesis has been like trying to write with disappearing ink. I would think of my experiences of victimization or re-victimization, but as the words touched the page they disappeared because I had been prohibited from using them. The legal system has created rulings that prevent me from using the words that describe my own experience of sexual violation in way that is meaningful to me. I feel confined and subjugated as a claimant within a legal system that I have found to be neither relative to my life, nor helpful to me.

Although this research surrounds the circumstance of (alleged) sexual violation, it is about something that I believe to be more insidious and far-reaching: I am writing about what in my opinion is the condoning and perpetuation of such victimization of women, by the legal system.

Approximately 97 percent¹⁰ of all sexual assaults never obtain a conviction. Without a conviction, society is left to assume that the allegation is false (Busby 286). This means that a sexual assault victim cannot say that her sexual assault happened. If a legal action fails to obtain a conviction, if a claimant abandons her case part way through, or if she chooses not to make a police report about the sexual violation, her allegations are assumed by society to be false, because the crime has not been determined by a court of law. A court of law has the right to name a woman's experience, although the woman herself, does not have that right. Busby writes, "It is troubling that a judge would assume that an acquittal means that nothing occurred--rather than it was not proved beyond a reasonable doubt" (285).

Since my only recourse was civil law, I legally had to prove my claim on a balance of probabilities. However, given the fact that sexual violation is serious, this standard of proof seemed dispensable. Sexual assault law is based upon the premise that convictions are extremely serious and they should only be obtained if there is a high degree of certainty that the offence was committed.

¹⁰ Based upon Roberts report from the Statistics Canada National Violence Against Women Survey, 1996; only 6 % of all sexual assaults were reported to police, and of those that went to court between 1983 and 1992, the maximum percentage of charges was 50%. This would indicate that 94% of sexual assaults went unreported, and of the 6% that were reported a maximum of 50% were charged, leaving 3% from the total 6% reported without charges. 94% + 3% = total of 97% of sexually assaulted women who cannot speak of their sexual assault.

Until the charge is proved, of course, the accused is presumed innocent (Busby 262). As one of countless women who finally had to abandon their cases before it reached trial, I must remember as I write, that my assailant is assumed to be innocent; I must invalidate my own knowledge that I was sexually violated, even though my life has been profoundly changed as a result of the violation I experienced.

Convictions are rare in cases of sexual assault, and without a conviction, all victims of sexual violation are silenced by the legal system. Silence is strategic. Who benefits from this imposed silence? Lawmakers are predominantly men. Primarily men commit sexual violations, and primarily against women. As a result, women (who have been sexually violated by men) are silenced (by men). Without a conviction, we are not only silenced, we cannot be considered a victim either: “One is not a victim until a conviction is entered, because the use of the term ‘victim’ is inconsistent with the presumption of innocence”¹¹ (Busby 262). Busby writes, “judges and defence lawyers repeat, mantra-like, ‘she is not a victim until a conviction is entered’” (286).

In cases of sexual violation, it is illegal for a woman to tell of her experience unless the offender is found guilty in a court of law, even though evidence suggests that the likelihood of her reaching a court of law is extremely slim. Boyle refers to this process as filtering cases of sexual assault through the justice system. Most do not make it to court. A lack of financial resources forces many women to give up their cases. Other women lack the emotional strength to endure the procedures.

¹¹ (R. v. Seaboyer 1992)

When reality is denied to us, we try to accept that it didn't really happen. There were times when I lost a sense of who I was because of my experience of sexual violation. Because I could not define myself through my story, I felt as though somehow I did not have the right to feel that it happened. I believed that if something like this happened to anyone, there would be recourse. There was no recourse. I felt like the soldier returned from Vietnam who, because of the political nature of his war, received no acknowledgement of what he had been through. Like those veterans, there was no support for me, and I couldn't even talk about the impact of being sexually violated without fear of recrimination.

I have had to experience the consequences of other people's legal notion of "truth" to determine, or deny, wrongdoing. It is difficult for some men to accept that their wives or partners have been sexually violated.¹² Often they respond with anger. They can be angry for several reasons. Sometimes they have feelings of guilt about failing to prevent the violation. Usually this guilt remains unrealized and manifests as rage directed at the woman. In some instances, men feel angry because they feel betrayed, or that their "property" has been damaged. In all cases, these feelings require resolution through time and personal healing. Without a conviction, some people could not accept that I actually was a victim, and therefore presumed that I was complicit in my sexual violation.

The situations that I have described frequently happen to women who are victims of sexual violation. I call it the "backlash." The backlash occurs when a woman has the courage to report a sexual violation, but when a conviction fails to emerge; those who believed she was victimized then punish her for complicity.

¹² Center for sexual ASSAULT, Victoria. B.C.

Such people are willing to believe that something happened that involved sex, but without a conviction they believe she chose it. Thus, those who normally support the women, socially reinforce the protection of men by the legal system

The backlash occurs regardless of the fact that, “There are very few cases of false allegations”¹³ (Busby 287). Despite this, the legal system continues to filter cases through the justice system and to “congratulate itself on proving, once more, that a woman or a child has lied about sexual violence” (Busby 287).

My Resistance

Drucilla Cornell believes that the process of uncovering the hidden reality of women is transformative (2). As I have uncovered my hidden reality in the discovery process, I feel that I have, in ways, been transformed. During the discovery examination I felt degraded and humiliated, and angry with myself for being incapable of protecting myself from the process. Through this analysis I have come to recognize the tremendous powers and strategies that I was up against. I also realize how unprepared I was. Significantly, however, I also recognize small acts of resistance on my part. Alan Wade suggests that the realization of even small acts of resistance can empower people and free them from the effects of their victimization (8). I will introduce the first sample of discourse from the discovery transcript with an excerpt that includes an act of resistance which I had not recognized until I reread the transcripts. The page is

¹³ MacKinnon and Boyle state there is evidence of very few false allegations of sexual assault.

60 and the line is 377, from the transcript. Q = the question asked by the "Questioning Lawyer" A = my answer to the questioning lawyer. I am also referred to as the witness. The lawyer representing me is referred to as "My Lawyer."

60/37

Q

Okay. And would I be correct, that that [sic], if I was following, the time line occurred much earlier than the time line that you were speaking of, when [your husband] made reference to having a girlfriend, and not wishing to continue his marriage with you?

A

[my husband] had a girlfriend prior to [Mr. Fred Black]. And there were several. He had another girlfriend before then. [Mr. Fred Black]; my experience with him occurred after my husband had left the home after [the sexual violation] incident. After our separation.

Q

It's a simple question. You can carry on if you want. I'm trying to get a time line here. If you can assist me.

A

I gave you the exact time. It was March, or spring, of the following year.

Q

Why don't you think it through and answer it?

A

I don't like the way I'm being spoken to, [my lawyer's first name.].

[My Lawyer]:

Well, the question is fair enough. The tone of voice may not be pleasant, but you can answer the question, I think. Would you like to repeat the question?

[Questioning Lawyer]:

Certainly.

My lawyer noted and commented on the questioning lawyer's sarcastic tone, but it is also clearly apparent in the text. To protest being spoken to in a way that felt demeaning was one of my several small acts of resistance. It was empowering to discover this, after what felt like such a grand defeat.

CHAPTER THREE: LITERATURE REVIEW

Ideologies of Sexual Assault Law

The following are some claims made about law;

The official version of law—what the legal world would have us believe about itself—is that it is an impartial, neutral and objective system for resolving social conflict. (Naffine 24)

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. (Section 7 of the Canadian Charter of Rights and Freedoms)

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons. (Section 28 of the Canadian Charter of Rights and Freedoms)

The official version of law is historically specific to Western society. It is based on a particular set of philosophical and theoretical positions, particularly conservatism and liberalism (Comack 24). The official version of law claims to be “value free.” To be “value free” is a positivist notion, meaning that a truth, unencumbered by any bias, can be uncovered if specific procedures are closely followed. This research, unlike positivist research, draws on interpretive strategies and acknowledges that nothing is value free, or neutral, and that everything is political. This means that all actions are based upon ideologies and interests of the individual. Christine Boyle supports this argument with regard to the legal system. Boyle indicates that the legal system does not state specifically any particular goals, but makes decisions to act or not act on individual matters which ultimately reflect the underlying values held by individuals within the system (3).

Historically, the law in Western societies has been comprised of various theoretical underpinnings, primarily conservatism, illustrated in the writing of Thomas Hobbs, the English philosopher and political theorist, and liberalism, illustrated in the writings of Jean-Jacques Rousseau and Thomas Stuart Mill (Comack 22). Thomas Hobbs believed in causality and a strictly materialist view of society. Rousseau believed that society could best determine its civic responsibility, and much like Totalitarianism those who believed differently would be excluded, Mill was committed to individualism. Each of these ideologies harbors specific philosophical notions of human nature and society. Each was created in a society which had real inequalities embedded within it. Consequently, only some privileged members, usually wealthy men, constructed them. Thus it is difficult to accept that the official version of law is value free.

The following views elucidate some of the values that have contributed to the evolution of law. Functionalism, introduced in the nineteenth century by Herbert Spencer and Emile Durkheim, applied a biological metaphor to society that shows it as an interrelated organism. The basic premise is that inequality will always exist and has a function that helps maintain a stable society. With regard to law, functionalists believe that the punishment society determines for a crime is indicative of the value society places on the crime. This suggests that the law operates as a form of social control that demands conformity to the norm. The question is, whose norm represents the norm? Functionalists suggest that we do not need to know the answer. Certainly, since inequalities prevent minority voices from being heard, it can be concluded that minorities are not

included in the norm. Therefore, the law is a mechanism that protects the interests of the dominant class, and their interests represent the norm. Consequently, the legal system works to sustain inequality.

Liberal pluralists believe that society is composed of many special interest groups all of which have competing interests, and which accept the existence of inequality. This is a way of renaming classism as competition of interests. To fully understand this we must critically examine structures that create, maintain and sustain the positions of each group or class. Structures are institutions and mechanisms of power, with rules and regulations that effect society. According to Comack, Liberal pluralists refuse to examine structures. She writes, "Liberal pluralists deem the examination of 'how authorities become authorities' to be irrelevant" (33). They also believe that "injustices may occur because of individual corruption, poor use of police discretion, or bad decisions of individual judges—but the system itself is basically sound" (33). Without an historical examination of structures, we cannot identify the organization of inequality in our society.

A contrasting view is found in the Marxist approach. The Marxist perspective views law as inherently political. The legal subject is recognized as a classed subject. Law promotes protection of property, which translates to protection of power for those who have property and power. A Marxist approach recognizes women and minorities as being alienated from the claims of the official version of law.

History of Law

I am not a lawyer. This analysis has been conducted with a layperson's understanding of the legislative and judicial history of sexual assault and sexual violations. I recognize however that inequality along race, class, and gender lines exists in society. This raises concerns about the role the law has played historically in generating these inequalities. Is the law part of the problem or part of the solution? This historical overview of the law will focus on the role that the law has played and continues to play in generating, reproducing and perpetuating gender inequality, particularly in cases of sexual violation.

Elizabeth Comack writes, "Everyone is subject to the law, even the sovereign or ruler" (23). She suggests that the law claims not to be influenced by special interest groups or classes. The purpose of the law is "to provide a barrier against the arbitrary exercise of the power of the state and a guarantee of the rights and liberties of individual citizens" (22). "The official version of law – what the legal world would have us believe about itself – is that it is an impartial, neutral and objective system for resolving social conflict" (Naffine 21).

Christine Boyle notes that there is an important relationship between lawmakers and the law that they make that must be recognized. She points out that the people who have created our sexual assault laws (until recently) have been exclusively male. She suggests that as a rule-maker one would no doubt try to imagine what it would be like to be affected by the rule in order to reach some opinion of the fairness and efficacy of the rule. Boyle believes that it is very difficult for male lawmakers to put themselves in the shoes of female sexual

assault victims, to imagine being the woman. Male lawmakers cannot visualize her education, her economic position, her class, her age, and the social and sexual vulnerability that comes with being a woman. Boyle stresses, “all of our law is deeply influenced by this limitation....It seems to have been extraordinarily difficult, however, for [a man] to cross the sexual barrier and put himself in the position of an assaulted woman” (4/5).

In early law, which was concerned primarily with crimes against property, men could see themselves as victims in a straightforward manner. Boyle argues, however, that in cases of sexual assault, male-law makers are not only unable to relate to the assaulted women, they identify with the accused and internalize the syndrome; “there but for the grace of God go I” (6). This bias is reflected in our legislative, judicial and criminal law enforcement institutions. In sexual assault cases, the law-making males protect other males, relative to their perceptions of their own potential: They fear it could happen to them. Herein lay competing interests, those of the women who claim to have been violated, and those of the men who might be falsely charged. The result of these conflicting interests is that there has been “little if any weight [given] to the simple goal of protecting women from sexual assault” (Boyle 6). Boyle goes on to say,

There is no doubt that lawmakers, both legislators and judges, were haunted by the specter of the innocent accused, the victim of false charge. It was feared that innocent, perfectly respectable men (that is, like them), could suddenly be caught up in the criminal justice system. This was not a fear that was prevalent with respect to other crimes, and special rules had to be developed to protect the falsely-accused person in this context alone. (6)

It is interesting to note that the law, with its basic functions, was trusted to detect truth in all cases except sexual assault where special rules were created to protect the falsely accused. Only in this crime was the complainant inherently suspect. The special rules that were created included the questioning of complaints in regard to their previous sexual experiences. This rule still applied in the discovery examination I participated in. Boyle writes, "it became notorious that the effect of this doctrine [questioning of past sexual history] was to subject the rape complainant to severe embarrassment. The courts realized that this may discourage reporting" (15).

Other special rules included the determination of chaste and unchaste women. If a woman was determined to be unchaste, the law was not obliged to protect her (Boyle 20). Another rule that was specific to sexual assault cases was the need for consistency in the woman's story. This was not meant to enhance the woman's credibility, or even to determine the truth. Consistency was used to "counter the very negative assumption that would otherwise be made that the witness was lying" (Boyle 153). The "recent complaint rule" and the requirement of corroboration of another party were both created to ensure the woman was not lying (Boyle 14). It was assumed that if a woman did not report the assault immediately, she must be lying. Considering that most sexual assaults occur in isolated circumstances, few assaults would have had the corroboration of another party.

Such special rules do not exist anywhere else in Canadian law. In every other aspect of law, the rules which exist to weigh evidence are considered

sufficient to determine the truth. It is only in cases of sexual assault that lawmakers have designed, rewritten and put into practice additional rules which they claim help to determine the truth. More specifically, these rules help to protect men who offend (Boyle 16).

These rules have generated many concerns over the past century, some of which have led to amendments in the law:

Prior to April 1976, a complainant could be asked questions about prior sexual conduct, but could not be obliged by the accused to answer. Nor could the accused lead evidence to contradict her testimony. Nevertheless, many complainants were unaware of their rights in this respect and concern grew that they were being caused needless pain and embarrassment when subjected to extensive cross-examination about their life-style by defence counsel. (Boyle 133)

I was unaware if I had the right to refuse to answer questions about my sexual history. I assumed that because my lawyer did not object to the large number of questions about my sexual history, that it must be an accepted procedure. This type of questioning is not allowed in criminal court. It was removed as a result of the negative effect it had on women. Sexual history questioning has the same effect on women whether the court is civil or criminal. It is inappropriate in both forums.

Lawmakers are aware of the gauntlet that women face when they dare to report a sexual violation. Their concerns about reduced reporting led to the creation of the old section 142 of the Criminal Code (Criminal Law Amendment Act, S.C. 1974-75-76, c. 93). This was created “to set some reasonable limits on questioning regarding the sexual history of the complainant, and thus hopefully

increase the rape reporting rate” (Boyle 134). The gist of the amendment was that the questioning lawyer had better provide specific information to the judge to justify her/his use of sexual history questions: “A number of judges stressed that questioning should not be allowed to turn into a fishing expedition” (134). I find this particularly of interest, since my experience in the discovery examination felt precisely like a fishing expedition. The questioning lawyer did not have to provide specific information to the judge to justify his use of sexual history questions. Instead, the questioning lawyer asked me details about almost every sexual relationship I have had. The following are examples of questions asked about my previous sexual experiences:

217/1257

Q

Could you tell me -- first of all, as I understood you before, you no longer have a relationship with [Bob Smith]

A

That's correct.

Q

Can you tell me, did you part, if I can put it that way, on good terms?

A

I believe so.

Q

Was it a mutual understanding of the relationship ending?

A

Mutual understanding?

Q

Between the two of you?

A

Could you define that a little further, please, what you mean by “mutual understanding”.

Q

As you know, probably better than I, that relationships are complex. What I am trying to understand is simply whether or not you and he jointly agreed to no longer carry on a relationship, or is that a misunderstanding?

A

No, no. I just wanted you to clarify because I know he understood equally that it was over, but he didn't agree with the reason why. It was me who initiated the break-up.

Q

Simply put, you took steps to initiate the break-up of your relationship with Mr. [Smith]?

A

Yes.

Q

And it has ceased since then?

A

Yes.

Q

What were the reasons for the break-up?

[My Lawyer]: Is this relevant?

[Questioning Lawyer]: You can object if you want.

[My Lawyer]: I do object.

[Questioning Lawyer]:

Q

Has it caused you or was your relationship with Mr. [Smith] something that caused you any stress?

A

No.

Q

Did it cause you any physical or psychological concerns?

A

No.

Above, regardless of my lawyer's objection, the questioning lawyer continued to question me about the same past relationship.

29/162

Q

Now, your marriage to [your husband], as I understand it, was not your first marriage. Correct?

A

Correct.

Q

And in was in fact your second marriage?

A

Yes.

Q

And your first marriage was to whom?

A
Do you want a full legal name?

Q
If you have it. Certainly.

The above was one of many inquiries made into my past personal life.

31/178

Q
And when did you first become involved with [your husband]?

A
When I was 12.

Q
Well, when did you first become – you knew him as a child then, in other words?

A
Yes.

Q
What is the difference in your age?

A
We're the same age.

Q
When did you first become involved with [your husband] in a romantic way?

A
When I was 12. What do you mean by romantic?

Q
Did he share those feelings at that time, too?

A
We held hands on a school bus.

Above, the questioning lawyer did not define the language used to ask about my past sexual experiences. I used the word romantic to describe a non-sexual puppy love between twelve-year-olds, through lack of a definition. He seemed surprised.

35/217

Q
Did you then commence a closer relationship after that which then culminated in a marriage?

A
Yes.

Q

Okay. Were you seeing any other men at that time?

A

At what time?

Q

At the time – let's say October of 19xx..

A

No.

Above, the questioning lawyer asked if I was seeing any other men at the time that I was getting married. I was married in October of 19xx.

36/220

Q

Prior to October of 19xx, but subsequent to your separation in 19yz from [Mr. Jones], were you seeing other men?

A

Yes.

Q

Okay. Do you know any of them at this point?

A

No.

Q

You have no recollection of who they were?

A

Oh, yes. I know who they were. I thought you meant do I still see them.

Above, at this point, the questioning lawyer is asking me for all of the men that I might have dated or seen between my two marriages.

36/223

Q

Let's move to a more current time frame. After you separated from you husband.

A

Yes.

Q

In September of 19xx –

A

Yes

Q

- did you commence any relationships with other men?

A

Yes.

Q

How many?

A

I had one very brief, what I would call a rebound relationship, with a mutual friend of my husbands and mine, which lasted a month maybe. It was more a close friendship.

Q

Did it include sexual relations?

Above, the questioning lawyer's need to know if a relationship was sexual felt relentless.

37/228

Q

Was that the only relationship you've had since separating in September 19xx?

A

Since 19xx I dated no one until this very year, when I dated a man whom I met in [city name], for about six months. And we have since stopped dating.

Q

Did that relationship include sexual relationships?

Again, his need to know about sex felt relentless. As a result I began to feel as though I was being undressed in public. There was no place of safety for me in the dialogue, no place where he could not expose me with questions.

39/242

Q

- that you had a relationship – a romantic relationship that included sex – with Mr. Fred Black?

A

One time. Yes. One occasion.

Q

Let me understand that. You had sex once with Mr. Fred Black?

A

That's right.

Q

In the spring of 19xy?

A

Yes.

Q

And was that the total extent of your romantic relationship? Or sexual relationship, as you defined it.

A

Yes, it was. All we ever did was we used to go for walks, and he used to let me use his house just to have a place to rest while he was at work.

Q

There was no holding of hands?

A

No. I don't believe so.

Q

There was no emotional support?

A

No. This was a man very much in love with his ex-wife.

Q

No physical contact in any way, apart from one sexual encounter?

A

No.

Q

Is that correct?

A

Yes. That's correct?

In regard to the above, the questioning lawyer seemed compelled to confirm four times that I had indeed had sex on one occasion.

59/373

Q

Can you also confirm for me what you said earlier? That in addition to [your husband] being – trying to look for your words, if I followed them correctly. You used a phrase that described having a rebound relationship with Mr. –

A

Fred Black.

Q

And that rebound relationship included one encounter of a sexual nature, with him?

A

Yes.

Q

And was that in the matrimonial home?

A

No.

Q

It was at somewhere else?

A

His home.

In regard to the above, I felt exhausted by what seemed like belaboring the issue of sex. Further, I question the use of a value-laden word like the “matrimonial” home. It felt as though he was trying to make me feel ashamed, in any way that he could.

Boyle writes, “There is no evidence to suggest that sexual activity has any link with credibility. Indeed, acceptance of such an idea would surely be against the interests of the accused, who normally admits the sexual activity, but wishes to be believed on the issue of consent” (20). Recent changes in the criminal code concerning sexual assault law are meant to have stopped the practice of interrogating the complainant about her sexual history. Boyle and MacKinnon both question whether anything has changed in practice to support the recent reforms on paper. In my experience, in the discovery it appears that very little has changed.

Boyle also argues that in law little “importance has been attached to the protection of women in their own right, as human beings with a right to sexual autonomy” (6). What she does recognize however, is that some women have been protected indirectly, through the court’s attempts to protect the man as husband, father and brother. Because lawyers and judges can relate to the pain and suffering of the male relatives of the female sexual assault victim, they will

make decisions which protect those men, but this is not done for protection of the female victims.

The law, in its attempts to reject notions of difference, has created a universal abstract of a person, which it calls a “legal subject.” This is done in an attempt to treat all people the same, without favoritism or ill will. In order to accomplish this, people are taken out of context. Legal subjects are assumed to be “able-bodied, autonomous, rational, educated, moneyed, competitive and essentially self-interested” (Naffine 52). Comack says, “In short, law’s preferred person is most likely to be a male who fits with the needs and priorities of a modern, industrial, competitive market society” (23). Even in sexual assault cases, the female victims are presupposed to fit the description of these legal subjects, despite the fact that physical and social barriers prevent all women from ever meeting this criterion.

As well as creating legal subjects with specific characteristics, the law has created specific characteristics for judges and jurors as well. Judges are considered by law to be “reasonable” (Dawson 159), and jurors are considered by law to be “rational” (Decrow 14). The utility of such legal definitions must be challenged, considering that reason and rationality are arbitrary qualifications with various interpretations depending upon your values. Historically, women were not allowed to participate on juries until well into the twentieth century because women were not considered capable of rational thinking. Rationality was a quality reserved particularly for the character of males.

Susan Edwards argues that, at first glance, it appears that sexual assault laws control the sexual behavior of men; however, upon closer examination it is in fact women's sexuality that is being controlled. In law women are a paradox:

Statute law incorporates the notion of female sexual passivity while case law and procedural rules are based on a belief in female precipitation, so that women are oddly seen both as potential victims of men and victimizers of the them. (Boyle 4).

According to Karen Busby, in a sexual assault case, the counsel for the defence is interested in finding

evidence that a complainant has made allegations of prior abuse that did not result in a criminal conviction. The absence of a conviction respecting such allegations, according to the faulty inference, indicates that she has a tendency to lie. Thus, argues defence counsel, any evidence of the prior sexual abuse should be used to compromise a complainant's credibility. (Busby 280)

During the discovery process, I was questioned extensively about my sexual history, which writes Busby, is "an ordeal no complainant should have to endure" (280). Furthermore, I was also questioned about my perceptions of being abused, not only in sexual relationships, but also within my family. The following is an example from the transcripts.

259/1472

Q

Can you tell me, are all of the statements correct in this respect, that you considered yourself to be a victim as having been abandoned by your birth parents. Is that correct?

A

I don't know if I would say I was a victim. I would say that I was abandoned by my birth parents, yes.

Q

Do you consider yourself to be a victim because you were abandoned by your birth parents?

A

I cannot answer that.

Q

Why not?

[My Lawyer]:

It involves self-diagnoses, I guess, really.

[Questioning Lawyer]:

She can answer.

[Questioning Lawyer]:

Q

Do you know? You can't answer it because you don't know?

A

It's not a clear question.

[My Lawyer]:

A victim of what?

[Me, The Witness]:

A victim now? A victim then? What?

[Questioning Lawyer]:

Q

Let's break it down. At any time have you ever considered yourself to be a victim by virtue of having been abandoned by your birth parents?

A

No.

Q

Do you at any time consider yourself to have been a victim by virtue of being abused by your adoptive parents?

A

Very much so, yes.

Q

Does that also apply in terms of considering yourself to be a victim of having been abused by alcoholic adoptive parents?

A

Very much so.

Q

Betrayed and sexually assaulted by your first lover?

A

No. No.

Q

Who was your first lover?

A

His name was [John Doe.]

Q

So that you can go to where I am reading, do you disagree with [counsellor xy's] comment then that you were a victim because you were abandoned by your birth parents?

A

No, I don't disagree with her perception of it.

Q

Can you tell me, were these all subjects, when I say "these", abandonment by your birth parents, abuse by your adoptive and alcoholic parents, betrayal and sexual assault by your first lover, all subjects that you discussed with [counsellor xy]?

A

Yes.

I unintentionally said "yes" to what I perceived to be generalized topics. I found the use of the word "lover" for my first boyfriend to be an embellished projection of maturity. The questioning lawyer appeared to have no difficulty using direct language ("sexually assaulted") to project onto a boyfriend. He was, in fact, manufacturing a sexual assault with my first boyfriend, which was not true.

The defence counsel, Busby explains, is interested in determining that a complainant "has a disordered sexual perception that could lead to misinterpretation, overreactions and false criminal accusations" (280). Busby writes,

Despite Bill C-49's limited effectiveness... [Law-makers] lost little time in developing a tactic to counter the bill. If they could not intimidate or undermine complainants by dragging their sexual lives into court, they would seek access to any personal record about a complainant that might contain other embarrassing or discrediting information... (281)

In my case, all of my counselling and medical records for the six years previous to the time of the sexual violation and up to the day of the discovery examination were sought, and most were attained. An excessive amount of more than 137 documents were ordered to my discovery. (Recent changes in discovery rules in the USA limit lawyers to requesting twenty-five documents.) It seemed to me that most of these documents were dissected and used in attempts to manipulate me

into discrediting myself during the discovery examination. Busby writes, "Access to personal records was virtually unheard of before 1992. The defence most commonly seeks sexual assault counselling records and child welfare records, but every imaginable personal record has been the object of a defence application" (281).

Discovery

Although I could find little literature about the discovery process, or concerning problems with the discovery process in Canada, I found some literature concerning problems with the discovery process in the United States. An article by Denis McLaughlin, in the *New Jersey Law Journal* (*Discovery Amendments Generate National Debate*, Dec. 18, 2000,)¹⁴ presents problems with discovery rules and regulations, and their interpretation and construction. In December 2000, amendments to the United States Discovery Rules became effective. One of the main reasons for the amendments was to restore national uniformity to discovery practices. Clearly, such limits do not exist in Canada. Particular to sexual assault cases, amendments include that a court order be required in order to ask questions regarding a woman's sexual history.

In Canada there are no limits on the amount of items that a litigant can be ordered to produce. I was ordered to produce more than 100 items. The questioning lawyer informed me that non-compliance could result in delay, and my case could be stopped for failure to produce documents. These requests

¹⁴ *New Jersey Law Journal*, Dec. 18, 2000 v162, I 12, p. 28. Full Text COPYRIGHT 2000 American Lawyer Media L.P. These Amendments were specific to Federal Discoveries.

were costly; my lawyer charged to locate and acquire documents. Additional fees were charged by many of my clinical counsellors and doctors for production of these documents. As mentioned previously, defence lawyers now seem to consider it standard practice to seek every conceivable recorded document regarding a complainant in a sexual violence case. I question who benefits from such standard practice? Could excessive requests for documents be part of a strategy to intimidate the complainant with excessive related costs or the number of potentially revealing and often unrelated inquiries into the woman's personal life. Busby notes that, although the court has been quick to protect against access to the records of a witness in other criminal cases, in sexual violence cases courts "have been satisfied with baseless and highly prejudicial rationales for access to records" (282).

Counselors for the defence have admitted that orders to produce documents are not for the purpose of finding information relevant to proceedings, but are requested, "with the intent to intimidate complainants into refusing to continue to participate in the process" (Busby 282). In my case, some of the requests were beyond my ability to fulfill; for example, I was ordered to produce my MasterCard receipts from someone close to me at the time of the sexual violation. The questioning lawyer not only ordered me to produce the documents, he used coercive language in his attempts to have me carry out the order. The following is an excerpt from the transcript:

216/1255

Q

I am going to leave with you a request that I made as of last time for production of all of the MasterCard statements, and I am going to suggest to you that it is

not unreasonable for you to make inquiries either directly of MasterCard or through [the person close to me], if it is [their] account and thus needs [their] authorization, to obtain those documents for me. Okay?
[My Lawyer]: I have a note of that.

In regard to the above, I could not believe that I was expected to put myself in an embarrassing and awkward position with this person who was once close to me, or to consequently be considered uncooperative. I did consult with the person, to no avail, in an attempt to be cooperative. It appears to me that the legal system not only disregards the physical, emotional and financial costs that sexual violation victims must bear in order to comply with the orders, but that perhaps it is part of a strategy to force them to abandon their case. Steve Perkes, professor of law at the University of Victoria, explained that one of the ways that the discovery process can be abused is through excessive and unreasonable requests. Excessive requests for counselling records may discourage women from seeking needed counselling support, from fear that these records may somehow be used against them in court. Another reason that victims often refuse needed counselling when they intend to press charges against their assailant is because courts are now suspicious that counselors use therapy to improperly influence complainants' memories. Busby suggests that there is actually no evidence to substantiate such claims (283). Busby suggests that women are further subjugated by the legal system, in their personal life, when they cannot freely seek professional support such as counselling, out of fear of recrimination.

Philosophical Foundation of Sex

The following review is to provide an understanding of how sex and sexuality have been understood in western society and in the legal system. Research in psychology and in feminist law has confirmed that the legal system handles sexual assault cases differently than other cases (Bavelas).¹⁵

Foucault conducted a philosophical analysis into the history of sexuality in European countries. He challenges the standard interpretations of modern sexual history and engages in a critique of societal arrangements in relation to sex. Foucault questions the historical notion of sexual repression. He further questions if power mechanisms such as prohibition, censorship and social denial that are created by structures in society actually support repression of sexuality, or if in fact they create and define sex. I question if the law is a power mechanism that creates and defines the acceptable exploitation of women's bodies by males.

In his analysis, Foucault examines who speaks and who does not. He examines the conditions under which people speak, what is being spoken about, what their positions are, and if there is an institution prompting, storing and distributing what is said (11). Foucault discovers that in the seventeenth century's bourgeois society, sex became difficult to call by name. Prudishness had become fashionable, and required that no one speak directly of sex. To do so warranted a social penalty: "As if in order to gain mastery over it [sex] in reality, it had first been necessary to subjugate it at the level of language, control

¹⁵ Sexual Cases are handled differently than other cases by the legal system. This is also supported by Boyle, MacKinnon, Prevost and Edwards.

its free circulation in speech, expunge it from the things that were said, and extinguish the words that rendered it too visibly present” (17). One might ask to whose benefit? Certainly not for the benefit of women, who by virtue of their childbearing nature and all that goes with it, are constantly dealing with sexuality, at some level.

By the eighteenth century, sex became a matter to regulate and to police. This was more than a taboo of the previous century. The regulating of sex was now a necessity, and such regulations required a public discourse. One of the first techniques used to publicly control sex was the notion of making population relative to social, economic and political problems (Foucault 25). This made sex, which had been a private matter, a public one, and open to public concern. Moral and religious campaigns followed, which combined to make sex “a concerted economic and political behavior” (26). Foucault notes that while this growing orchestration of sexual control is taking place, “There is not one but many silences, and they are an integral part of the strategies that underlie and permeate discourses” (27).

By the end of the nineteenth century, the sexuality of parents, adolescents and children was being screened, and sex was being shaped through public discourse as something that was dangerous. Discourse made sex a scientific matter involving potential perils, warnings, diagnoses and therapies. This was a time when hysteria and other disorders specific to women were endemic to society (31). Foucault believes that “intensifying people’s awareness of it [sex] as a constant danger...in turn created a further incentive to talk about it” (31).

Foucault determines that the institution of religion turned sex into something that was dark and negative, something that remained hidden and refused to show itself. Religion made sex something that above all else, had to be confessed (35).

Foucault postulates that it was not through direct methods or intentional censorship that sex was controlled, it was through “regulated and polymorphous incitement to discourse” (34). In sum, “What is peculiar to modern societies, in fact, is not that they consigned sex to a shadow existence, but that they dedicated themselves to speaking of it *ad infinitum*, while exploiting it as the secret” (35). I interpret these points to mean that by defining sex as a problem, society could create specific discourses to talk about sex as much as they wanted. It was not, however, the voice of women who created and sustained the discourse. Very few women occupied the role of clergy, doctor or therapist. The discourse of sex, which was largely about women’s hysteria and other speculative disorders, was restricted to a dialogue created by men. Clergy and doctors were the primary shareholders in the creation of sexual discourse. Women did, or could do, very little to affect the discourse which was so much concerned with their experiences.

Foucault argues that by the twentieth century, the management of this discourse was motivated by a basic concern “to ensure population, to reproduce labor capacity, to perpetuate the form of social relations: in short, to constitute a sexuality that is economically useful and politically conservative...” (36). The power to impose all of this rested with the institution of law. Laws defined and

condemned “unnatural” or “improper” sexuality and homosexuality. Foucault notes “with regard to the other condemned forms such as adultery or rape...the latter were condemned less and less...” (39). Any practice considered contrary to “nature” was stamped as especially abominable (38); however, it is important to remember that which determined “nature” was what was considered economically useful and politically conservative. Punishments were created and enforced for non-compliance.

Critical to this thesis is Foucault’s argument that there came a time (early twentieth century) when “parents and teachers were alerted, and left with the suspicion that all children were guilty [of desiring sex], and with the fear of being themselves at fault if their suspicions were not sufficiently strong” (42). This was the beginning of a public surveillance whereby society began monitoring itself to assist the state in the enforcement of that which was considered unnatural sex. Taboos were created to give name to that which was being enforced (68). The development of this particular notion that women and children wanted sex, and were therefore guilty, was the basis of the development of rape mythologies that still exist in the minds of many lawyers and judges.

Foucault concludes that by not talking openly about sex, and not allowing sex to be natural, we have supported powerful economic interests, particularly those of law, corrections, medicine, psychiatry, prostitution, and pornography. He argues that there has never been more exercise of power, more attention paid to an issue, or more talk (discourse) than there now is about sex. Foucault states, “We must therefore abandon the hypothesis that modern industrial

societies ushered in an age of increased sexual repression” (49). Foucault’s argument that sexual repression has never existed in our society is significant in this thesis because repression has been considered an influencing factor in the indirect communication within law, women’s notions of “truth” and the elimination of women’s voices from law. Judges and lawyers claim to use indirect language because to talk directly about sex would make them very uncomfortable. (Prevost) Foucault’s literature challenges this argument. Ultimately, the discourse of sex has been constrained by institutions that promote their own political and economic interests.

Philosophical Foundations of Truth

The notion of truth is an inexhaustible topic however in this thesis I only wish to present the following salient points. One of the most private parts of the private life is sex. Anthony Giddens argues that sexuality is essential to the “regime of truth,” and that texts about sexuality are seen as a form of access to the truth: “since women are historically linked to the private world, sexuality as a topic is directly connected to women’s truth (2).

A premise of the official version of law is that “truth” can be found through uninhibited testing through questioning. According to the official version of law, “the judge’s task is to discern the ‘legally relevant facts’ of the case—to find the ‘truth’ about the matter brought before the court” (Comack 22). Unlike the law, qualitative researchers believe that there is no legal truth, or any one truth. There are many different subjective truths. The official version of law claims to

be a truth-seeking process; however it permits only part of the story to be told. There is no place in the legal arena for the subjective truth, that is, the telling of whole, rich experience of the individual.

Philosophical Foundations of Power

Power is not an institution, and not a structure; neither is it a certain strength we are endowed with; it is the name that one attributes to a complex strategical situation in a particular society. (Foucault *History* 93)

Foucault argues that all power is exercised with a series of aims and objectives. This does not however, mean that these aims or objectives result from the choice of one individual. He suggests we not look for the headquarters of such rationality because most often there is no individual who has designed these aims and objectives (*History* 95).

A popular method used in the analysis of power has been Marxist theory, which views power as oppressive, and argues that it is used by one class to dominate another. Foucault interprets power differently. As mentioned previously, Foucault argues that power is everywhere. He believes that power is formed and is exercised from all places towards all places, and that no single form of power is omnipotent or permanent in its form. The emergence of even one previously silenced voice is an exercise of power.

Foucault suggested that power functions to “produce knowledge, multiply discourse, induce pleasure, and generate power” (73). Foucault believes that to understand power we must investigate how it originates, how it is sustained and

how it is concealed (73). Existing research on the subjugation of women by the legal system reveals how power is recreated and reinforced through discourse, in trial judgments. I would like to suggest that the discovery process is another way in which power is sustained and reinforced, and in particular a location where power is concealed. The examination for discovery takes place in a private location, and there is a lack of specific rules and regulations through which women can be informed and prepared. The discovery process is an initial point for the concealment of women's voices. If something cannot be said at the discovery examination, then it will not be used at the trial. In contrast, what a woman is coerced into saying in discovery can be used at the trial. The power to control what is said and what is not said, and what can be used against another is an example of the power held by the lawyer who is supported by an institution.

In Foucaultian terms, power circulates in the discovery process. It is used directly and indirectly. Power can be used indirectly to obtain information about the woman's financial status that in turn, determines the financial probability of her being able to continue with her case. I was questioned about my personal financial status, my father's financial status and my potential for inheritance upon his death.

Only wealthy women are able to find some privilege and possibly protection in the existing establishment of law because they can afford to pay for that protection in lawyers' fees. The legal system is driven by an economy that is political and was designed by, and serves the interest of, wealthy men. Its benefits are rarely afforded to women.

Foucault describes what he calls “The uniformity of the apparatus” (84). He suggests that in regard to sex, “whatever the devices or institutions on which [power] relies, it acts in a uniform and comprehensive manner; it operates according to the simple and endlessly reproduced mechanisms of law, taboo, and censorship...” (84). A look into history reveals that “In Western societies since the Middle Ages, the exercise of power has always been formulated in terms of law” (87).

My research was difficult to conduct, largely because of the complexity of the power which I believe silences women in the legal system. Why are these power mechanisms so difficult to see? Foucault states, “this society has been more imaginative, probably than any other in creating devious and supple mechanisms of power” (86). He suggests, “power is tolerable only on condition that it mask a substantial part of itself. Its success is proportional to its ability to hide its own mechanism” (86). Foucault further suggests that people would never accept power if it were viewed in its total cynical nature. Mechanisms of power are hidden not for negative intent, but because the success of power depends upon it. Foucault suggests that people need to think that power only places a limit on their desires, and does not remove all of their freedom. People perceive that they still have a measure of freedom (even when they do not). It is because of this illusion of having a measure of freedom that people continue to accept what I perceive to be the abuse of power by the legal system. During the discovery examination, I imagined that I, too, must have had some measure of power. I did have a measure of power, but much less than I anticipated. I could

quit, or I could endure what felt like verbal punishment for attempting to speak of my experience of sexual violation.

Foucault writes that all monarchies eventually overstep their legal bounds and put themselves above the law. The manufacturing of “special rules” in sexual assault cases aligns with such breaches. Foucault states, “the legal system itself was merely a way of exerting violence, of appropriating that violence for the benefit of the few, and of exploiting the dissymmetries and injustices of domination under cover of general law” (88). Foucault suggests that to “conceive of sex without the law, [is to conceive of] power without the king” (91). The “truth” about sex is whatever the “king” (legal system) determines it to be. The “truth” is not the experience of the woman who has been sexually violated.

Rape Mythologies

MacKinnon describes the present day sexual assault myth as,

If it happened and it hurt her, she deserved it. If she didn't deserve it, either it didn't happen or it didn't hurt her. If she says it hurt her, she's oversensitive or unliberated. If she says it happened, she's a liar or a natural-born whore. Either it didn't happen or she loved it. (MacKinnon 13)

This describes what I believe is the reason that victims often fail to endure the legal processes. During one discovery session, the questioning lawyer directly suggested that I was ultimately responsible for the sexual violation that I experienced. This would support the notion that he believed that I deserved it. Another line of questioning however challenged the notion that the sexual

violation happened at all. At another point in the questioning, I was questioned for what seemed to me to be my oversensitivity, when I was asked if I had been abused by several different parties in my life, including my parents. I think the questioning lawyer attempted to coerce me into saying first, that I enjoyed it; second, I lied about it; third, that it didn't happen at all. I felt coerced into acknowledging something that I believed was completely untrue. I felt beaten and re-victimized by the legal system that I thought would support me.

Karen Busby believes that sexual violence laws were founded on rape mythologies, and these beliefs remain deeply embedded in lawyer's and judge's reasonings about sexual violence (261). Busby believes that the greatest myth in sexual assault law is that women (as well as children) frequently lie about sexual assault out of malice or delusion. She believes that this myth underpins all of the other existing myths about women in sexual assault cases. Foucault also suggests that the suspicion of women and children, and the reinforcing of this suspicion through discourse, is a mechanism of power that serves the interests of those who hold the most power at the time.

Boyle describes women the court views as "open territory" (vii). These women are sexual assault victims who have transgressed the norms of acceptable female behavior. These are women who had been drunk, separated, divorced or in common-law relationships, and those who were mentally ill or considered to be sexually promiscuous (vii). Boyle states that "apparently respectable women have been treated as suspect and their evidence tested to determine if they had been taking risks with their sexuality and to ensure that

they were not making false accusations.” (vii) Boyle’s interpretation of how the courts treat women, speaks to the way that I perceive that women are re-victimized by the legal system. An empirical study of rape victims in Toronto “showed that it was only those women who had some property value, who were in practice protected by the law” (Boyle vii).

Lawyer Karen DeCrow believes that sexism is pervasive in legal training (7). She suggests that as women go through law school they are changed, and become convinced that they are special and superior to the average woman. They come to feel that they are more like men, than like other women. No doubt this assists women lawyers to accept rape mythologies, because they believe that the myths apply to average women, not to them.

De Crow discusses how, in her role as a lawyer, she is constantly forced to change language in casebooks (unless she is quoting directly) because of phrases such as “unchaste women,” “adulterous women,” “his mistress,” and “the mother’s indiscretions” (7). De Crow determines that all of these are sexist judgments because they are never applied to men in similar situations (7). Primarily, judges who rule on cases of women sexually violated by men, are men. From her professional experience and research, De Crow notes that judges are often brothers, friends or fathers of men who are alleged to have committed sexual assaults. The decisions judges make in sexual assault cases, and the language they use to state their decisions, reflects the way they understand sexual assault. People understand something as a result of

constructs that are either learned or as a result of personal experience. Understanding is never objective (De Crow 8).

De Crow cites a passage from a recent first-year property casebook: “For, after all, land, like woman, was meant to be possessed” (7). Constructs such as these have impacted women prior to their entrance into the legal system. Until recently women were not allowed to participate in the legal system: “Originally jurors were drawn from people who voted. This did not include women” (De Crow 9).

Constructs such as these led to the creation of rape mythologies. Women have suffered from rape mythologies for decades. New rape mythologies continue to emerge, including the most recent myth to impact women in sexual assault cases: the “false memory” myth. This myth suggests that women who have never been sexually violated, are led by their therapist to believe that they have been violated. This is called a “therapy-induced false memory.” Judges have now decided that “therapy-induced false memories” contribute to false allegations of sexual violation by women and children.

Conclusions of Literature Review

Historic and current literature reveals that the premises of the official version of law as a neutral and objective source for resolving social conflict, and the Canadian Charter of Rights and Freedoms as supporting the rights of women, are not substantiated in legal practice. A review of the history of law

reveals that the principles that law was founded upon are conservatism and liberalism, which promote individualism, a male dominated exercise of power that ultimately manifests as our capitalist society. Capitalism creates and sustains inequality. Some of the underpinning ideologies of law, such as functionalism, include the belief that inequality is essential to sustain a stable society. A legal system that is founded on ideologies of inequity cannot possibly be neutral or objective in processes or resolving conflict, nor can it support the interests of women, when the system exists because of the dominant interests of men.

Historically, law makers have been predominantly male. Men cannot visualize themselves as victims of sexual violation. Further, men are personally involved in the potential of being charged with sexual violation, and react with the “there but for the grace of God go I” response. As a result, competing interests exist between protecting themselves from possible allegations and protecting the women who are sexually violated.

At first glance, it appears that the sexual assault laws control the sexual behavior of men; however, closer investigation reveals that they actually control the sexuality of women. The fact that male law makers protect themselves instead of the female victims of sexual violation is evidenced in the creation of numerous “special rules” that do not exist anywhere else in law. These rules directly protect the male offender while increasing the burden on the female victim. Examples of these special rules include: *determining chaste versus unchaste women*, a *recent complaint rule*, a *consistency rule*, a *corroboration rule*, *discredit through evidence of prior claims of abuse*, *evidence of disordered*

sexual perceptions and, of course, *rigorous questioning of sexual history*. Some of these special rules have been stopped in practice, but others quickly emerge to take their place, such as (previously mentioned) the recently developed “false memory” syndrome through counselling.

The only women who are protected by law, in cases of sexual violation, are those few women who (as previously mentioned) have been found to have “property value,” or who are indirectly protected because the judge wanted to protect, or sympathized with, a husband, brother or other male relative of the sexual violation victim, and did so by finding the offender guilty (Boyle 6).

Lawmakers know the problems inherent in the creation of special rules in sexual assault law. Evidence for this exists in the creation of Bill C-49, which attempted (unsuccessfully) to eliminate sexual history questioning (Busby 281). It is also evidenced in lawmaker’s decisions to stop the practice of some of the special rules, because lawyers and judges identified that these rules were responsible for a decrease in the reporting of sexual violations. I could not find legislation identifying the known problems with the discovery process in Canada. I did however find evidence of legislation identifying and attempting to solve the known problem with the discovery process in the United States. In the USA, in December of 2000, amendments were made to eliminate some of the obvious problems sexual assault victims face in discovery. The time limit of the discovery was reduced to one day of seven hours. (My discovery, and the costs for it, was double.) Lawyers must limit interrogatories to a maximum of 25. Sexual history questioning now requires a court order. (My sexual history

questioning was an unlimited and unrestricted fishing expedition.) These amendments were made in the USA to reduce the burden and the expense borne by victims of sexual violation.

The notion of “truth” is arguable. A premise of the official version of law is that truth can only be determined through rigorous and uninhibited questioning of legal subjects. Such questioning in the discovery process is the focus of this analysis and of this thesis. This research is based upon the theory that there are multiple truths as perceived by various individuals.

Foucault believes that power functions to produce knowledge, multiply discourse, induce pleasure and generate power (*History* 73). As explained, the discovery process meets these criteria and thereby illustrates that it is a mechanism of power that promotes the political and economic interests of those who hold the most power at the time. History supports this argument. Since the Middle Ages, power has been formulated in law. Typically, Foucault notes, power always oversteps its own laws. This is evidenced in the creation of special rules for the protection of men, in sexual violation cases.

According to Foucault rape mythologies first appeared in discourse with the control of sexuality in the seventeenth century. This control was in the political and economic interests of men. Sexual assault law was founded on rape mythologies (Busby 261). These mythologies continue to be pervasive in legal training (DeCrow 7). The result is that lawyers, judges and lawmakers continue to perpetuate what De Crow calls “sexist justice,” through practices, judgments

and laws that are based upon myths about women and their sexual nature, and clearly do not apply to men in similar situations.

CHAPTER FOUR: METHODOLOGY

Critical Discourse Analysis

Discourse analysis is sometimes defined as the analysis of language 'beyond the sentence'. This contrasts with types of analysis more typical of modern linguistics, which are chiefly concerned with the study of grammar: the study of smaller bits of language, such as sound (phonetics and phonology), parts of words (morphology), meaning (semantics), and the order of words in sentences (syntax). Discourse analysts study larger chunks of language as they flow together. (Deborah Tannen, *Discourse 2*)

An objective of this thesis is to examine the "larger chunks of language as they flow together." This means that in most cases, individual sentences will not be examined in isolation but in relationship to the surrounding sentences. I chose this method because of the revolving nature of the question and answer process of the discovery, and because I believed it might lead to the social purpose of the discovery process.

Critical Discourse Analysis is a type of analytical research that primarily studies the way social power, abuse, dominance and inequality are enacted, reproduced and resisted by text and talk in the social and political context. With such dissident research, critical discourse analysts take explicit positions, and thus want to understand, expose and ultimately to resist social inequality. (Teun A. van Dijk, *Critical 2*)

Some aspects of critical discourse analysis existed prior to the Second World War, in the critical theory of the Frankfurt School. The current focus on language and discourse began in the 1970s, in Australia and the U.K. (van Dijk, *Critical 2*). It is sometimes abbreviated to CDA, and is recognized in most social science departments. CDA is not a different direction or field of analyses, rather

it is a different approach or perspective with which to conduct existing forms of discourse analysis. Less critical perspectives exist in conversation analysis, narrative analysis and ethnography to name a few. These are examples where discourse analysis is not as likely to be used to identify power and inequality.

According to van Dijk, critical research on discourse is different from empirical research. He believes that critical research needs to satisfy a number of requirements in order to effectively realize its aims, as well as to provide a convincing argument amidst empirical research (*Critical 2*). This claim arose from the societal perception that only scientific quantifiable research existed. Included in van Dijk's requirements for critical research is the notion that critical research must be multidisciplinary; it must include examination from various perspectives or fields. In the case of this thesis, methods include subjective coding of data from social work, empirically tested methods from psychology, and theoretical examples from medicine. Historical reviews, and theories of societal structures and societal interactions are from the disciplines of sociology, political science, philosophy and law.

Van Dijk also believes that critical discourse does more than just describe social problems; it attempts to explain them. In this thesis, I attempt to understand the social purpose of the discovery and to explain the problem of women's inability to receive justice from the legal system. The following methods are applied:

- a) I describe my own experience as a woman within the justice system; this is done in part with my subjective coding of the transcript.

- b) I combine my experience with my own practice, knowledge and background as a social worker and a counsellor.
- c) I critically examine literature to confirm or contrast my personal experience.
- d) My findings are presented to inform and educate the public, as well as legal educators, of the effects of legal practice.

Discourse is broadly defined as including every utterance, text, play or organized communication. "Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it" (Foucault, *History* 101). All discourse involves a relationship between a speaker and hearer, or writer and reader. All communication is organized with the intention of influencing the other party in some way (Sarah Mills 5). Discourse analysis has many interpretations. A broad definition includes all utterances and texts that have any meaning. For the purpose of this thesis however, the following two definitions by Michel Foucault are most relevant: The first pertains to identifying groups of utterances that seem to be coherent and have a common theme. The second pertains less to the actual discourse than to the governing rules and structures that support and maintain the discourse. Group utterances, primarily questions and answers from the discovery interviews, will be analyzed, with attention to the rules and structures that support and maintain the discourse. Jeremy Hawthorne suggests that analysis of discourse will reveal its larger social purpose (16.)

Discourse is examined to determine the meanings and assumptions embedded within it. Language can reveal how people make sense of the world and explain why people, and systems, use language the way they do. Post-Saussurian linguistic theory proposes that language is not simply how we talk about things that have independently formed meanings; instead, our linguistic practices indicate how we see the world. For example, the word “assault” does not have an exact meaning that was formed independent of our thinking. When we use the word “assault” it is actually used in a way that represents how we already think about “assault.” Our use of this word reflects how we think about the world, and how others have constructed it (Belsey 342). This is particularly relevant because lawyers, judges and lawmakers select specific language, which reflects their worldview. Consequently, discourse affects society through legal judgments and legal practices. Comack writes that discourses “will vary according to the power effects accompanying them; certain discourses will attain a position of dominance in society. From this perspective, knowledge is not objective, but political” (62).

Law, like science, is recognized as a form of knowledge, and therefore a form of power. Foucault also believes that power is at work in the smallest situations as well as in the most obvious. The discourse analysis in this thesis is an attempt to disrupt what we think we know about the legal system. The personal and subjective experience of a sexual violation victim, in a pre-trial discovery examination is combined with literature and research on the subject of women and law.

It was my experience that the victim's subjective experiences are disqualified from the legal discourse of the discovery process. Subjective experiences are rich in meaning for the victim, but are not translated into the forum of legal discourse. This thesis will locate and examine attempted expressions of subjective experience, along with the ways in which the law disqualifies them. The ideologies embedded in the discovery process, which promote and sustain the disqualification of women's subjective experience will be identified, located, and analyzed. The ways that the law has the power to define, to disqualify, and to name "truth" (truth which does not include women's subjective experience) will be examined.

The ways that law constructs women, not only in comparison to men but also in comparison to each other, will be examined. Some women benefit from the legal system, for example, women of wealth, or women attached to men of wealth (Boyle viii). In addition, various "types" of women have been constructed historically in the legal system, and are addressed in the section of the thesis entitled "rape mythologies."

This analysis has been conducted within present social, political and economic structures. These structures shape the identities of all members of society, including, of course, lawyers, judges and law makers, as well as the victims and perpetrators of sexual violation who participate in the legal process. How people are privileged, or not, is related to how they are positioned within these structures. This thesis makes visible some of the ways that the legal

system affords privilege to some and denies access to others, how this pattern began, and how it is maintained.

Dany Lacombe's game metaphor offers a simple description of the kinds of questions that are asked throughout this analysis:

Who won? Who lost? [what] are the moves the players made; the stakes they had in the game; the value of the specific cards; the trump cards players used to effect a change of direction or to modify the stakes; the positions of players in the space of play, and the relative force of each player. (Comack 67)

Further I have been mindful of questions that Comack asked in her investigation into the law-society relationship:

What "order is law re-producing? Whose interests are reflected in law? Is law divorced from the play of politics, as the official version of law would have us believe? Does law live up to its claims of fairness and equity? Does it, in practice, dispense justice? If law is not living up to its ideal, how do we go about changing it? (Comack 68)

This discourse analysis is a combination of three methods. The first is my interpretative analysis of my own experience of the discovery process. After studying the text thoroughly, I decided to code each page based on feelings and thoughts I had about what had taken place at the time of the discovery examination. My coding index and samples of how I created the coding from the original text are on worksheets in appendix 5.

My second method is to determine the meaning inherent in the discourse by using discourse analysis in ways that have been empirically tested in existing research conducted on trial judgments.¹⁶ I chose to analyze language use,

¹⁶ See sample of measure in appendix, by Prevost, and articles by Bavelas and Coates.

particularly direct vs. indirect, erotic and affectionate, neutral, and consensual language. I selected these because they can be deconstructed to determine agency of an action, as well as placement of responsibility, both of which are relevant in the justice system. This is not an exhaustive list of language types that could be used to analysis this discourse.

The third method used in this thesis is the application of current literature to my experience of the discovery process. The material that I have drawn upon includes scholarly feminist and legal literature, philosophical and historical views of sex, power and law, as well as notions of truth. Included in the literature is women's experience within the legal system.

This analysis is conducted within the existing structures of a capitalist and patriarchal society. As I explore my experience in the discovery process to determine its social purpose, I understand that I am affected by social, economic and political structures, institutions and related mechanisms of power. For example, I have conformed extensively to legal requirements, most of which have been reinforced by my academic institution. These will be discussed in the final chapter.

This analysis has been conducted within an academic institution that sets acceptable norms for research. Particular ethical standards must be adhered to, and research procedures must be followed. Finally, and most significantly, I realize that being a woman has affected everything that I have done, including the answers that I have found in my research, and the support (as well as the lack of it) that I have experienced along the way. I have never been neutral or

been treated neutrally, as the law suggests. Being a woman in this society influences everything that I experience and write.

Sample Selection

At the time of the examination for discovery, I had no idea that I would one day use the transcripts of the procedure for the purpose of research. I was so uninformed with regard to legal procedures that I did not realize there would be a transcribed text, or that I would one day have possession of that document. It is important for readers to know this, and to understand that this discovery process was not staged for later political use. This is a retrospective study.

Those who subscribe to positivist research traditions might look for a random sample of discourse and would disapprove of the selection methods that I use in this research. The following passage by Elinor Ochs describes the theory, which this thesis embodies. In the selection of discourse, Ochs encourages selectivity. She specifically states, “selectivity should not be random”(1). Rather, researchers should be conscious of the filtering process that they are using. She stresses, “the basis for the selective transcription should be clear”(1). The researcher should state clearly why a particular discourse was selected. Ochs says that the selection should be based upon known criterion. For example, selections of discourse can be chosen because of their relevance to existing cognitive, linguistic and social studies. Additionally, the selection should reflect the interests of the researcher and the hypothesis to be examined (Ochs1).

In this research, I have been acutely conscious of the filtering process, and have drawn on existing studies, as well as openly presented my own interests and my own hypothesis. One distinct advantage of being a participant in the discovery process is that I have gained insights that are not available to alien observers. It is an objective of this thesis to illustrate that such insights, based upon personal experience and insights of female victims of sexual violation, are fundamental in order to create a more just and equitable society.

My experience of sexual violation and my experience in the discovery process, combined with my education and intuition, have guided me to analyze specific areas of the transcripts. I experienced various thoughts and feelings as I reviewed the transcripts. I used my thoughts and feelings as a guide. It was precisely the areas that left me most confused, or with the strongest emotions, that I felt most compelled to analyze. In a sense, I am following the smoke back to the fire. I followed my thoughts and feelings back to their place of origin in the discourse. When a qualitative researcher consciously selects data, that is a political decision. Likewise, when a positivist researcher chooses *not* to focus on emerging themes in the data, in favour of a random sample, that must also be recognized as a political decision.

Photocopied samples of the actual discovery document are included in the appendix (4). In this analysis, I have retyped selections of the document verbatim. Only the names and places of parties involved have been changed.

Coding

After several reviews of the transcript of the discovery, I created a coding system (Appendix 5) to represent my basic cognitive and emotional impressions of the discourse. My coding system includes categories such as rude, leading, sarcastic, put-down, trivialize, assumption, romanticize, projecting, indirect and direct. Other categories are identified as association of phrases, impossible questions, absurd questions and cut-off. A grammatical analysis is conducted to determine attribution and agency (responsibility) in the discourse. I have coded topical information such as education, finances and sexual history. (These are indicated in the coding work sheets in Appendix 5). I have coded the questioning lawyers' speech as well as my own, and in a very few instances, my own lawyer's speech. This coding is concerned with the types of questions asked, the amount of questions, the way they are asked, and ultimately, the intended purpose of the questions.

Form

The discovery document is a formal text produced from within the institution of law. It is significant because it stores, as well as distributes, what is said in the discovery process. Foucault considers such texts to be "discursive fact" (Foucault *History* 11). Discursive fact is the way selected information is "put into discourse" (11). It seems that the information that gets put into this discourse is significantly one-sided. It is legally driven, by legal rules, and with sanctioned

power from government. A good deal of information was not allowed into the discovery discourse, primarily my story of my experience.

The form of the discovery document is two bound books with clear plastic covers and a black plastic spiral binding. Each book is approximately one inch thick. The document is typed in a quasi-judicial format. Form is an important part of the analysis. Norman Fairclough states, "I would argue that one cannot properly analyze content without simultaneously analyzing form, because contents are always necessarily realized in forms" (184). Many theorists, including Marshall MacLuhan and Michel Foucault, have recognized that the medium the discourse is presented in impacts society, sometimes more than the message itself. If a judgment or scientific report states something as fact, it is usually unchallenged and accepted as fact. The medium, or form of the message, often holds more meaning than the actual message. Different mechanisms operate to convey messages in different social institutions. The concrete text of the discovery document reinforces the way women are treated in the legal system. To society, the concrete civil trial judgment means that responsibility has been attributed to an offender, an award is made against him and a sexual assault victim is recognized.

The discovery document is a product of the legal realm. Its form recreates, reinforces and perpetuates the actions of the legal institution. The institution of law continually shapes society. For example, the way that lawyers question women in the discovery, and the restrictions placed on what women are

allowed to say, is reinforced within society with each discovery document¹⁷ that is printed. The form of the text which law has produced has an impact on society; however, the focus of this analysis is on the discourse which comprises the physical text.

Conclusions of Methodology

The methodology of this thesis is a critical discourse analysis. The analysis is concerned with the relationships between questions and the answers in the discovery transcript. Individual sentences are not examined in isolation but in reference to the sentences around them. This is particularly well suited to the question and answer process of the discovery. Critical discourse analysis is concerned with the ways that power is enacted, reproduced and resisted through the use of discourse. Critical discourse analysis helps to identify power and inequality in our social systems. Narrative analysis and ethnography are examples of discourse analysis that are less critical because they are not as concerned with the identification of power and inequality.

This methodology consists of three parts. The first is a self-coded interpretative analysis of my experience in the discovery process. The second is the analysis of the use of language and the properties of the dialogue to determine meaning inherent in the discourse. The third is an analysis that tests the discourse against historical and current scholarly feminist and legal literature. These methods are used to explore and to expose the structures, institutions and the underlying ideologies that support the discourse.

¹⁷ Discovery documents that pertain to sexual assault cases.

This research has been conducted within existing structures of a capitalist and patriarchal society, within an academic institution and from the perspective and experience of a woman. The effects of these influences on the research as well as on the researcher are discussed throughout the thesis.

CHAPTER FIVE: PROPERTIES OF DIALOGUE

Narrative Reconstitution of the Self

People create narratives to convey themselves, not to deceive but to sustain their lived reality (Erving Goffman 252). Goffman further suggests that people tell their stories in order to make sense of their personal experiences. Storytelling usually occurs when the self is feeling disembodied (521). Goffman points out that this is not unlike what social scientists do. As a researcher in the social sciences, I have presented my story as a result of feeling dehumanized in a discovery process. I have conducted this research, in part to make sense of my personal experience.

In sexual violation cases, the female victim is dehumanized as her body is put on display through the use of discourse that includes personal questions, assumptions and verbal probing. This appears similar to research findings on the dehumanizing effects of discourse in medicine (Young 429).¹⁸ Discourse entails more than professional jargon and medical questions. According to Young, medical discourse creates a realm, or world, that is foreign to the patient (429). In the foreign realm, the patient is created and subjected in ways that are alien to him or her. The ordeal I experienced in the discovery reveals a similar dehumanizing discourse in the justice system.

Young and Mishler conclude that people have a necessary and critical impulse to reconstitute a self during a dehumanizing process. To reconstitute the self is the opposite of dehumanization. It is a way to preserve the self. Young

¹⁸ This is supported by Mishler, 1984.

finds that there are four ways that patients respond to dehumanization by medical discourse.

This reconstitution [from dehumanization] can be undertaken by the patient in one of two moves [four methods]: either by breaking the framework of the realm of medicine by disattending, misunderstanding or flouting its convention or by maintaining the framework but inserting into the realm of medicine an enclave of another ontological status, specifically, a narrative enclave. (Young 429)

I have chosen to focus on the method of reconstitution of self by “maintaining the framework of the foreign realm through insertion of a narrative enclave” (Young 429). I have done so because it is particularly relevant to my experience in the discovery process. To maintain the narrative frame of the foreign realm means to continue to participate in the verbal probing process of the medical (or legal) practitioner, but to insert narratives from the individual’s real life realm.

Young describes a medical examination from a patient’s perspective to illustrate the process of dehumanization;

Medical examinations threaten untoward intimacies. The accoutrements of propriety are stripped away: I appear in nothing but my body. What follows has the structure of a transgression, an infringement, but one in which I am complicit. I disclose my body to the other, the stranger, the physician. To deflect this threat to the embodied self, medicine constitutes a separate realm in which the body as lodgment of the self is transformed into the body as object of scrutiny: person become patient. This transformation is intended to protect the sensibilities of the social self from the trespasses of the examination. (Young 429)

Young states that there is the medical realm, and there is the real life realm of the patient, and these two worlds are very different (433). I believe that this applies to a woman in a legal process as well, particularly in cases of a sexual nature. In the medical realm, the person is reduced to a patient. In the real life realm, the patient reappears as a person. According to Young, there is a different narrative frame for each realm: "The discourse within the frames is understood to be of a different ontological status from the discourse without" (429). In the legal process, the sexually violated woman is reduced to a litigant. In real life the sexually violated victim is a woman who has been harmed.

Young recounts the experience of a male patient, a professor and a former captive of Auschwitz, as he undergoes a medical examination. Young describes how the patient is dehumanized by the doctor's inquires about his body (breathing, back, heart, bones and scars). Dehumanization occurs because the patient is more than his body; he is the experience of his body. Instinctively, the patient attempts to include his personal story about his experiences in the questioning process. By doing so, he injects his real life realm into the medical realm and makes the medical process one that he can relate to. Young says that we cannot easily separate one reality (professional) from the other (personal.) In this case, the former Auschwitz captive cannot separate his experiences of being a prisoner from being a patient. For example, the former prisoner has many stories. He has stories about capture, torture and liberation. He does not need to tell his stories when they are relevant to the doctors questions, however, and more significantly, he does need to tell them when the doctor's questions are

relevant to his stories. As each part of his body was examined, the patient associated a memory or a story with it. His missing finger represented an incident of torture. A guard purposely pushed him into a saw he was operating. The doctor's examination of his head and genitals represented his capture, and the shame and humiliation he endured as a prisoner at Auschwitz.

Patients will naturally attempt to attach or to insert their lived experience into the realm created by the medical practitioner [or the legal practitioner.] This is a protective mechanism (Young 439). Not to do so compartmentalizes the person leaving "them dispirited, unpersoned, or dehumanized..." (Young 435). The human need is to tell one's story as it is aligned with the body, not to play on the hearer's emotions (435). It is about presenting the real life conditions of the individual, and thereby creating continuity between two realms.

During the process of discovery women are questioned about their sexual self. They feel as though they are being stripped bare and dehumanized as they are questioned about the explicit details of the sexual violation(s) they experienced. When women answer the questions, they are not allowed to tell their story. They cannot explain why something occurred, or how it occurred. Furthermore, they are robbed of their privacy when they are also questioned beyond the sexual violation, about their past and present sexual experiences. Having been made acutely vulnerable by these questions, women are then relentlessly probed for possible complicity in the sexual violation. I argue that the legal discourse used in the discovery process has the same dehumanizing impact upon sexual violation victims as the medical discourse has on patients.

Some doctors allow or invite their patients to insert their narratives into the medical realm of questioning. Some doctors believe this provides a more comprehensive and holistic picture of the patient's overall health. It was my experience in the discovery, that sexual violation victims are never afforded the same opportunity. To the contrary, it was clear to me that I was considered uncooperative when I attempted to insert my story into the discovery. I perceived punishments such as raised voice, sarcasm or what seemed to be rudeness when I would try to insert the story of my experience of the sexual violation.

A foreign realm constituted through discourse can be reinforced in many ways. One method of reinforcement is through physical context. In a medical examination, the bright, sterile examination room reinforces the medical realm.

During the discovery process I was moved to an examining room, which was more imposing to me than any doctor's examining room. I was one woman between two male lawyers, backed up by a silent stenographer, at a huge boardroom table that had chairs for twenty people. The door was shut. The windows revealed a seventh floor view of the top of other buildings. I was not allowed to speak of my real life realm, my experience, my story. I was questioned if I wrote notes or even reached into my purse.

Considering the devastation that accompanies a sexual violation, it is difficult, if not impossible, for a woman to separate her feelings of victimization, from the experience of being a litigant in a discovery process, particularly when the discovery is precisely about the sexual violation. Nonetheless it appears that the questioning lawyers expect the victim to compartmentalize her thoughts and

feelings of being violated, from the questions they ask about the violation. I do not wish to compare the trauma of sexual violation with the trauma of being a prisoner at Auschwitz. That is merely an illustration of how people who have experienced atrocities have an innate human need to reconstitute their self. People protect themselves from dehumanization by injecting their stories into probing questions of painful events. In a sexual violation discovery, the structure of the question refuses to allow the woman's narrative into the process, and therefore her experience of sexual violation is disqualified from the process. I would argue her whole experience is not only relevant, but is essential in determining what happened.

Conversation Styles

The only preparation that I received for the discovery interviews was that I would be "asked" for information. The discovery process involves questions. When I think of questions I generally think of an interview. I have been interviewed many times in the past, including instances when I provided evidence, on behalf of my clients, for legal reports. A premise of the official version of law is that truth can only be determined through rigorous and uninhibited questioning of legal subjects. Although the Federal Court Rules governing discovery state that cross examination is permitted, I was shocked with what I now consider to be similar to re-victimizing police interrogation tactics. I believe that a significant problem with the discovery process is that there is no specific description of the "methods" by which one party gains information from

the other party. The “unrestrained vigor” of questioning which I often hear lawyers refer to, requires some limitations to prevent it from crossing the lines to interrogation and re-victimization. Women who have been victimized do not warrant the same interrogation tactics that would be applied to a suspected offender. Women who are victims of sexual violation are not the offender; they are perusing prosecution of an offender. During the discovery, I felt as if I was assumed to be the offender.

Properties of dialogue can be described as conversational style. Conversational style includes many elements that cannot be detected in written texts. Some of these are: pitch, amplitude, intonation, voice quality, lexical and syntactic choice, rate of speech, gaps in speech, pauses, overlaps in conversation, self-interruption, sarcasm and audible breathing (sighs, gasps, breathing, snorting). Non-verbal behaviors such as facial expressions, gestures, gaze and stance are not traceable in the transcript and therefore will not be included in this analysis.

Discourse analysts and conversation analysts have found that properties of dialogue include phonology, grammar, vocabulary and semantics. Other properties of dialogue include, but are not limited to, cohesion and the organization of turn-taking and latching. Turn-taking is a culturally designed method of verbal communication. Latching is a way of enhancing verbal communication. Latching occurs when the listener repeats or latches onto what the speaker says, as if to reinforce and continue the speaker’s stream of communication. These are common speech practices in our Western culture.

Gillian Brown asserts that women are particularly skilled at latching and keeping the flow of a conversation going. In my discovery examination, ordinary patterns of speech were not allowed. Patterns of dialogue were interrupted, ignored and fractured with repeated questioning, cut offs, and silences. As two days of questioning progressed, it became increasingly difficult and frustrating to communicate without commonly practiced methods of dialogue.

Registers

Registers contribute to the formation of genres and types of discourse. Norman Fairclough mentions registers “such as scientific German or the English of advertising” (*Linguistic* 184). The discovery process uses a particular genre and type of discourse that is unique to the institution of law. The genre is re-accentuated in the production of texts (Bakhtin 184). This is significant because the properties of dialogue that create the genre of law are recreated and reinforced with the production of legal documents. This illuminates the process of perpetuation of discourse in the legal system. As we continue to allow the dialogue that silences women in the discovery process, we reproduce the legal genre, and reinforce it with texts. As I participated in the dialogue of the discovery process, I became an active agent in the perpetuation of the legal genre which silences women in cases of sexual violation. We insert history into text, and text into history (185).

Cross-examination and Interrogation

Cross-examination is defined as an in-court procedure used to test the veracity of the witness. The premise of the official version of law is that “truth” can only be found through uninhibited testing through questioning. Uninhibited questioning is not clearly defined, and nowhere is it stated that cross-examination or interrogation may be used in the discovery process. Such questioning tactics are reflective of the legal system’s mistrust of women, and its insensitivity to the effects of sexual violence.

I expected to be interviewed in the discovery. I was not advised that the discovery process was an adversarial process that included cross examination. I researched police interrogation tactics used on criminals. I found that the questioning techniques used in police interrogations, matched those included in my discovery cross examination, at approximately 70 percent (Shuy 82). Roger Shuy defines the differences between interview and interrogation:

Interrogators make ample use of their power. They challenge, warn, accuse, deny, and complain. They demand and dominate. They challenge what the ‘suspect’ has said. (12)

An example of interrogation questioning is described as follows:

The interrogator’s five question here all fall within the prescribed limits of police interrogation. The first is direct and forthright: “Did you do it?” The second approaches the issue from [the suspect’s] motivation and presupposes that he actually did the deed. The third challenges [the suspect’s] truthfulness. Although it also accuses [the suspect] of doing it, such accusation is legally acceptable in police interrogations. The fourth is direct and

straightforward, adding the alleged [location of the violation.] The last question is a classic in interrogations of this type, again presupposing that [the suspect] actually did the deed but offering [her] a somewhat sympathetic motive. (Shuy, 82)

It is my opinion that these and other tactics were applied to me in the discovery process. The following are examples from the discovery transcripts which in my opinion align with criminal interrogation tactics. The questioning lawyer is referring to a letter I had written shortly after the sexual violation when I blamed myself for my sexual violation.

84/534

Q

And am I correct in understanding you to say there, that the total extent of your relationship with [the alleged assailant], you were taking responsibility for. Correct?

A

At that time I was. That's correct.

Q

So at that time it was a true statement. Correct?

A

No.

Q

I see.

A

That is what I wrote at that time.

Q

I see. Okay. And you expressed sorrow; humble, repentant and ashamed.

A

Yes.

Q

Was that true at the time?

A

That is what I was willing to take responsibility for at that time.

Q

Was it true at the time?

A

No.

[My Lawyer]:

Objection. It's not capable of being true or not.

THE WITNESS:

There is no defined true or false in the world.

[Questioning Lawyer]:

Q

Well, did you feel sorry when you wrote this?

A

I took responsibility for this.

It appeared to me that the questioning lawyer was attempting to get me to take responsibility for, or to say that I was complicit in my sexual violation. Even my lawyer found it necessary to intervene. However, the questioning lawyer did not change his vein of questioning.

231/1321

Q

Okay. At this point you don't recall then, I take it, what particular document you read that allowed you to recall a date of August XX, 19XX when your relationship with [the alleged assailant] became romantic?

A

No, I don't know which page or which part of the document it was.

Q

Do you have a recollection that that is the date that [the alleged assailant] has said that you attended at this residence late one evening?

A

I don't know what he said. No, I didn't read his.

Q

You didn't read his statement [in the document] that you reviewed?

A

No. I don't even think I have ever read it. Pieces of it perhaps.

Q

"I don't think I have ever read it. Pieces of it perhaps"?

A

I have never read the full [document]; perhaps I have read pieces of it.

Q

What I am asking is do you recall reading a statement [the alleged assailant's]?

A

No.

Q

Have you ever read the statement of [the alleged assailant's] in connection with the [report that was made]?

To me, it felt like the nature of the questioning became increasingly more accusing. Shuy writes,

Interviewers use less of their power than interrogators do. An interview probes not cross-examines. It inquires but does not challenge. It suggests rather than demands. It uncovers rather than traps. It guides but does not dominate. Questions are largely open-ended, not yes-no, It completely avoids tag questions such as “You were there, weren’t you? (12)

At one point during my questioning I wrote a note to myself. At another time I reached into my bag (for a pen). I was questioned about what I reached for in my bag and I was questioned about what I wrote on the notepad. I still don’t know if I had to tell the questioning lawyer what I wrote to myself or why I reached for my bag. That was part of the dehumanization. Part way through the process I concluded that my lawyer should have been more effective. I felt so confused and distressed by the questioning process, and by my perceived lack of support from my own lawyer, that by the lunch break of the first day of the discovery I called a professor from my university for advice. He confirmed, based upon the events I described, that my lawyer’s behaviour was not acceptable.¹⁹ I returned to the questioning, probing and manipulating for only one reason: my lawyer stated that I would appear to be a hostile witness if I did not comply. I did not know, and still do not know, if that was true. I question the purpose of designating a client a “hostile witness” solely because they cannot tolerate the questioning. I question who benefits from this. I felt threatened by the idea that I

¹⁹ During the discovery lunch break, I phoned my Social Work professor, David Turner, who specializes in law, at the University of Victoria, to say that my own lawyer had responded to my complaint by saying “Go scream in the bathroom if you want to.” Mr. Turner replied “that is not good representation and that it doesn’t sound like a very good situation.”

could be designated a “hostile witness”. This felt very coercive to me. It is common knowledge that authorities treat women harshly in cases of sexual violation: “Police should be restrained from using coercive tactics during investigations” (Busby 262). The discovery appears to be a secluded process for the coercive tactics of lawyers.

Sarcasm and Rudeness

Inflections and tone of voice produced sarcasm and rudeness that cannot be perceived in written text, but would have been recognized as demeaning in a court of law, and was demeaning during the discovery process. I felt insulted and dishonored by questions and comments that I felt attacked my character. It seemed to me that my memory and my intelligence were repeatedly attacked.

(Please refer back to the transcript section 231/1321 cited on page 85.)

The transcript on page 85 is an example of what appeared to me to be rudeness, through the use of repetition and sarcasm. It felt not only like interrogation, it felt belittling. Ultimately, I ended up acknowledging that I had read the report, when in fact I had not. Another instance where the questioning felt rude and intimidating to me was when the questioning lawyer swore at me when I did not know an answer. This is cited below.

278/1566

Q

I am not going to ask you to assume, you can take your time and look at any records you want and let me know, or just tell me you just don't bloody know.

In regard to the above, I found it very intimidating and shocking to be sworn at, particularly early in the discovery.

Topical Continuity

“Topical Continuity” is a term Katherine Young uses to describe one aspect of personal narratives in social scientific discourse (430). Personal narratives are one way that people construct a sense of themselves. Young suggested that narratives require specific frames such as “prefaces, opening, beginnings, endings, closings...” (430). All of these create a space for a narrative, or invite a narrative, or give permission for a narrative to occur. Young calls these frames “enclosures.” If an individual is to engage in a conversation in a foreign realm, such as medicine or law, an enclosure is required into which a person is able to inject their narrative. In my discovery examination there were very few enclosures created for me. To the contrary, I found that leading questions were constantly used to direct my answers. The following are examples.

52/322

Q

I see. So you're wanting to discuss – it was a fairly simple question – a power imbalance. I'm simply asking a very straightforward question. Do you take any responsibility for showing love and affection to [the alleged assailant]?

A

I do not. Because of the context.

Q

You did express love to [the alleged assailant]?

A

Again, I find it impossible to answer this question.

Q

It's a simple factual question. What's the difficulty that you're having with it?

A

The problem is that this man held a lot of power in my life. He had confidential knowledge provided to him about my vulnerabilities; my weaknesses. And he manipulated me. And if you could call my response love and affection, then so be it.

Q

Let me put it another way for you; really simple. And I'll break it down for you. Did you express love to [the alleged assailant]? It's a simple, factual question.

A

No.

In regard to the above, It seemed to me that there was nowhere for my story to be heard. It appeared that the more I attempted to insert my version of my experience, the more the questioning lawyer resisted it.

66/409

Q

In fact, there was [an episode] in your marriage?

A

Not until [the alleged sexual violation] incident.

Q

I see

A

The one [episode] – happened the day my husband made a phone call about [the alleged assailant], to try and expose him. And I was still frightened and blaming myself. And I felt very betrayed by this involvement on my husband's part, when it would be me who was questioned.

Q

Let's go back to the letter then. Okay?

A

Yes.

In regard to the above, it seemed to me that if my story began to emerge, I was flatly cut off. At this time I was talking about my fears around a serious episode

that I experienced, which was related to the sexual violation. The questions quickly changed directions to concentrate on an unrelated letter.

The Relevancy Rule

The “Relevancy Rule” is another term Young uses to describe how people use specific discourse in specific realms. To insert another discourse (a personal narrative) into a foreign realm is to “break the frame” of the present discourse (433). This relevancy rule dictates that what we say, must be relevant to the current frame, otherwise it will be dismissed. The relevancy rule controls the course of the dialogue. This control is strengthened if a professional or someone with authority sanctioned by an institution articulates the dialogue. Young says,

the rule for topical continuity, the selection of a next discourse event which shares at least one element with a previous discourse event, permits trivial connections between discourses and, by extension, between realms. (434)

It is difficult, if not impossible, for a sexual violation victim to inject her story into the discovery dialogue because the questioning lawyer is a professional who has the power to control the dialogue, and his/her power is sanctioned by the institution of law. It is impossible to have what is normally considered a dialogue with such a profound power imbalance. Even though the sexual violation victim may feel dehumanized, she does not feel entitled to tell her story in the discovery process because of the lack of “enclosures”.

Attempts to tell her story will most likely be rejected by the questioning lawyer (an example of Young’s relevancy rule). This happened to me during the

discovery process, when the lawyer appeared to ignore what I said and then cut me off. In each instance he changed the subject back to the dominant (relevant) discourse, seemingly refusing to recognize my story as part of that discourse.

Persistence

As I read the transcript of the discovery examination, I realized that a pattern existed in the discourse. This pattern appeared to be a relentless pursuit of information designed to influence my response. Deborah Tannen's term "persistence" is descriptive of my perception of being led to answer in a specific way: "Persistence refers to the pattern by which speakers continue trying to say something despite lack of attention or interruption" (468). Tannen says that "persistence" reflects a conversational economy where the listener is compelled to show enthusiasm for the speaker (468). I found the persistence of the questioning lawyer was relentless. I found the process exhausting. If my comments did not support the questions, they went unacknowledged. The following is an example of what I perceived to be the questioning lawyer's persistence.

45/276

Q

You were changing the order. That's fine. I wasn't trying to imply anything. My understanding though, is this: That you seem to be taking the position that [the alleged assailant] began his relationship with you, in terms of your broad definition of a romantic or sexual relationship, prior to your separation.

A

Yes.

Q

Do I have a correct understanding of that?

A

Yes.

Q

Would it help if I suggested this to you as accurate: You had in fact asked your husband to leave the matrimonial home and he did so. And it was as a result – and then immediately following that you commenced your relationship, in terms of overtures from [the alleged assailant], that were of a romantic nature?

A

No.

Q

You still have a recollection, then, that you had a romantic relationship with [the alleged assailant] that preceded your separation?

A

Definitely.

Q

Okay. Do you have any records that would assist you in your recollection?

A

No.

Q

Okay. In any event, if I understood you correctly, at this point, in terms of your statement in Exhibit 2: You have no reason to doubt that your separation from [your husband] commenced in the month of August of 19xx?

A

I do doubt that.

Q

And the only reason you doubt that is because somehow you don't believe that you had commenced your relationship with [the alleged assailant] at that time. Is that correct?

A

That's correct.

Q

Is there any other reason?

A

No.

Q

Now, so that we're clear, all you're talking about, then, is essentially what came first?

A

No. Actually, I'm talking about the time period. I know what came first. What I'm unclear about is exactly the dates that they happened. But it's no question in my mind of what precedes what.

In regard to the above, a theme that became common throughout the two-day discovery was a constant demand for me to state that I had separated from my

husband prior to being sexually violated. I think this was an attempt to make a violation by someone I knew, look like an affair and thereby make me complicit. I became exhausted with what appeared to be an incessant demand to make me admit something that was not true.

42/264

Q

Let's go back, Ms. MacKinnon, to the statement. You wrote this letter on August 19xy?

A

I did.

Q

So it was exactly one year, or thereabouts, from the time frame of your involvement with [the alleged assailant] Correct?

A

I do not believe that I knew for certain it was one year and one month ago, specifically.

Q

You're talking about today, are you not? You're talking about your recollection today. Correct?

A

You'll have to rephrase –

Q

Certainly. I'll rephrase it then. Let's go back to the statement you make in your letter of [the month and date] Exhibit 2.

A

Yes.

Q

What can you point to today that would indicate that your statement at the end of page 1, that your separation from you husband occurred a year ago this month – referring to August of 19xy – is incorrect?

A

If I understand your question correctly, you would like me to recognize the fact that I wrote, on August xx 19xx, that I believed it was a year and a month ago that my husband and I separated. Is that correct?

Q

That's not the question I asked you.

A

Well, I don't understand your question.

Q

It's a very simple question, I'll try it again. What can you point to today, sitting here, in [town name], on [today's date] –

A

What can I point to, I guess, is that I'm confused –

Q

What information can you point to, in any way, written or otherwise –

A

Yes.

Q

-- that would indicate to you that the statement you made--

A

Yes.

Q

-- back in the letter of August xx, 19xx, in Exhibit 2, Is not correct?

A

The only information that would lead me to believe this letter is not correct, is that I recall my involvement with [the alleged assailant] happened in September. If I'm incorrect in that, then this letter could be true. But if I'm correct in my assumption that I was involved with [the alleged assailant] romantically in September, then this letter is false, and I made an error when I wrote it.

Because I am certain in a – my husband did not separate from my home until after [the alleged assailant] incident. Because that incident began the night that I was going to throw him out of the house, when I sought advice from [the alleged assailant]. The incident had not – of my husband leaving the house – had not happened yet, until I saw [the alleged assailant]. And that was the beginning of his romantic overtures to me. Have I answered your question?

[Questioning Lawyer]:

You've given me some information. I'll pursue it with you further. Okay.

In regard to the above, again, I felt exhausted by the relentless pursuit of the same date and statement. Persistence frequently turned into interrogation. I was so focused on the issue of the date, that I didn't realize that I seemed to have been railroaded into using the term *romantically*. This term signified to me the differentiation between the *[alleged assailant's]* personal and professional behaviors. I read the transcripts and it appears that I acknowledged being romantic with the alleged assailant, and prior to the ending of my marriage. It was, and still is, very frustrating. The effects of the discovery do not end when

the discovery is over. Had my case continued to court, these sentences would have been used against me.

Co-operation

Most people have a style of communication that is different than that used by the Questioning lawyer in the discovery examination. When people are cooperative they allow words and phrases to go unchallenged. During the discovery examination I allowed words and phrases to go unchallenged, even though I disagreed with their implications. The following is an example taken from very early in the discovery (the fifth question). I agree to something false out of my instinct and desire for cooperative communication.

5/25

Q

And in support of that you would have filed an affidavit, I take it?

A

Yes.

Q

You did?

A

I assume that's what the procedure is.

Q

Do you recall swearing an affidavit in support of the Petition for Divorce brought by you out of the [town name] Registry in the Supreme Court of [province name]?

A

I'm not familiar with all the legal terminologies of all of the processes which I had to go through.

Q

Simple question. Do you recall swearing an affidavit in support of the petition that you brought for divorce?

A

I'm not sure what an affidavit is.

Q

Well, if you don't know what an affidavit is, let me show you one, I take it, that you produced this morning from [your husband].

A

Yes.

Q

Take a look at that document.

A

Um-hum.

Q

That's a document. Do you agree?

A

Um-hum.

Q

You have to answer orally.

A

Yes, I do.

Q

Can I have that back for a moment? That affidavit has on the second page, a lot of writing on it –

A

Yes.

Q

-- and circling and highlighting. What colour is that? Orange or yellow or --

A

Orange.

Q

Okay. Is that your handwriting?

A

Yes, it is.

Q

So you've read affidavits before?

A

Yes. But that was my husband's. I'm not sure if I made one or not. I recall criticizing the one that he made. But I'm not sure if I submitted one.

Q

Let's deal with that. Do you know what an affidavit is?

A

Yes.

Q

Do you have any difficulty with what an affidavit is, in terms of what it means?

A

I don't think so.

Q

You understand that it's something that you set out in writing and then you swear to the truth of?

A

Yes.

Q

Do you have, at this point then, no recollection of whether you have sworn any affidavits in the Supreme Court of [province name] proceedings, [town name] Registry Number Dxxxx. Is that my understanding of what you're telling me?

In regard to the above, I was trying to help. I did not expect to be tested or tricked. I did not know what an affidavit was at that time. I had only heard the word. I was trying to be agreeable and so I eventually answered "yes," even though I was not sure what he was asking.

231/1318

Q

And what date do you come up with now?

A

August xx, 19xx.

Q

On what basis do you come up with that date?

A

I just sat down and looked at all of the material I had and tried to put things in the right dates and looked through the [report] and wrote a few significant dates that I recall.

Q

I understand.

What document did you look at that led you to come to a date of August xx, 19xx?

A

It was some page in the [report] that I had known the date of. The exact date. I just searched through my copy of the [report].

Q

Okay.

At this point you don't recall then, I take it, what particular document you read that allowed you to recall a date of August xx, 19xx when your relationship with [the alleged assailant] became romantic?

A

No, I don't know which page or which part of the document it was.

In regard to the above, because of the association of phrases, I missed the questioning lawyer's use of the word "romantic". This happened because I was focused on the bigger question. I felt manipulated. It was frustrating. I felt led. I acknowledged what I did not believe to be true: that I had a romantic relationship with the alleged assailant.

Part of the reason that I tried to be cooperative and that I did not challenge the questioning lawyer was because, being naive, I assumed collaboration and good intent on his part. I thought that he was trying to understand the event. I did not suspect that he was trying to lead me to accept his version of the events. As the discovery examination progressed, and what appeared to me to be the questioning lawyer's attempts to manipulate me became obvious, I understood that I was not allowed to protest his persistence. I noticed that I eventually became acculturated. I felt as though the questioning lawyer hounded me, if my answer did not meet with his approval. This suggested to me that I was doing something wrong, and that I should "get it." In retrospect, I observed that at these times during the discovery examination, I would let myself be led, and would answer in a way that made me uneasy, just to avoid the pending conflict. Had I challenged every question that I felt I could not answer because it was leading, incriminating, not specific, etc., there would not have been a discovery. It has been difficult for me to accept that the culture of law permits what seemed to me to be the sanctioned torment of women.

Reiteration

Deborah Tannen suggests that “reiteration” normally constitutes thematic cohesion and establishes rapport (3). Often, I allowed aggravating and inaccurate words go by without comment, and volunteered cooperative answers in order to establish a rapport. As I reviewed the discovery document, my cooperative answers (which I coded as “led answers”) frustrated me more than anything else. My led responses were probably the most valuable of my comments, for the questioning lawyer.

At other times, I would not cooperate and ceased to build rapport. At such times I felt chastised by the questioning lawyer as well as by my own lawyer, for my non-cooperation with the questioning lawyer’s agenda. I interpreted my lawyer’s acceptance of the agenda to indicate that this was somehow normal and acceptable. Unfortunately, it may be normal, but it is by no means acceptable.

Conclusions of Properties of Dialogue

A linguistic analysis by Norman Fairclough revealed

the doctor asks closed questions which limit patient accounts, whereas the nurse practitioner asks open questions which encourage them; and the doctor filters patient responses to focus upon medical issues, whereas the nurse practitioner follows up clues in the patient’s responses about her social circumstances and style of life... the latter ‘supports’ the patient and ‘legitimizes her explanation.’ (*Linguistic 4*)

In the discovery examination cross-examination is used to ask closed and leading questions. There is no place for the sexual violation victim's reality to be acknowledged or explained; yet, somehow from this process a truth is supposed to emerge. To deny women the opportunity to incorporate their experience is to deny the legitimacy of her reality. The deliberate omission of a woman's experience reveals the narrow scope of what is considered relevant information in the discovery process. The properties of dialogue used in the discovery process appear to contrast with effective communication in Western society.

CHAPTER SIX: THE USE OF LANGUAGE

Direct versus Indirect Language

What is the significance of the use of direct or indirect language in the process of discovery? Why would anyone want to obscure the reality of a sexual violation through language? (It is worth noting that the legal advisor of the university instructed me to remove the words *sexual assault* from references to my experience. I agreed to use the more indirect words *sexual violation* in this research.) In an article entitled "Telling it like it Isn't," Prevost argues that in cases of sexual assault, many judges use indirect language in their descriptions of the crimes. Prevost suggests that this usage minimizes the crimes, and that minimization through language impacts the victims:

If judges do not accurately describe the details of sexual assault, they may be inadvertently hiding the severity of the crime and may decide on a sentence according to their indirect description of it. More importantly, imagine the feelings of the victims who are in the courtroom listening to how the severity of the crime is being understated and how the details of the crime are being changed. If the victims can survive such a trauma, we should at least be able to talk about it [directly and without minimization]. (1)

Several recent studies conclude that it is easier for people to talk about positive or neutral events and more difficult to talk about negative or violent ones (Henley & Miller).²⁰ Discomfort is the primary reason for the use of indirect language. Further, euphemisms are a self-protective mechanism (Bavelas, *Discourse* 6). Discomfort, however, is an excuse rather than a legitimate

²⁰ This is supported by Bavelas, 1994, and Prevost, 2000.

reason. With regard to indirect language used in trial judgments of sexual assault cases, Prevost argues,

Why do judges speak [indirectly] about sexual assaults? A judge's duty is to remain unbiased and to recount the specific details of the offence in order to decide on an appropriate punishment for guilty offenders. If they are to remain unbiased and objective, why would they obscure the facts of the offence or remove responsibility from the offender? (9)

I challenge discomfort as a legitimate reason for the use of indirect language. My experience in the discovery process reveals that the questioning lawyer had no difficulty using direct language when it was used to place responsibility for my alleged sexual violation on me.

72/452

Q

Now I understand you to some extent. Can we go back to what you wrote there?

A

Um – hum.

Q

I'm trying to have some understanding of what you are trying to say there. You state, in part, "I know now that I should have trusted in God to lead me." Do you see those words there?

A

I do, yes.

Q

So I take it that in August of 19xx you continued to believe in God?

A

Yes.

Q

And that you should have placed some trust in Him. Correct?

A

Yes.

Q

And that trust was to lead – in Him to lead you?

A

Yes.

Q

And what is it that you were expressing there, in terms of where you wished God to lead you?

A

I have no idea, to be honest.

Q

Okay. You then go on and say, as sort of the opposite of that proposition, "and not act on my own feelings."

A

Right.

Q

I take it I'm correct in understanding that you are expressing a view that you were, or had, acted on your own feelings?

A

Yes.

Q

Would I be - first of all, why don't you just tell me. What feelings did you act on?

A

I have no idea what I was referring to. I would assume my feelings of neediness, which I acted on by allowing myself to play out the relationship with [the alleged assailant].

Q

So we're clear then, if I take what you've said. You were, in part, allowing yourself to play out a relationship with [the alleged assailant]. Is that correct?

A

Yes.

Q

So you were a participant, equal participant in that relationship?

A

Absolutely not was I ever an equal participant in that relationship.

In the above, the questioning lawyer found no difficulty making using direct language. Direct language is most commonly applied with "you" statements. The questioning lawyer directed many "you" statements to me.

Direct language is often indicated by the use of "active voice." Examples of active voice are, "He *assaulted* her" and "You *attended* him". Direct language is also indicated by the use of a "linking verb". Examples of linking verbs are, "he *is* remorseful" (12). In her empirical study, Prevost measured the degree of

directness using a measurement rating scale (appendix 1). I used this scale to determine direct and indirect language types and to provide a basis for my analysis. Prevost argues nouns like “offence,” “act” and “assault” represent indirect language. These are legal terms judges use to describe crimes (Prevost 16). The same indirect legal terms were used in my examination for discovery. My experience demonstrates that lawyers are selective, just as judges are, when they choose to use direct language to describe sexual violations. I reported my observations in this research to Dr. Janet Bavelas, professor of psychology at the University of Victoria, who confirmed that my finding is consistent with a new theory that she has recently formulated (Appendix 3). Dr. Bavelas describes “Equivocation theory” as the notion that “people will be direct or indirect depending on the goal or consequences” (Appendix 3). My findings, combined with this theory, suggest that lawyers in a discovery process, as well as judges, intentionally use direct or indirect language to attain a goal or to avoid a consequence. The purpose of this research is to determine what the goal is, who benefits and who does not. Further, who receives or does not receive the consequence, and what does this imply. It is my assumption that in removing the words “sexual assault” from my personal experience in this research, the university avoids the potential consequence that alleged assailant might sue. Clearly the university, as well as the alleged assailant, benefits. There is however a consequence to me, and that is the minimization of my experience.

As stated previously in a quotation from Prevost, indirect language distorts the act of sexual assault and reduces the offender’s responsibility for the crime.

This would indicate that in sexual cases the strategic use of indirect language by lawyers and judges purposely distorts the assault to benefit the male offender.

A serious result of the use of indirect language is suggested in a personal communication from provincial court judge Cunliffe Barnett, to Janet Bavelas, on April 5, 2000. Judge Barnett notes that,

Judges' descriptions in trial judgments are transcribed and become the record of a sexual assault that is used if the sentence is appealed. The appellate judges read the description of the sexual assault, and if it does not appear to be as severe as the sentence would suggest, they may question why the trial judge was so severe and reduce the sentence. This decision would then suggest to other trial judges that longer sentences are not appropriate and would set a precedent for shorter sentences in future sexual assault cases. (Prevost 17)

This would indicate that as a result of the indirect language used in sexual assault cases, not only is a conviction less likely to be obtained, but when it is obtained sentences are more likely to be reduced.

In analyzing my discovery transcripts, I was startled to find out how `distorted the language was. Not only did the questioning lawyer trivialize events that occurred through the use of indirect language, I did as well. I used words such as "sexual" and "relationship" to describe what I meant as a personal (as opposed to professional) relationship. I am certain that the questioning lawyer accepted my errors because they supported his argument. In trial judgments, in discoveries, and in academic forums as well, it is critical that direct language is allowed to be used and terms are allowed to be defined as much as possible, if the truth about women's experience is to emerge.

24/133

Q

Where did your sexual relationship with [the alleged assailant] occur?

A

I would say it began the evening that I went to his home for help; which I do not know the date of. And lasted for – which I believe is approximately a four-week period, until he [relocated].

Q

And you had a sexual relationship with [the alleged assailant] on an evening that you went to see him for help?

A

I would say it began that night that I went to see him for help. Yes.

[My Lawyer]:

We need to define sexual relationship, I'm afraid.

[Questioning Lawyer]:

Are we going to have a Bill Clinton problem? That's what you're going to suggest?

[My Lawyer]:

Yes.

The questioning lawyer was constantly using the word “sexual” to describe my relationship with the alleged assailant. Because of the inherent ambiguity of a word such as “sexual”, and because of my culturally instilled tendency as a subordinate to answer to authority, I found myself using “sexual” when I otherwise would not have used it to describe my relationship. To me it did not mean “sexual intercourse” in this context. Such terms were not defined at the discovery. We each appeared to have our own understanding of what we were talking about. My lawyer knew the events I was speaking of did not include a sexual relationship and interjected with “*We need to define sexual relationship, I'm afraid.*”

Ambiguous Language

Danet says, "When the meaning of the act is ambiguous, the words we choose to talk about it become critical" (189). This statement was made in reference to a trial, but it applies equally to the pretrial discovery process because information is gathered at the examination for discovery in order to be used in the trial.

Indirect language minimizes the crime because it does not directly describe what occurred. Prevost tested for the possibility that indirect language might simply be characteristic of formal settings such as courtrooms; however, this did not prove to be the case. In cases of sexual assault, indirect language dominates at some points and is nonexistent at others, depending upon the subject matter. That indirect language, as well as direct language, was used in my discovery examination, supports Prevost's findings that indirect language is not limited to formal courtroom settings.

Indirect language is used in sexual assault judgments to remove the offender from the position of agent, that is, to distance him from the offence he committed. In the same judgment however, direct language is used to describe the good character of the offender, i.e. he is an upstanding member of society (Prevost 12).²¹ In cases where the offender was found guilty of sexual assault, the combination of direct and indirect language in trial judgments was found to enhance the character of the offender, while simultaneously rendering him ambiguously responsible, or removed from responsibility for the assault by not being mentioned. An example of the offender not being mentioned would be a

²¹ This is supported by Coates, Bavelas & Gibson, 202)

nominalization such as “the assault occurred” (Prevost 12). I interpreted that the questioning lawyer used nominalizations in the discovery process to describe my experience.

80/506

Q

You had, in fact, made prior arrangements with [the alleged assailant] to rendezvous with him in [city name]?

A

That's correct.

Q

And in fact, it was an intention to meet him out of town, so to speak. Away from prying eyes, so to speak.

A

No. I don't agree with that. It was just a trip to [city name.]

In the above questions, nominalizations soften or distance the action. “It was an intention,” sounds easier to accept than, “you intended.” “It was an intention” sounds as though I didn’t do it, so I am more likely to agree with the notion. I am more likely to disagree with something that begins with “you...”.

Minimizing and Consensual Language

Another way of minimizing the sexual violation is to describe it as if it were consensual. Creating a false sense of consent is a way to hide the violence of sexual violation. Prevost cites an example from a newspaper:

The *Globe and Mail* described the actions of a former teacher who was convicted of molesting at least 90 children: ‘Most liaisons began in the classroom with a friendly child.’ The term liaisons implies mutuality...It ignores the abuse of trust and the suffering of the young children. (5)

In the discovery, the questioning lawyer referred to the incident of my sexual violation as “a rendezvous,” thus distorting the impact. He also used the word “attended” to describe what I later realized was the first of a series of manipulations by the alleged assailant, that led directly to the sexual violation.

Henley & Miller also found that journalists obscure the facts of sexual assault with passive or indirect language, as opposed to the use of active or direct language when describing positive or neutral events. Prevost argues that inaccurate consensual descriptions of sexual assault occur not only in the media but in the legal setting as well. The use of indirect language helps to create distance from the reality of the crime, distort its seriousness and reduce responsibility of the offender (Prevost).²²

231/1322

Q

Do you have a recollection that that is the date that [the alleged assailant] has said that you attended at his residence late one evening?

This is the single date of August xx, 19xx, which in my opinion, the questioning lawyer incessantly pursued. The simplicity of the questions suggests a social visit. It seemed that the questioning lawyer did his utmost to have me admit that this was in fact a social visit, when it was not.

²² This is supported by Coates, Bavelas & Gibson.

Neutral Language

According to Prevost, neutral information includes “demographic information, marital status, employment history, background information, etc” (13). Much of the transcript that I did not select for my analysis contained what I determined to be primarily neutral information.

True to the critical discourse analysis that is used in this research, I question the concept of neutrality. For example, economic information that might appear neutral may be used to determine if the sexual violation victim has sufficient resources to continue the case. I was questioned about my past and future finances, and whether I was the beneficiary of my father’s will, and even how much I expected to inherit from my father (who was seriously ill at the time of the discovery interview). Not only was this irrelevant to the sexual violation, it was insensitive. Financial questioning is relevant if the questioning lawyer plans to intimidate me with extensive costs, as he subsequently did. I felt personally invaded with questions about unrelated arenas of my life. I felt violated by questions about my father’s will, when my father was dying. I felt I was being tested for a breaking point by the deliberate insensitivity of the questions.

Positive and Negative Language

In cases of sexual violation, all language is directly related to the intent of the speaker. Language choice is political. Language is used to influence the listener in one way or another (Brown 26). In several studies, Coates and

Bavelas, and Prevost, have found that the use of positive information such as “he is a hard worker” and “he is an upstanding citizen” influences the judge’s decision positively.

If the offence is described less negatively, it will not seem so bad. If the offence is characterized more negatively, it will seem more severe. Because the information obtained in the discovery process is used in the trial, the use of positive or negative language in that context will most likely influence how the judge will view the case. For example, in my discovery it appeared to me that the questioning lawyer chose not to use the words “separate from your husband” in favour of the words “kicked your husband out.”

22/123

Q

Let’s go back then. So am I correct in understanding from your reflection on the matter – that you’ve been sharing – that your initial separation with your husband occurred in 19xx?

A

No. 19xy

Q

Okay. I understand that you, in fact, did separate from your husband in 19xx. Is that correct?

A

Okay. If the incident with [alleged assailant] happened in the – September of 19xx, then it would have been that fall of 19xx that we separated. And that extended into 19xy.

Q

Well, with respect, I’m going to suggest to you that you kicked your husband out in the summer of 19xx, prior to the incident with [the alleged assailant]?

A

No. That’s not true.

Q

I’m going to suggest to you that you kicked your husband out of the matrimonial home - or asked him to leave; I didn’t mean to imply a pejorative sense - in the summer of 19xx?

A

It was after the [alleged assailant] incident.

Q

What's the [alleged assailant] incident that you're referring to?

A

The time what we had our sexual relationship.

Q

Okay. And when did you begin your sexual relationship with [the alleged assailant]?

Regarding the above, it appears to me that the questioning lawyer minimizes my experience by changing "separated" into "kicked out." He also adds the value-laden word "matrimonial" home. Due to a lack of clearly defined language, I referred to the sexual violation as a sexual relationship. I thought I was differentiating the events surrounding the violation from the professional relationship that I had with the alleged assailant. I did not realize until I reviewed the transcripts how many of my sentences, in isolation, suggested that I had simply engaged in a sexual relationship. I am still shocked that my own lawyer did not have us clearly define what was being said. The lack of protest from my own lawyer left me to assume that this must be typical of how discoveries are conducted. The questioning lawyer's intentional use of positive and negative language, which is allowed in the discovery examination, has the capacity to erroneously influence a judge's perception of the sexual violation. Further that language can influence attribution of the crime, as well as sentencing or damages decided upon, depending upon civil or criminal courts.

The Language of Agency and Attribution

The discovery process provides an opportunity to lay the responsibility for the sexual violation upon the victim. In a courtroom there would be a lawyer to

counter such accusations and a judge to prevent leading questions. Prevost found that in cases where the accused had been found guilty of committing the offence, he was not mentioned in 59.4% of the legal descriptions of the crimes (16). Crimes were described in such ways as “the rape occurred” and “she became bruised” (16). The second description is interesting because it not only removes the offender from the crime, it puts all of the focus on the victim, almost as though she bruised herself.

In my discovery process, the total emphasis in regard to the violation is put on me. The alleged assailant is rarely mentioned.

Q

I take it I'm correct in understanding that you are expressing a view that you were, or had, acted on your own feelings?

A

Yes.

Q

Would I be - -first of all, why don't you just tell me. What feelings did you act on?

In regard to the sexual violation and throughout the discovery, I am considered the primary actor. Prevost noted that although the language used to describe the crime often failed to include the offender, most of the character descriptions did include reference to the offender (16). This means that in trial judgments concerning sexual violations the judges did not talk about the offender directly in relation to the crime, but they did talk about the same offender, in the same case, directly in relation to his good character. This appears to hold true in discovery. This supports the historical notion that the legal system supports

the male while the female victim of the sexual violation is recognized by the legal system as the perpetrator of a false allegation. The male is therefore protected.

During the discovery, it seemed to me that the questioning lawyer accused me of being the active agent. He had no difficulty placing responsibility upon me. For example, he said, "you went with [the alleged assailant]", "you phoned [the alleged assailant]", and "you attended him...". At one point he even asked me directly what acts I was responsible for, and when I refused to take responsibility for the actions of [the alleged assailant], he suggested that I was manipulative.

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Q

And there's no doubt in your mind that at the time you wrote your letter of August xz, 19xy, Exhibit 2, that the reason for your separation was a ten year period of suffering, generated by [your husband], in your marriage?

A

That is what I wrote at that time.

Q

Was it true?

A

That is what I believed to be true at that time.

Q

Do you still believe it to be true today?

A

No.

Q

Okay. When did you stop believing that to be true?

A

I would say that it took me a process of about two years to stop blaming myself for the incident, maybe longer, and that view has strengthened with time and healing.

Q

So where in the first page of Exhibit 2, are you blaming yourself for the pain and suffering in your marriage? And the damage to your marriage?

A

What I was doing –

Q

It's a simple question. Where, on page 1 of Exhibit 2, are you blaming yourself for the damage to your marriage? And the pain and suffering generated in your marriage? What words should I look to that put blame on you?

A

I hear the question. It's fine. Nowhere, specifically, on page 2 does it blame myself.

Q

You're in fact looking at page 1.

A

That's fine.

Q

Nowhere, in terms of the words you used on page 1, do you in fact blame yourself. Correct?

A

Um-hum. Right.

Q

You, in fact, blame your husband for the difficulties in your marriage. Is that correct?

A

At that time I did.

Q

In fact, you blamed him, quite specifically, for pain and suffering caused by your husband in your marriage.

A

That's right.

Q

And you blamed him for causing that pain and suffering over the ten year period of your marriage?

A

That is right.

Q

And you also blamed him for damage to your marriage. Is that correct?

A

That is what I said at the time. Yes.

Q

Okay. And if I understand you correctly, you resile from that position today? You no longer blame your husband for any pain and suffering from your marriage, or any damage to your marriage. Is that correct?

A

No. That's not correct.

Q

You do still blame him today for pain and suffering he generated in your marriage

A

Yes, I do.

Q

-- over a ten-year period?

A

Yes, I do.

Q

And that that was very real and very damaging to your marriage?

A

Yes, it was.

Q

And in fact that caused you to separate in August or September of 19xx?

A

No, it didn't.

[Questioning Lawyer]:

So you resile from your words on page 1 of your letter; Exhibit 2.

[My Lawyer]:

Can you refer to the words?

[Questioning Lawyer]:

Q

Certainly. "These areas of our personal lives were which led to separation a year ago this month." You resile from that?

A

Yes, I do.

Q

You go on and say on page 2, at the very top of Exhibit 2, "Our separation was unrelated to your husband in any way." Now, I pause there to make sure we're absolutely clear with each other. You're referring to your separation with your husband. Correct?

A

Yes. That is correct.

Q

And your words were that your "separation was unrelated to your husband," referring to [the alleged assailant] Correct?

A

[the alleged assailant]

Q

[the alleged assailant] Thank you.

A

I understand the question exactly. Yes.

Q

So in fact -- just so we're absolutely clear -- what you stated in Exhibit 2 to [the alleged assailant's] wife was that nothing that you had -- in terms of any relationship with [the alleged assailant] -- had anything to do with your separation from your husband. Isn't that correct?

A

I believed that at that time.

Q

That's what you stated. And you believed it at that time?

A

Yes. That's right. I blamed myself at that time. And I took far more responsibility than what was mine, at that time.

Q

Do you take any responsibility at this point in time?

A

Yes.

Q

What is your responsibility, at this point in time, that you take for yourself?

A

Regarding exactly?

Q

Regarding your relationship with [the alleged assailant] that is the subject of this lawsuit. What responsibility do you take?

A

I am responsible for being vulnerable, [for reasons] [and from seeking advice from a professional] period.

Q

And nothing else then?

A

That's correct.

Q

Okay. So I take it you take no responsibility for showing any love and affection to [the alleged assailant] Is that correct?

A

I think we need to recognize the context of what we're calling love and affection. I think we need to address a power imbalance before we can discuss love and affection.

Q

You sound like a psychologist. Are you trained in psychology?

A

Some courses.

Q

I see. So you're wanting to discuss – it was a fairly simple question – a power imbalance. I'm simply asking a very straightforward question. Do you take any responsibility for showing love and affection to [the alleged assailant]?

A

I do not. Because of the context.

Q

You did express love to [the alleged assailant] ?

A

Again, I find it impossible to answer this question.

Q

It's a simple factual question. What's the difficulty that you're having with it?

A

The problem is that this man held a lot of power in my life. He had confidential knowledge provided to him about my vulnerabilities; my weaknesses. And he manipulated me. And if you could call my response love and affection, then so be it.

Q

Let me put it another way for you; really simple. And I'll break it down for you. Did you express love to [the alleged assailant] ? It's a simple, factual question.

A

No.

Q

You never expressed words of love to him at any time –

I felt as if the questioning lawyer ignored my story completely and that he continued to try to trap me. I observed that a clear pattern emerged. When he managed to get me to provide a statement that appeared to be self-incriminating, he backed off for a while and changed the subject. This felt like operant conditioning. I was indoctrinated into system of covert rules halfway through the first of two days of questioning. It was bewildering. It felt as though my choices were to cooperate or to suffer the punishment of what felt like verbal intimidation.

In judgments in which the legal language removes the offender from the agency of his crime, the result is that the offender is presented as less responsible, less guilty, and thus worthy of a lighter sentence than in cases where the offender is not removed from the agency of his offence. Similarly, having posed me as the active agent in the discovery process, I would be viewed as being more responsible, more culpable, and less deserving of a compensatory award. The assumed culpability of the female victim in cases of sexual violation is addressed in the rape mythologies section of this thesis.

Erotic and Affectionate Language

In my discovery examination, as in the trial judgments examined by Prevost and Bavelas, the sexual violation could be interpreted as minimized through indirect language. The use of erotic and affectionate language is another way to distort the severity of a sexual assault (Bavelas²³). Examples of erotic and affectionate language include the use of the words “relationship,” “sexual relationship,” “personal relationship,” and “sexual nature,” rather than “assault.” “Rendezvous” and “of a sexual nature,” were the words that the questioning lawyer used to describe the sexual violation that I experienced.

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Q

So this, if I am following you correctly, you are saying the day you left [the institution where the professional worked] was the day after you and [the alleged assailant] in the fall of 19xx, had a rendezvous of a sexual nature in [city name]. Is that correct?

In regard to the above, the nature of the sexual violation described as a “rendezvous of a sexual nature,” sounds like a mutual affair and completely eliminates any sense of what I considered to be the abuse of power that was taking place, or even that a sexual violation of any kind occurred. The use of erotic and affectionate language is suspect because it distorts the crime, refashioning it into a mutual, and therefore consensual, act: Erotic or affectionate language implies a positive act and does not convey the fact that these acts were not wanted or mutual acts but violations of the victim (Prevost 5).

²³ This is supported by Coates, Prevost.

CHAPTER SEVEN: CONCLUSIONS

Emotional Effects of the Discourse

Gender is an inequality of power, a social status based on who is permitted to do what to whom.
(Catherine MacKinnon)

Through the creation and perpetuation of laws, society accepts and endorses women being treated in a way that threatens to destroy their self-esteem. This has been painful for me to accept. When I began this research, I found reading the work of Catherine MacKinnon and other feminist scholars to be a wrenching experience. They presented views that I had hoped were merely radical opinions and not true. By the time I completed this research, I found the conclusions made by feminist scholars to be not only accurate, but also advanced. They are able to present issues of gender inequality despite the quagmire of bureaucracy that hides those issues from public view.

When I began this research, I naively believed that I was an important member of society, and that if I was harmed, particularly if I was sexually violated, the legal system would respond. I had hoped that my case was the exception, that I had been treated poorly because of a particularly inept lawyer, and that the way my case had been handled, was a mistake. Unfortunately it was not. I realize now that my belief that the legal system would respond protectively was a utopian vision in a paternalistic society.

MacKinnon suggests that women believe that they hold status between themselves, however nominal. I interpret her words to mean that as women we are deceived into believing that there are different types of women in society.

She argues that this difference in status is only an illusion. In many cases these illusory types are perpetuated, if not created, by rape mythologies at work in the legal system. I had unknowingly subscribed to the illusion myself. Some examples of characters within rape mythologies are the liar, the adulteress, the pornographer and the prostitute. MacKinnon points out that the benefits some women might believe they acquire, by not being “those” women, are an illusion. MacKinnon argues that when considering the issue of pornography most women do not think that *they* are perceived to be in any way like those women. Most men don’t believe that *they* are perceived to be like the men in pornography either. MacKinnon found that men are mostly right in their perception and the women are mostly wrong (12). *Women are perceived to be those women.*

Most women believe that if they are good, not one of “those” women, they are worthy of the protection of the state. The state is men. MacKinnon explains that “This gives the relatively advantaged [women] a stake in the status quo, which they hang on to with all the tenacity of having something to lose... A precarious status, and a matter of degree, but very real nonetheless” (12). Indeed, before I was sexually violated, I believed that I was a woman who was worthy of protection by the state. I was honest, hardworking and a contributing member of society. I believed I deserved the support of the legal system in protecting my human rights. I am now shocked by my naivety. I now realize that in the patriarchal order I am insignificant. If I am sexually violated I can expect little or no protection by the state.

MacKinnon describes “inalienable rights that were a normative principle of natural law that supposedly underlay positive law” (12). She writes that she once believed that all people had inalienable rights. However, after representing hundreds of women in sexual assault cases, she came to consider that notion deceptive in regard to women. I consider the legal system’s notion of justice deceptive in regard to women.

MacKinnon argues that, in cases of sexual assault, the law does not know how to deal with someone “whose rights [have been] systematically and cumulatively violated—for instance, a woman hurt as a woman, [sexually violated] as a member of the gender female—does not seem to be what the law had in mind” (13). She argues further that not only does the law not know how to handle such cases, lawmakers do little about tackling this problem. MacKinnon states, “Lawyers considering whether anything can be done for a woman who is damaged in ways that make her less than the perfect case, rarely concluded that they should confront or change the law. They look at cases the way surfers look at waves” (13). Surfers size up a wave to see how far they can ride it. I interpret MacKinnon to mean that lawyers size up a case to see what money or publicity they can get out of it. This analogy reflects how I felt I was treated by the legal system. I spoke to more than ten lawyers about my case, and eight considered taking it. In each discussion, it became clear that the lawyer would gain little financially. The gain would largely be publicity, because of the ethical nature and timeliness of the case.²⁴ I expected justice. I expected that because I was honest I would be not only believed, but supported. I also believed that with

²⁴ The 1990’s and early millennium have been fraught with headlines of sexual abuse.

literally volumes of supporting documents (documents which have been omitted from this research to protect the identity of the alleged assailant) the integrity of my case was obvious. I naively believed that I would be championed for helping to bring a predator to justice. I could not have been more wrong.

After my experience of sexual violation I felt out of control. I could not depend upon my judgment or trust myself, or anyone else. For eight years after the violation, I was single, and dated no one during that time. I also had to continue living with the knowledge that the people close to me might have thought, or at least wondered, if I had lied about the violation (because after all there was never a conviction or judgment in my favour). I felt degraded, humiliated, hurt, depressed, alone and angry. Some of these feelings remain as shadows. They loomed while doing this research. When society does not believe that you were victimized, self-doubt becomes a constant companion. Sexual violation victims pay dearly for being victimized.

Sexual violations hurt women, but society perpetuates the falsehood that there are exceptions to this rule. Andrea Dworkin, as well as many other feminist and legal scholars, states that the effects of sexual assault (whether the assailant is someone known to the woman or not) are always horrific and damaging (45). While doing this research, I revisited all the feelings I experienced concerning the sexual violation. Some days, while reading the transcripts, I felt too demoralized to continue, and I had to lay my work aside for a while. Even though I knew intellectually that sexual assault hurts all women, I felt (in a large part because of the lack of support by the legal system) as though my violation was somehow not

serious, or I was somehow not important. Dworkin writes about a male lawyer who defends rapists in court. He apparently believes “that when a woman is raped by someone she knows it is not so bad” (141). He also says that if the woman is raped by someone she knows, it is confounding for the lawyer “because we can never know what the woman really wanted” (141). I now find views such as this infuriating.

Dworkin recounts the story of a young female university student who, after being the victim of an attempted rape, lost her determination, her confidence, and her ability to quiet her fears and to study, or to recover from the ordeal she had experienced. The woman was “entirely undermined by the callous indifference of those who were supposed to help and protect her” (109). I suggest that people need to know that they are valuable and cared about by their society, particularly in regard to their race and as a gender. Not to be valued is to suffer the effects of prejudice and discrimination.

I presume that my perpetrator went on with his life as usual, expecting that he had little to fear from the law or anyone else. When I attempted to tell my story in the discovery, I was silenced. It is difficult for me to accept that the legal system, which is supposed to have the ability to determine justice and fairness, could consider this either just or fair. What is painfully clear is that in cases of sexual violation, the law favors men. If I had known then what I know now, like so many women, I would not have taken legal action. But where does that leave women? It leaves women vulnerable to men like my alleged assailant, who can continue to violate women without fear of reprisal. I feel offended and enraged. I

could not have imagined, or believed, how little he had to fear, or how little support there would be for me in my only recourse: the legal system.

I am concerned about the harm that could be done to women more fragile than I am. As a counsellor I work with many clients who have been victimized and traumatized. Some of my clients have developed serious mental health disorders as a result of past traumas. Some of these women are in treatment as a direct result of sexual violence. I am acutely aware that people who have already been victimized are more likely than others to handle another trauma worse than first-time victims. There is no psychological screening of sexual assault victims prior to the discovery examination, and the psychological records that are brought forward are more likely to be used against sexual assault victims, to indicate poor character, than to indicate fragility. All of my counselling records were collected and used in the discovery examination, for no reason I can see, other than to try to make me look unstable.²⁵ As discussed in Chapter 5, Narrative Reconstitution of the Self, individuals need to protect themselves. Women depend on the law for protection in cases of sexual violation. The bitter irony is that for sexual violation victims, the justice system is a trap.

Many victims of sexual violation whom I have met in the past few years are still struggling. A few years ago, I was asked by a counsellor if I (as a sexual violation survivor) would form a support team with one of her clients, a woman much like me, who had children and who had been sexually violated. I later

²⁵ As a psychology student with a determination to heal myself from the effects of the violation, and a strong belief in therapy, and a medical plan that covered a portion of costs, I engaged in counselling with approximately a dozen counselors since the time of the sexual violation to the discovery.

learned that as a result of her sexual violation, her husband had left her and she had attempted suicide. Her four young children had found her in a bloody bath.²⁶ Nearly eight years later, this woman was still having a difficult time surviving. Despite her counselor's suggestion to form a support team, the woman never actually met me. She did, however, give the counsellor a card for me. On the card she wrote, "Never stop believing in yourself — This must stop." I still have the card. I went through my undergraduate degree with a friend who withdrew from several classes as a result of the stress from a sexual assault case she was dealing with. Such realities fuel my determination to increase the awareness of the injustice that I, and so many other women, have experienced, and which others will undoubtedly experience, if they become victims of sexual violation.

Conclusions

Most feminist activists and academics have found that the legal system not only fails to provide a remedy for sexual assault and sexual abuse, the system itself perpetuates inequalities and causes harm (Busby 7). This thesis supports Busby's statement. Through conducting my research I have found that an incredible complexity surrounds the issue of sexual assault law, making it a difficult area to tackle. Sexual assault law must be analyzed in several different areas that are linked together. Similarly, I have combined my subjective experience with historical data, current literature and empirical methods. Any one of these alone would be insufficient to form an argument or to determine the

²⁶ I was only given this information much later, in an anonymous way, when it was clear that I would never know who this woman was.

social purpose of the discovery. All areas of this analysis indicate that the social purpose of the discovery is to act as a mechanism of power, within the institution of law, which advances the political and economic interests of those who hold the most power in society. Those who hold the most power are not women.

The legal system is not a neutral or objective mechanism for the resolution of conflict. The discovery is an example of how the legal system is fraught with hidden agendas that support its archaic ideologies of inequity. It creates, re-creates, sustains and perpetuates inequality. Its power is evidenced in Foucault's criteria: the discovery produces knowledge, multiplies discourse, induces pleasure (the pleasure of protecting males and the interests of those who hold the most power, not the female victims) and generates power.

Women's voices are silenced except when cross-examination and interrogation tactics, in combination with special rules, are implemented in attempts to coerce women into stating complicity in their own sexual violation. Then women's voices are encouraged, recorded, transcribed and used in court against them. The conditions under which the discovery is conducted are unequal. Women are not adequately prepared for the discovery, nor are there clear rules anywhere that could prepare them for exactly what they will encounter. Except for brief moments of resistance by the victim, the agenda of the discovery is completely controlled by the questioning lawyer. The positions are those of novice and expert. The power imbalance is profound. Further, the questioning lawyer's power is increased through his relationship with the institution of law.

The discovery process creates and circulates discourse that shapes society. The concealment of women's voices for the protection of men, and the perpetuation of male political and economic interests, is not immediately visible in the discourse of the discovery, or anywhere in law. Law operates as a mechanism of power that conceals this fact. This concealment is carried out at the expense of women. This is evidenced in the decision by law makers to stop the practice of some of the special rules designed specifically for sexual violation cases. The creation of Bill C-49 was an attempt to stop the application of some of the special rules. Further, the recent amendments to the discovery process in the United States clearly indicate the abuses of the discovery and the need for specification and unity in discoveries. Despite policy changes, and other influences, practices in Canada apparently have not changed.

In my experience, strategies and tactics of cross-examination including interrogation, leading the witness, rudeness, sarcasm (even swearing) and assaults on character are all permitted in the discovery. The dehumanization of women is recognized by the legal institution, but is still practiced under the guise of *an adversarial process*.

I wish to specifically address the notion of *an adversarial process*. I was told several times by various lawyers "what do you expect? It's an adversarial process." The Law Dictionary describes the adversarial process: "... by hearing evidence and argument presented by both parties" (Carswell Law Dictionary). This research reveals that women's argument is not heard in discovery. The following is my interpretation of the problem with the adversarial process.

Adversary means enemy or opponent. In either case this would presume that both sides must have formidable strengths; otherwise there would be no contest. The discovery should not be a contest; it is an information gathering procedure. It appears however to be a contest with women lightweights pitted against heavyweight lawyers. The result is victimization masked as cross-examination. The fact that the alleged assailant is the woman victim's real opponent is lost. In my opinion, such a power imbalance should not be considered an adversarial process. It appears to me that the discovery is not a contest, but a conquest. The techniques of the questioning lawyer and the special rules that limited my power in the discovery felt like a battery of weapons used against me. When women consistently feel oppressed by these procedures, and abandon their case or avoid entering into the legal process at all, I argue that it is no longer an adversarial process. Justice demands that unequal power must be balanced. The scales of justice symbolize this balance.

At first glance sexual assault laws appear to focus on the sexual behavior of men. Upon closer inspection however, it becomes apparent that sexual assault laws are designed to control the sexual behaviour of women and to protect men. Busby's words concerning the rape trial are equally fitting to the discovery process: it appears that "the whole rape trial is a process of disqualification (of women) and celebration (of phallocentrism)" (284).

I wanted this research to add to the existing body of research in the area of sexual assault (violation). According to Dr. Janet Bavelas (appendix 3), this goal has been accomplished. Furthermore, I wanted this research to uncover

the hidden process of discovery and the experiences of women in this process. Finally, it is my hope that this research will inspire changes in legal education.

Implications for Education

It is essential that the education of lawyers include such research as this, otherwise the legal system will continue to recreate, reinforce and perpetuate discourse and practices which oppress women victims of sexual violation.

Women victimized by sexual violation feel that legal processes victimize them further. It's hard to engage in a verbal battle when you feel stripped naked (through describing the intimate details of sexual violation) in a foreign arena. Legal education must include an examination and recognition of the psychological effects of questioning in cases of sexual violation.

Few women are able to compete with questioning lawyers even if they have some knowledge of legal conventions. I believe that law students must be taught how to obtain information in a respectful and humane manner in the discovery of women who have been sexually assaulted. The most profound finding in this research is the silencing of women. It is critical that lawyers resist the notion of conquest if justice is their goal. Justice requires hearing the evidence and argument of both parties. Justice cannot be achieved if women's voices are silenced. Lawyers must hear the victim's story in cases of women's sexual violation.

The fact that "sexual harassment has become illegal" (MacKinnon 26) has provided a false sense of comfort to women like me with. The creation of such

laws led me to believe, that in the event of sexual violation, I would be supported by the legal system. In practice however the picture remains bleak. As long as new laws such as Bill C49 remain more theory than practice, the message will remain, that access to a woman's body, even against her own will, is a man's right (MacKinnon 26). Legal research needs to identify and locate the barriers that prevent Bill C49 and other amendments from becoming practice.

Very few men are ever brought to justice, compared to the known number of sexual violations against women in Canada. The message to both men and women is clear. Men can sexually violate women without consequence and women are, apparently, not worthy of protection by the law. I believe that legal educators must critically examine their complicity in these messages.

Legal educators must become conscious of the re-creation and perpetuation of archaic and damaging ideologies that persist in law schools. Feminist literature should be incorporated into legal education. Feminist literature can assist lawyers in preparing sexual violation clients for questioning, and to inform themselves, so they can become more "just" in their attempts to find "truth."

Proposed Directions

In a recent lecture at the University of Victoria, Catherine Morris, a Victoria lawyer and the former executive director of the University of Victoria Institute for Dispute Resolution, suggested four approaches for dealing with inequality: a power-based approach, a rights based approach, an interest-based approach,

and a transformative approach. The power-based approach requires little explanation, and includes strong-arm tactics such as use of the military. The rights-based approach uses the existing legal system to bring perpetrators to justice. This is precisely the approach that I attempted (unsuccessfully) with my legal action, and it is an approach that is failing sexual violation victims in our society today. This thesis has been an attempt to show how it is failing.

Morris' transformative approach is designed to restore and transform relationships, and appears to be most appropriate for adversarial relationships where conflict requires settlement. I do not think it is a suitable approach in cases such as sexual violation because men and women do not possess equal power, and differ in their perception of the problems in sexual violation cases. The system appears to work, superficially at least, for the majority of men.

The final approach Morris presented was interest-based and incorporates a genuine consideration of the needs and interests of all parties. It has been suggested that this is more than a needs approach because it addresses how people might flourish, as opposed to just having their basic survival needs met. This approach includes recognition and maximization of the capabilities and potential of all parties concerned. It is doubtful that lawmakers and policy-makers are capable of acting at the level of the interest-based approach (given indoctrinated notions of the adversarial process); yet, I agree that the solution lies at this level. In order to apply an interest-based approach to gender-based inequality, there needs to be genuine respect. We cannot respect that which we

do not know; specifically, men in the legal system cannot respect those whom they do not know. To know means to understand the reality of another.

There was a time when I did not respect segments of our society; yet, I assumed I was neutral. I was not neutral. There is no neutral. I was ignorant. Ignorance equals prejudice²⁷. Steven Greymorning, the present director of the Indigenous Governance program at the University of Victoria, describes this problem as cultural relativity. He says that if we do not know another group, we judge them by the values and standards of our own group. In regard to sexual violation, this lack of cultural relativity harms women.

Men in the legal system need to comprehend what it is like to be a victim of sexual assault. I believe legal education should include courses designed to eradicate prejudice against women. Like any program designed to eradicate prejudice,²⁸ such courses would be taught in every year of a four-year program, with increasing number of simulations²⁹ each year. These would be required, full-credit courses for each year of a four-year program. The design could be borrowed from First Nations programs in Social Work departments, cultural centers, and centers for the eradication of discrimination.

There has been very little research conducted on the discovery process in Canada, particularly in cases of sexual violation. More research needs to be done to expose this aspect of the legal system, which has been virtually hidden

²⁷ Prejudice often stems from a basic 'unfamiliarity' with a group, and therefore preference is given to the group that is most familiar.

²⁸ Programs to eradicate racial prejudice have been designed and implemented in universities as well as in cultural centers where ethnic cultures clash with mainstream cultures.

²⁹ Simulations are a process of recreation of the experience of others that enables people to relate to an experience of someone from a different culture. It requires a debrief exercise for full processing. (Steven Graymorning, Uvic, dept. of Indigenous Governance. 2002.)

from public view. Research needs to illuminate what the law states in writing and how it is contradicted in practice. In this way, the archaic methods of questioning and their social purpose can be publicly debated. For example, there should be limits on questioning. Sexual violation should be treated like other cases, in that claimants should not have to be tested for lying.

The Challenges of Publishing My Experience of the Discovery

Attempting to publish information about my own experience in the discovery process has been challenging. There appears not only to be an absence of specific rules governing discovery, but a lack of specific rules surrounding the use of a discovery transcript. There is, however, evidence that supports the fact that all rules governing the use of discovery transcripts are for the protection of the discovered litigant. As a result, I was eventually permitted to use my own transcripts in this research.

During my attempts to have this research published, I was instructed by my academic institution that I had to remove potentially identifying information for the protection of my alleged assailant. The fact that the sexual violation I experienced was supported by evidence such as medical reports and written confessions by the alleged assailant was irrelevant. My institution acted on its concern that the assailant might sue for defamation, and demanded that I protect his identity. If there was one consistent theme that prevailed, from the sexual violation, through the discovery, to the publication of this research, it is that the woman complainant is the least important of all possible players. Every

conceivable person and institution that could in any way be negatively impacted as a result (however slim) of this research, must be accommodated ahead of the woman complainant.

Women are not permitted to speak out about the violations they experience at the hands of men. I repeat, this silencing prevents women from reaching what Foucault calls “the intersection of the excess of armed justice and the anger of the threatened people.” (*Discipline 73*)

Integral to this thesis, my academic institution is governed by laws. It is a representative of the law who advised my institution of the concern that the university needed to be protected against liable. It is for this reason that I had to leave out many parts of my experience. It seems that women’s voices must be powerful to require so much containment. I have never met with an experience that required so many laws, special rules or apparent needs to silence. It is virtually impossible for a lone woman who has been sexually violated to scale all the barriers the legal institution has erected and tell her story.

At one point, my academic institution wanted to block my research from public view. I celebrated each opportunity that was given to me to carry on a bit farther, even though it felt as though each revision was at the expense of my reality and freedom to express. I felt as though the continual legal demands had a stranglehold that silenced my voice, and as one colleague said “squeezed the life out of my research.”

Catherine MacKinnon suggests that “women are powerless, and as a result of their powerlessness, women don’t just speak differently, often they don’t

speaking at all (*Feminism* 38) MacKinnon also states that when women are silenced they “aren’t just deprived of a language with which to articulate [their] distinctiveness... [they] are deprived of a life out of which articulation might come” (3)

* * *

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Appendix Item

Measurement Scale to Determine Directness and Indirectness of Language.

Used by Prevost. 200

"A scale was created to measure the degree of directness for both the character and crime descriptions. The most direct references, which received a score of 4, included an active verb with the offender as the agent ("he raped her"), or a linking verb with the offender as the agent ("he is remorseful"). A score of 3 was assigned to verbs in passive voice with the offender as agent ("she was raped by him"), to verbs in active voice with both the offender and the victim as the agent ("they had intercourse"), and to linking verbs with both the offender and the victim as the agent ("they were close friends"). A score of 2 was assigned to verbs in passive voice with no mention of the offender ("she was raped") and to nominalizations and gerunds with mention of the offender ("his assaults"). The most indirect descriptions received a score of 1 and included nominalizations, gerunds, and infinitives with no mention of the offender ("the offences").

Legal Definitions

The following legal definitions are from Barron's educational series. They are intended to assist the reader with legal terminology.

"Discovery A modern pre-trial procedure by which one **party** gains vital information held by the **adverse party** concerning the case; the disclosure by the adverse party of facts, deeds, documents and other such things that are exclusively within his or her knowledge or possession and that are necessary to the other party's defence. ...See **depositions; interrogatories.**"

"Proceeding [T]he form in which actions are brought and defended, the manner of intervening in suits and of conducting them... The term is usually broader in meaning than action and is also applied to any step in an action. In its derivative sense, the term means the action of going onward, advancing."

"Adversary Proceeding A **proceeding** involving a real **controversy** contested by two opposing **parties**. In Canada, the judicial process is based on the adversarial system, as compared to Europe's process, which for the most part is based on the inquisitorial system. In the former, the judge's role is one of an impartial arbiter weighing the **evidence** presented by the opposing parties and determining the applicable decision. The lawyers each present full proof and argument. In the latter process, the judge plays a much greater role in the selection and questioning of witnesses and in the assembling of evidence."

"Civil-1. The branch of law that pertains to suits other than criminal practice and is concerned with the rights and duties of persons **in contract, tort, etc;** - **2. Civil law** as opposed to **common law.**"

"Tort -[I]njury; wrong. The **breach** of a **duty** imposed by law, whereby some person acquires a right of action for damages....A tort is civil wrong, other than a breach of contract, which the law will redress by an award of damages..."

"Common Law - The system of **jurisprudence**, which originated in England and was later applied in Canada, that is based on judicial **precedent** rather than legislative enactments; it is to be contrasted with **civil law**... Common law depends for its authority upon the recognition given by the courts to principles, customs, and rules of conduct previously existing among the people. It is now recorded in the law reports that embody the decisions of the judges, together with the reasons they assigned for their decisions...."

"Criminal -1. An adjective denoting an act done with malicious intent. See **malice; malice aforethought.** -**2.** One who has been convicted of a violation of the criminal law. After the criminal has satisfied whatever sanction has been imposed and is released, he or she is called an EX-OFFENDER. A person who

re-offends after having been judicially dealt with for one offence is called a **recidivist.**"

"**Defendant -1.** In **civil proceedings**, the party responding to the claim of the **plaintiff**; the party sued in an **action.**" **-2.** In the **criminal proceedings**, the **accused.**"

"**Plaintiff** -The one who initially brings the **suit**; a person who brings an **action.** Also, a **defendant** who brings a **counterclaim** will be considered a plaintiff as relating to his or her counterclaim."

"**Deposition** -A method used in pre-trial examination for **discovery**: it consists of a statement of a witness under oath, taken in question-and-answer form as it would be in court, with opportunity given to the adversary to be present and cross-examined, with all this reported and transcribed stenographically."

"**Cross Examination** -Questioning of a witness in a trial by the lawyer for the party who did not call him or her, after examination of the **witness** by the lawyer for the party calling him or her, which is known as the EXAMINATION-IN-CHIEF. The main purpose of cross-examination are to test the **veracity**(emphasis added) of the witness and to obtain answers that assist the case of the cross-examining party."

"**Interrogation** -An informal term used to describe the process by which suspects are rigorously questioned by police."

"**Witness** -One who gives evidence in a cause before a court and who **attests** or swears to facts or gives or bears **testimony** under oath...a person who gives **evidence** orally under **oath** or by **affidavit** in a judicial **proceeding**...
-ADVERSE [HOSTILE] WITNESS One who has exhibited such a hostile animus towards the party calling him or her as to reveal a desire not to tell the truth."

Trevor & Cheryl Oram

From: Janet Bavelas [jbb@uvic.ca]
Sent: May 7, 2002 4:41 PM
To: Trevor & Cheryl Oram
Subject: Re: from Cheryl Oram - re: MSW thesis

Cheryl,

I did get your email and have looked it over (a bit in a hurry because of present demands). Your finding is interesting, and it is not inconsistent with our theory at all. And I don't think it has anything to do with gender. I'll try to explain it here, but we may need to chat in person.

If you look on my website for the outline of my lecture on "apologies," which did a similar analysis to Danielle's, you will see that our general theory is that people use indirect agency or description strategically--to avoid saying something. So the cross-examining lawyer would want to avoid describing the defendant's actions and agency directly, but would be quite eager to describe yours that way. Your data show that they are capable of both ways, so they make a strategic choice.

This is part of our equivocation theory: People will be direct or indirect depending on the goal or consequences:

- subjects in our experiments waffled when they had something hard to say to a friend, but were direct when it was a good thing
- the judges avoided agency and action when it was an unpleasant or embarrassing topic to discuss in court, but were clear when it was a neutral topic.
- churchies avoided agency and action in their apologies when they could be sued or it reflected badly on them, not when they were talking about positive things
- In your case, lawyers avoided agency and action when talking about their client's actions (because they want to avoid implicating him) but did not avoid it when talking about yours (because that's good for them).

In brief, I think the difference is situational and strategic, not due to gender, because the pattern is so clear (above) in many different settings. You wouldn't need to review the whole theory in your thesis necessarily. An accurate short version would be that (1) people are capable of both direct and indirect language; (2) they use one or the other strategically, according to what they want to accomplish in that situation.

If that is not clear (as it may well not be!), let me know.

Janet Bavelas

----- Original Message -----

From: Trevor & Cheryl Oram
To: jbb@uvic.ca
Sent: Thursday, May 02, 2002 9:58 AM
Subject: from Cheryl Oram - re: MSW thesis

Dr. Janet Bavelas

08/05/2002

that you wrote in Exhibit 2 was much closer in proximity to the events we're talking about. That being the separation from your husband.

A Yes.

293 Q And there's no doubt in your mind that at the time you wrote your letter of August 12th, 1993, Exhibit 2, that the reason for your separation was a ten year period of suffering, generated by [REDACTED] in your marriage?

your husband

A That is what I wrote at that time.

294 Q Was it true?

A That is what I believed to be true at that time.

295 Q Do you still believe it to be true today?

A No.

296 Q Okay. When did you stop believing that to be true?

A I would say that it took me a process of about two years to stop blaming myself for the incident, maybe longer, and that view has strengthened with time and healing.

297 Q So wherein the first page of Exhibit 2, are you blaming yourself for the pain and suffering in your marriage? And the damage to your marriage?

A What I was doing --

298 Q It's a simple question. Where, on page 1 of Exhibit 2, are you blaming yourself for the damage to your

A Again, I find it impossible to answer this question.

324 Q It's a simple factual question. What's the difficulty that you're having with it?

A The problem is that this man held a lot of power in my life. He had confidential knowledge provided to him about my vulnerabilities; my weaknesses. And he manipulated me. And if you could call my response love and affection, then so be it.

325 Q Let me put it another way for you; really simple. And I'll break it down for you. Did you express love to

[REDACTED] It's a simple, factual question.

A *The alleged assault*
No.

326 Q You never expressed words of love to him at any time

545 Q I see. Did you feel humble at the time?

A I assume so.

546 Q Did you feel repentant?

A Yes, I would assume so. And ashamed.

547 Q Thank you. I take it then, your expression at page 5 was also a true expression of your feelings, when you state, "I am so sorry for the heartache my participation inflicted upon you."

A Yes. What was your question about? Did I write it? Yes.

[redacted] No. You should listen to the questions.
questioning lawyer

[redacted] Question was?
my lawyer

[redacted] Fair enough. You expressed a feeling of sorrow
questioning lawyer for heartache your participation inflicted upon

[redacted] In Exhibit 2 at page 4. Correct?
the alleged assailant's wife
Page 5.

my lawyer
THE WITNESS: I wrote that. Yes.

[redacted]:
questioning lawyer
548 Q That was a feeling you held at that time. Correct?

A That's correct. Could I ask for time out for a moment, so I can consult with my lawyer for a moment, please?

[redacted] This is an Examination for Discovery. You can't
my lawyer stop it.

[redacted] Next time maybe your counsel can explain to you
questioning lawyer

that these are, in fact, cross-examinations.

THE WITNESS: I'm aware of that. But I'm not going to participate in being talked down to.

[REDACTED] I'm not speaking down to you.

questioning lawyer

my lawyer

[REDACTED] The tone is firmly and --

questioning lawyer

THE WITNESS: No. It's sarcastic and it's talking down. And I won't participate if it continues.

[REDACTED] If your counsel objects, he can object. He knows the rules.

questioning lawyer

questioning lawyer

549 Q Going to page 5, carrying on. Third paragraph down, beginning with the words, "I do not want to appear condemning of him." See those words there?

A Yes, I do.

[REDACTED] You're referring to **[REDACTED]** there?

questioning lawyer

Read it to make sure you get ^{the alleged assault} the context.

my lawyer

THE WITNESS: I think I'm referring to **[REDACTED]** at the time. "I do not want to appear condemning of him," because it's who I was speaking about in the previous paragraph. To the best of my knowledge.

my husband

[REDACTED] If you can answer --

my lawyer

questioning lawyer

550 Q Let me read the paragraph to you. You tell me.

You're the only one that can answer it, I would think,

Page 145

Coding (Revised Schedule)

- Put down
- Ignores me.
- Power Over
- Sarcasm.
- Rude.
- Swearing
- Testing?
- Trivialized
- Assumptions
- Romanticizes
- Infers-consensual
- Agency on Me.
- W? Absurd/Impossible questions
- Projecting

- Refutes my Evidence
- Badgering
- Leading Questions
- Lead response.
- Cut off
- Association of Phrases.
- Confused
- Unrelated sex life
- Employment/Financial Education.
- Note Word Use.
- Value Laden
- Truth??? Notions of.

Coding (1st Schedule)

- Put down
- ✓ Ignores me
- ? Power over
-) Sarcasm
-) Rude
- E Swearing
-] Test
- } Trivialized
- ∞ Assumptions
- ⊕ Assumed Truth
- ∞ Romanticizes
- ∞ (infers) Couple.
- > Puts possession on me.
- w(?) Absurd/Impossible
- ✂ Projecting
- ⊗ ~~Refusing~~ Refutes my evidence

- ⊙ → Leading
- ☹ Led response - (but don't know why.)
- ✂ Cut-off
-
- ✂ value-laden (loaded) Education
- \$ Employment or Finances
-] Unrelated Sex Life
-] direct (his) request } Association of Phrases.
- ✓ direct (mine) real answer.
- ⊙? Confused
- Q? My question (Now)
- YELLOW My feelings.
- N Note word use.
- ☺ my lawyer's intervention
- L Analyze language.
- ⊙ Opposing Lawyer's acknowledged Error.

.....???

Part I

Federal Examination for Discovery.

Question #

16
A) M

You were sworn
at that time....
So your memory
is such that you don't recall @ this time?

* "Question" # is
organizing the
material - not
"line #s"

☑ Note word use -
"such" >
↓ dictionary;
put down ↓

13

put down
power over
"other/my lawyer"

↓ put down
↑ power over
⊙

19 A) That I have
just produced
that to you?

✓ direct answer.
I showed my genuine
lack of understand

You would have filed an affidavit?

25
A) M

A) Yes

☹ led answer.

- Trying to help -
- not expecting to be tested or tricked.
- didn't know what an affidavit was.

(keeping the
~~student~~/victim
powerless. →

* I should have had a
law dictionary w/ me
* My lawyer couldn't
help w. terminology

28 ① Simple Question - he put ^{me} down

☹ rude
"emphatic"

1566 I am not going in
~~in~~ You just don't
body well know.

what did
I feel when
he swore @ me?

♂ power over
Rude ♂ power
Swearing over.

1572 your relationship
w. ~~_____~~
your minister

punishment

association of phrases
after pg's of
not getting what
he wanted /
he swore at
me
↳ (L) puts possession
on me.

my relationship
w. him

I took on
"my relationship"
where's the clear

😊 led answer

(L) definition: - state of being
related, connection,
association, colloquial
emotional association
between two people.

1576 Again you are
making a note -
what is the note?

What right
does he have
to ask this?

♂ Power
over.

I explained...
I feel awful
as if I catered to
his abuse pattern
w. a passive response
especially after
he swore earlier.

😊 led answer.

} associated
phrases.

* what if I had have
said "I wrote that you
swore at me"



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The Examination for Discovery in Cases of Sexual Violation: A Discourse
Analysis

Author:


Cheryl MacKinnon Oram
October 16, 2002