
Judicial Constructions of the Seriousness of Child Sexual Abuse

CLARE MACMARTIN, Department of Family Relations and Applied Nutrition,
University of Guelph

Abstract

Past research has suggested that the characteristics of sexual abuse have been used in the Canadian criminal justice system to discount the seriousness of sexual offences against children. Two such characteristics are the typical absence of physical harm to victims and the frequently close, often familial relationships existing between offenders and victims. The present discourse-analytic study used discursive social psychology to explore whether and how these two characteristics were evaluated in 74 written sentencing decisions involving child sexual abuse offences in Ontario from 1993 to 1997. Judicial descriptions tended to denounce sexual abuse and censure offenders on the basis of the frequent psychological harm visited upon victims and of breach of trust concerns (e.g., using metaphors such as “psychic scarring” and the “robbery” of childhood innocence). I discuss these findings in relation to the evolution of judicial discourse about child sexual abuse.

Résumé

La recherche passée suggère que les caractéristiques de l'abus sexuel ont été utilisées dans le système de justice pénale pour amoindrir la gravité des infractions d'ordre sexuel contre les enfants. Deux de ces caractéristiques sont l'absence typique de dommage corporel aux victimes et les rapports souvent étroits voire familiaux entre les contrevenants et les victimes. La présente étude a utilisé la psychologie sociale discursive pour déterminer si ces deux caractéristiques avaient été évaluées dans 74 sentences impliquant des infractions d'abus sexuel contre des enfants en Ontario de 1993 à 1997 et la façon de les évaluer. Les descriptions judiciaires avaient tendance à dénoncer l'abus sexuel et à censurer les contrevenants sur la base des dommages moraux dont souffrent fréquemment les victimes et des préoccupations quant aux abus de confiance (p. ex. en utilisant des métaphores comme des « cicatrices psychiques » et le « vol » de l'innocence de l'enfant). L'évolution du discours judiciaire au sujet de l'abus sexuel d'enfants est discutée.

Researchers have argued that the very features comprising the typical content of sexual assault have been used to discount the seriousness of such crimes in the Canadian criminal justice system. For example, Renner, Alksnis, and Park (1997) studied sexual assaults on children and adults in the Nova Scotia courts from 1989 to 1993. The same features that constitute opportunities to offend, and that typify cases of sexual assault, were used to mitigate the seriousness of the offences. Two of these features consisted of the lack of evidence of physical harm to the victim and the existence of a close, often familial relationship between victim and perpetrator. The purpose of the present study was to investigate the discourse of more recent judicial sentencing decisions in criminal cases of child sexual abuse to see whether and how judgments addressed the absence of physical harm and the closeness of the relationship between offender and victim. Were such characteristics used to mitigate the seriousness of the offences?

The absence of physical injury in most cases of sexual assault is associated in part with the characteristic lack of collateral or instrumental violence, that is, a lack of force used in addition to the inherent violence of the sexual assault itself. Bavelas and Coates (2001) used qualitative and quantitative methods to study 75 British Columbia judicial judgments (trial and sentencing decisions) taken from Quicklaw, a computerized database. The decisions covered a wide range of sexual offences from 1986 to 1992. Eighty percent of the decisions involved child complainants. Reference to the use of force, violence or unilateral action on the part of the offender was infrequent. Of 22 judgments that included reference to the root word “violence,” 11 judgments denied the presence of violence or referred to the absence of violence; only one judgment treated sexual assault as constitutive of physical violence.

Most offenders can use more subtle forms of coercion than collateral physical violence to perpetrate sexual assaults against children with whom they are typically in an authoritative, caregiving role; in cases involving women victims, women may seek to avoid

additional injury by refraining from overtly fighting back (Alksnis, 2001). Judicial reference to appropriate resistance by the victim (or to the problematic absence of such resistance) has been questioned by researchers because such discourse fails to acknowledge the dynamics of sexual assault and the experience of its victims. For example, Coates, Bavelas, and Gibson's (1994) discourse-analytic study of a random sample of 12 Canadian written trial and sentencing decisions in the Yukon and British Columbia (1986 to 1992) identified several troubling themes, including the mention of appropriate resistance by the victim.

The frequent absence of visible signs of physical injury in sexual offences has been drawn upon to criticize the redefinition of rape as sexual assault in 1983 in Canadian law. Renner and Yurchesyn (1994) compared cases of physical assault, sexual assault and robbery in Nova Scotia. Analogous to the crime of physical assault, the severity of sexual assault was measured by the level of physical violence. Renner and Yurchesyn proposed that "sexual robbery" was a more appropriate metaphor for sexual assault on women and children than physical assault because in a robbery injury is not required in order to see the individual as a legitimate victim. Alksnis (2001) has countered that "the search for a suitable metaphor may have prevented us from recognizing that sexual assault is intrinsically different from other offenses" (p. 70).

The absence of physical harm and the presence of a close relationship between perpetrator and victim may typify most sexual offences involving either women or children complainants. However, researchers have noted differences between court cases involving women and children. Renner et al. (1997) and Coates (1997) reported lighter sentences when sexual offences involved child victims rather than women victims. Differential characteristics of the offences may have been partly responsible for these different outcomes, due to selectivity regarding the kinds of cases entering the court system. Cases

involving aggravated assault in Renner et al.'s sample were more likely to have women as victims rather than child victims.¹ Less violence was displayed toward children than toward women in the sense that there was less frequent use of a weapon, and less intrusive sexual contact in the child cases (Renner et al.). As proposed earlier, such details are consonant with the interactional dynamics and kinds of acts perpetrated upon children (Furniss, 1991). There was also a higher frequency of guilty pleas in child cases than in adult cases (Renner et al.). When corroborative evidence existed (especially in those cases involving younger children), guilty pleas were often entered; children did not have to testify and offenders received lighter sentences than they would have otherwise, often on the condition that they seek treatment. In her qualitative and quantitative analyses of 70 British Columbia written sentencing decisions and trial judgments from 1986 to 1994 taken from Quicklaw, Coates reported that lower sentences were given to those who assaulted children in their family than for other kinds of sexual assault, raising concerns about whether breach of trust was taken seriously by the courts. Perhaps this sort of breach of trust, which is considered in law to be an aggravating factor increasing the seriousness of the offence, was offset by the prevalence of certain mitigating factors in the child cases. In Renner et al.'s sample, there was a lower incidence of physical resistance by child victims than by women. This difference may be due in part to the specific characteristics of child sexual abuse, including the extreme degree of intimidation that can be associated with adult-child relationships. Furthermore, children may not know that sexual abuse is wrong, as offenders often frame the abuse in the context of caregiving or affectionate actions. These tactics either efface the transgressiveness of the activities or make children feel responsible for their enactment (see Furniss, 1991).

Not all of the differences between the child and adult cases involved the relative diminution of the seriousness of offences against children, however. Coates et al. (1994) noted that the few judgments describing sexual assault as intrinsically violent had child, not adult, complainants; furthermore, while women were criticized for not physically resisting their assailants, no such criticism was levelled at children. Echoing Renner and Yurchesyn (1994), Coates et al. suggested that in the case of women victims, a model of assault involving male-male combat between equals is drawn upon, whereas in the case of child victims, there appears to be greater acknowledgment of the inappropriateness of resistance in situations of asymmetrical power and strength.

1 Studies have underscored the importance of identifying case characteristics other than the ages of the complainants. For example, Spohn (1994) compared sexual assault cases involving child and adult victims in Detroit. Adult sexual assault included significantly higher rates of incarceration and greater mean length of sentence than did child sexual assault cases. But the cases involving children were less likely than cases with adult victims to involve charges of aggravated sexual assaults, that is, assaults accompanied by collateral physical injury. When this predictor was controlled for, offenders convicted of sexually assaulting children were more likely to be incarcerated than were offenders convicted of sexually assaulting adults.

Another aspect that may be important in assessing the differences between cases involving women and children as complainants concerns the matter of consent. A routine defence argument in a sexual assault trial with a woman complainant is that the woman consented to sexual activity; a judge may address a woman's failure to resist her assailant as part of assessing whether there is reasonable doubt compelling acquittal. Children, however, cannot legally consent to sexual contact with adults (Sas, Wolfe, & Gowdy, 1996; but see MacMartin, 2002).

The existence of greater power differences, less intrusive sexual contact, and the impossibility of consent in cases involving child complainants compared with adult complainants has been recognized with the introduction of new offences in 1992. These charges, exclusively pertaining to the sexual abuse of children and young persons, include sexual interference, invitation to sexual touching, and sexual exploitation (Sas et al., 1996). The new offences acknowledge the wide range of ways in which children can be sexually abused outside of the conventional definitional boundaries of the offence of sexual assault. Such recent legislative changes reflect increasing collective knowledge regarding the dynamics and the pervasiveness of child sexual abuse (Sas et al.). However, the question remains as to whether judicial sentencing decisions orient to the inherent violence of such categories of crimes. These charges may not draw on the model of physical assault underpinning the offence of sexual assault. Indeed, the offence of invitation to sexual touching may not involve any bodily contact whatsoever between offender and victim. The inscription of these newer sexual offences in the Canadian Criminal Code invites close analysis of the judicial discourse of more recent sentencing decisions in child sexual abuse cases. The present research project was designed to explore such decisions.

Perhaps judicial mention of the absence of resistance by women in Coates et al. (1994) is bound up with judges' evaluations of defence claims in the trial portions of the proceedings. One cannot know in this study if the decision to acquit or to convict occasioned mention of the absence of resistance. This is because trial judgments and sentencing decisions were not differentiated by Coates et al. In sentencing proceedings the commission of the offence is assumed; decision-making revolves around the purposes of sentencing and the aggravating and mitigating factors in the particular case before the court. However, the institutional activities enacted in the judicial discourse of a trial involve deciding whether or not a crime has taken place. The trial decision

only establishes beyond a reasonable doubt whether or not an accused committed a sexual assault; it does not evaluate the relative seriousness of the crime in order to sanction the guilty offender. It makes sense, therefore, when attempting to investigate how seriously sexual offences are treated, to consider sentencing decisions apart from trial decisions.

The present study analyzed the discourse of recent written sentencing decisions in Ontario comprising a range of child sexual abuse offences. The aim was to investigate whether and how the violence or seriousness of these crimes was constructed in the texts of the decisions. Specifically, the analysis focused on two typical characteristics identified in the previous literature as having been used to mitigate the seriousness of such offences: the frequent absence of physical harm to the victim, and the close, often familial relationship existing between offender and victim. Attention was given to judicial descriptions of the offences and the victims, including how such descriptions were employed to display adherence to sentencing principles and to evaluate specific aggravating and mitigating factors that judges used in justifying their decisions. (Analyses of constructions of the offender, including reference to the offender's character and to the presence or absence of remorse, are reported separately in MacMartin & Wood, 2003.) Specific research questions included the following: Did the judgments describe sexual offences against children as inherently violent? Did the judgments orient to the presence or absence of physical harm to victims? Was the presence or absence of instrumental violence described? Did the judgments describe the kinds of relationships existing between offenders and victims? How were such descriptions constructed and used in judicial evaluations of the seriousness of the offences? How were these evaluations of violence and breach of trust used to promote the seriousness of the crimes? The discourse analysis undertaken to answer these questions was informed by discursive social psychology (e.g., Potter & Edwards, 2001; Potter & Wetherell, 1987).

Discursive Social Psychology and Discourse Analysis

Discursive social psychology (DSP) applies ideas from discourse analysis to central topics in social psychology (Potter & Edwards, 2001), including psycho-legal decision-making (e.g., MacMartin, 2002). The analytic focus in DSP is on the actions performed through discourse as part of situated practices. DSP relies on empirical analysis of records of naturalistic data rather than on experiments, questionnaires, and interviews (Potter & Edwards, 2001). Discourse is defined as talk and texts which are studied as social

practice. Judicial discourse in the form of a written sentencing decision is therefore both an object of analysis and a practice (see Potter & Edwards, 2001).

There are three key theoretical features of DSP that are helpful in contrasting it with more conventional social-cognition approaches to the study of legal decision-making. First, discourse is situated, that is, it is both occasioned and rhetorical (Potter & Edwards, 2001). By “occasioned” we mean that talk and texts are embedded in a particular context as part of some kind of sequence. This notion of discourse as occasioned comes from conversation analysis and the study of two or more speakers’ talk-in-interaction (Hutchby & Wooffitt, 1998); nevertheless, the concept of situatedness is equally important in the discourse analysis of a seemingly monologic text like a sentencing decision written by a judge (see Antaki, 1994, on this point). For example, consider judicial mention in a sentencing decision of the inherent violence of a sexual assault. The description of the offence as intrinsically violent may be a counter-argument, occasioned by the report of a prior defence argument that a relatively mild sentence is appropriate because there was no use of additional physical force by the offender.

This theme of argumentation provides the second sense in which discourse is seen as situated; it is not just occasioned – it is pervasively rhetorical (Billig, 1996). In the foregoing example, a judge’s description of sexual assault as inherently violent stresses the gravity of the offence and thereby counters the alternative, mitigating version. It is important to note that the occasioned and rhetorical character of discourse is not assumed to operate deterministically in the mechanical manner of the variables-and-outcomes model underpinning most social-cognition research (Potter & Edwards, 2001). In the foregoing example of sentencing discourse, a claim about the absence of collateral violence is not a contextual variable predicting that the judge will automatically uphold or discount the violence intrinsic to the offence.

The second feature of DSP concerns the treatment of discourse as action-oriented (Potter & Edwards, 2001). The idea here is that judicial discourse performs actions, such as the imposition of a period of incarceration in a sentencing decision. Moreover, it is not just the portion of the judgment that declares the sentence (i.e., “I am sentencing you to two years less a day. . .”), which performs actions in the text of a sentencing decision. Even a seemingly neutral description of the offence itself can be action-oriented in terms of constructing the objective, factual basis of the crime (see Potter, 1996).

This brings us to the third theoretical feature of discourse, that it is constructed. There are two senses in which DSP is constructionist (Potter & Edwards, 2001). First, as just suggested, discourse *constructs* versions of the world that do things, such as argue that sexual assault is violent. Secondly, discourse is itself *constructed* from words, figures of speech, rhetorical devices, descriptions, stories, etc., which can themselves be studied to illuminate how the discourse is assembled and designed to perform particular actions. Indeed, in the present study, metaphorical devices turn out to be an important judicial resource for constructing the seriousness of the offences.² The idea that judges’ discourse is constructed or designed does not mean that it is necessarily planned, or that discourse analysis provides a route to the inner cognitions or hidden motivations of the judges. To say that an utterance is designed means “only that it does have some particular design or shape” (Nofsinger, 1991, p. 50). Nor do the notions of rhetoric, design, and construction assume fabrication in the form of judicial manipulation of the truth.

Database and Sample Characteristics

The data in the present study were 74 Ontario sentencing decisions in criminal cases of child sexual abuse offences from 1993 to 1997. Each decision typically included descriptions of the offence or offences, the sentencing principles involved, assessment of the aggravating and mitigating factors, related case law, and the sentencing decision handed down by the judge. The texts of the decisions came from Quicklaw, an electronic website containing international legal information and archives, including databases of Canadian case law. The decisions were downloaded from the Ontario Reports Plus database (ORP). Although not all Ontario sentencing decisions are entered on ORP, a much larger corpus is available there than is found in Ontario law reporters (the

2 Given the many poststructuralist challenges to the realist dichotomy between literal and figurative language (Smith & Turner, 1995), the distinction between metaphorical and non-metaphorical discourse is not always clear nor sustainable (Potter, 1996). However, such a distinction is not required to embark on the study of descriptive categories in DSP (Potter, 1996). Here I treat metaphor as entailing the description of one thing in terms of something else through the juxtaposition of phenomena (see Smith & Turner, 1995). The aim is to explore the possible functions of metaphors in talk as “rhetorical devices serving a particular purpose for the speaker” (Coffey & Atkinson, 1996, p. 85). This conceptualization does not offer support for foundationalist arguments about root-metaphors (e.g., Pepper, 1942/1961) or about the relationships among linguistic structure, the body, and the nature of mind (see Johnson, 1987; Lakoff & Johnson, 1980).

bound journals of judgments that are selected by editors because of the interest of legal practitioners in issues of law).

Search parameters used to select the decisions were key words corresponding to all possible criminal sexual offences against child and adolescent victims (age 17 or younger). In order to explore sentencing of offences no longer in the Canadian Criminal Code, as well as newer offences, search terms for repealed offences (e.g., "rape" and "buggery") were also included. Given that a number of these offences, both repealed and extant, can include crimes against adults, any cases with victims who were adults at the time of the offences were eliminated. Appeal decisions were also discarded because they tended to focus on legal issues rather than on the substance of the offences.

Although all of the sentencing decisions occurred in the years 1993 to 1997, the time frames in which the offences were committed varied from 1952 to several months preceding the sentencing decisions.³ This time span allowed for exploration of variations in the kinds of issues addressed by the judges, including the phenomenon of "historical sexual abuse"; according to the law, sexual offences against children occurring before 1985 should be sentenced according to the provisions in force at the time the crimes were committed (Ruby, 1994). The kinds of sexual offences ranged from sexual assault and indecent assault (the most frequent categories of crimes) to buggery, rape, and sexual exploitation. There were a number of cases in the sample in which offenders were being sentenced for other charges in addition to the sexual offences.

In 46 decisions, the offenders were related to their victims, either by blood or through marriage or common-law marriage to relatives of the victims. In 18 decisions, offenders were known to their victims as teachers, principals, coaches, neighbours, friends or acquaintances of the victims' families. In three cases, offenders had abused both relatives and nonrelatives, all known to the offenders. In five cases, the offenders were strangers to their victims. In another decision involving multiple victims, the offender was a stranger to one of the victims and was known to the other victim because he had joined a volunteer program where he met young women and girls. In one other decision, the nature of the relationship between offender and victim was not described. Only one offender in the sample was female. There were 122

victims in total. One case involving five victims did not include sufficient detail to identify how many victims were male versus female. In the remaining 73 cases, 86 victims were female while 31 were male.

The charges comprised a wide range of types of offensive actions ranging in the degree of physical intrusiveness involved: from (in laypersons' terms) vaginal, anal, and oral rape of victims to one case in which the offence involved the offender sexually abusing the victim by "hugging" him in a store in which the offender was the proprietor. In 39 of the decisions, offenders had pleaded guilty to the sexual offences.⁴ In 34 decisions, sentencing followed convictions of offenders by either judge or jury. There was one case involving sexual and nonsexual offences in which the offender pleaded guilty to two charges and was convicted on another, but it was impossible to determine from the decision whether the guilty pleas were associated exclusively with the sexual offences.

In 67 cases, there were explicit custodial sentences clearly ascribable to sexual offences. The average length of incarceration for the sexual charges was 1,076.2 days. The excluded cases were five suspended sentences with probation, one custodial case of indeterminate length involving a designated dangerous offender, and one case of stranger assault in which the custodial sentence for sexual assault could not be disambiguated from that portion of the sentence applied to break-and-enter committed by the offender in the same incident. The longest sentence handed down on sexual abuse offences was 11 years imprisonment. The offender had victimized his daughters and stepdaughter multiple times over many years. The charges were indecent assault, sexual assault, and assault causing bodily harm. Among the suspended sentences was the case of the sole female offender in the sample who had pleaded guilty to sexual interference of her small son on one occasion. The conditions of sentence included a no-contact clause.

Discourse Analysis

The analysis investigated judicial justifications of the sentences imposed in the 74 judgments using the methodology of discourse analysis (Wood & Kroger, 2000). Attention was given to the sentencing principles followed and the aggravating and mitigating

³ One of the cases did not include information about the time frame of the crime.

⁴ In one case, the accused pleaded not guilty to the charges but did not contest the evidence. Because the judge treated this situation as tantamount to a guilty plea (with a concomitant assessment of the offender as remorseful), the case was categorized as a guilty plea.

factors in each case. The analysis examined the discursive details of judges' descriptions of the offences and the victims, particularly with respect to whether and how judgments constructed the offences as inherently violent, whether and how judgments oriented to the presence or absence of physical harm, and how the relationships between offenders and victims were described. These descriptions proved to be crucial rhetorical resources in promoting the assessment of the seriousness of the offences. It is important to note that discourse analysis of this type adheres to the practice of analytical indifference. Analysts are not concerned with making assessments of the fairness or appropriateness of sentence type or length; rather, the focus is on how the sentencing decisions were constructed as fair or appropriate. The first section below consists of analyses of judicial descriptions and categorizations of the violence of the offences. The second section of analyses concerns judicial constructions of breach of trust. However, as the analyses demonstrate, descriptions of violence and of breach of trust were frequently intertwined in the texts of the decisions.

Categorizing Violence

Violence as inherent. As part of evaluating the seriousness of the sexual offences, judges addressed the relative violence of the crimes. Descriptions of the inherent violence of the offences and the presence or absence of additional violence were analyzed. In 12 of the 74 decisions, there was explicit acknowledgment of the violence of sexual offences in the absence of overt threats or the application of additional physical force by offenders; this acknowledgment was made in various ways through the description of sexual offences as inherently violent, as threatening, or as having a quality of violence even when offenders used no threats nor collateral physical violence. Reference to inherent violence at times including quotations from Madame Justice Abella in an appeal case (*R. v. G.M.*, 1992). Seven of the 12 cases consisted of relatively recent categories of sexual offences such as sexual assault and sexual interference; three cases involved a mixture of current and repealed offences; three additional cases involved repealed offences such as indecent assault. Here is an excerpt taken from a decision in which the offender pleaded guilty to the indecent assault of his stepdaughter:

Excerpt 1, Case 16:

[para 16] I agree with the Crown that all sexual assaults are inherently violent and most leave lasting scars. Further, the offence here occurred at puberty, a particularly crucial time in the victim's sexual development.

The phrase, "all sexual assaults are inherently violent," consists of a discursive device called an extreme case formulation (Pomerantz, 1986). Such constructions use extreme points on relevant dimensions to make compelling claims in arguments or justifications. Here, any sexual assault is categorized as a violent offence by definition. In some decisions, mention of the inherent violence of an offence was associated with judicial rejection of the defence's position that the absence of additional physical force was a mitigating factor, but this was not always the case. Here is another excerpt, taken from a case in which the offender was convicted of indecently assaulting his stepdaughter:

Excerpt 2, Case 2:

[para 15] A second mitigating factor is that there were no threats or every any use of force, although I am conscious that any sexual assault, or in this case indecent assault, involves inherent use of violence, but nevertheless the offender ceased all sexual activity on being told by the complainant to do so, under her threat of alerting his wife.

At the outset of Paragraph 15, an extreme case formulation ("no threats or every any use of force") upholds the absence of collateral violence as a mitigating factor. The appearance of a subsequent extreme case formulation ("any sexual assault, or in this case indecent assault, involves inherent use of violence") is part of an overall design in which the threats or use of force are treated as separate from the violence of sexual abuse itself. The judgment particularizes this case as one in which an absence of threats or application of force mitigates the seriousness of the offence.

Absence of instrumental/collateral violence. Case 2 was one of 25 decisions that explicitly mentioned the absence of instrumental physical violence in the cases being sentenced. Given that such descriptions potentially undermine the treatment of sexual abuse as serious, it is not surprising that the design of some judgments managed such implications by differentiating between inherent violence and the additional use of force, as exemplified in Excerpt 2 above. There was variability across the decisions in terms of how the absence of instrumental violence was assessed. In some decisions, such as Case 2, it was treated as a mitigating factor; in other cases, it was treated as a mitigating factor of diminished weight, and in still other decisions, it was rejected as a mitigating factor. Certain judgments, including Case 44 below, did not clearly indicate whether lack of additional violence

was mitigating; the absence of additional violence was acknowledged but was offset by explicit reference to other aggravating factors such as psychological damage and breach of trust. The offender in Case 44 was convicted of having sexual intercourse with his daughter.

Excerpt 3, Case 44:

[para 6] Although no force was used and no physical harm was inflicted, there is serious residual psychological damage to the victim. Incest is characterized by a violation of the parents [sic] position of trust and authority, the predatory nature of the crime against a young, vulnerable, unsophisticated and captive victim, the extreme nature of the sexual invasion.

Case 44 was one of four decisions in which descriptions of the absence of additional violence were embedded in subordinate clauses that created a rhetorical contrast (see Edwards & Potter, 1992) between the absence of physical damage on the one hand and the presence of psychological damage as a result of sexual abuse on the other. Case 44 was also one of five cases in which acknowledgment of the absence of physical violence was offset by an emphasis on breach of trust or abuse of power and the coercive dynamics of the offences. In Excerpt 3, “violation,” not physical violence, constitutes the basis for constructing the seriousness of the offence. The discursive feature of listing (Edwards & Potter, 1992) layers consecutive multiple adjectives that emphasize the seriousness of the crime of incest through the description of its victim as “young, vulnerable, unsophisticated and captive.” A similar rhetorical contrast appears in Case 34 in which the offender pleaded guilty to indecent assault of his daughter, K.M. Paragraph 29 enumerates those factors of “diminished mitigating value in the circumstances of this case.”

Excerpt 4, Case 34:

[para 29] . . . 2. Absence of violence
No physical violence was inflicted on K.M. In that limited sense there was no violence. However, her father’s breach of trust and the severe power imbalance between this parent and this child inflicted emotional violence that haunted her childhood and early adolescence.

Of note here is the description of Item 2, the “absence of violence,” which by conventional implication categorizes violence as synonymous with, and exclusively pertaining to, physical violence. The judgment first concedes the absence of physical violence but then redefines violence more broadly by acknowledging the presence of “emotional violence.”

The verb “haunted” is an interesting lexical choice. It conveys the protracted nature of the abuse and its consequences as well as its invasive, negative (and covert) features. Here, emotional violence is connected to the breach of trust associated with the category membership of abuser as “father,” as “parent.”

Presence of Instrumental/Collateral Violence

In 14 of the 74 decisions, the presence of collateral violence was specifically mentioned as an aggravating factor. This category included a wide range of offensive actions on the part of offenders, including vaginal rape causing one victim to bleed, attacks resulting in bruising, death threats, other verbal threats of force and threatening looks. Interestingly, in one of these decisions, a judge rejected the defence submission that the offence involved “low scale sexual assault simpliciter” (i.e., that this was not a very serious instance of the offence). The judge itemized multiple aggravating factors in the case, including the following descriptions of the two offences against a 9-year-old boy and an 11-year-old girl who were abused by a stranger entering their home while they were asleep:

Excerpt 5, Case 42:

[para 20] Firstly, the assaultive aspect admitted by the guilty plea includes an unauthorized application of force by at least touching. As is often the case, the assaults by this offender were by a person of comparatively superior physical strength and dominance. Accordingly, the assaultive aspect has elements of bullying. . . .

[para 22] . . . (c) The fondling of the boy was brutish and intimidating; (d) Upon getting into the girl’s bed the offender, an adult stranger, administered a drunken sexual mauling through hugging and rubbing actions that could be nothing but terrifying and repulsive. . . .

The description of the offence as “bullying,” of “fondling” as “brutish” and “intimidating,” and of “drunken sexual mauling” in the form of “terrifying” and “repulsive” hugging and rubbing foregrounds a sense of violation experienced by the victims. The extreme case formulation (“nothing but terrifying and repulsive”) underscores the seriousness of the offences with reference to the membership category of “adult stranger” and the threat posed by the offender’s “comparatively superior physical strength” and “dominance.” This construction draws on a characteristic intrinsic to the sexual abuse of children, that it is perpetrated by those more powerful than, and inherently threatening to, children. Such a description upgrades the gravity of generic

sexual assault conveyed by its formal definition in the Criminal Code as “an unauthorized application of force by at least touching.” This discourse signals that there is much to be considered beyond “at least touching.” What increases the seriousness of the crime is not necessarily an escalation of the physical invasiveness of the acts constituting the crime, nor the severity of physical effects. Here, it is the description of the offence in terms of who perpetrated that touching, how, and with what psychological effect, that affirms the seriousness of sexual assault.

Metaphorical Extensions of Physical Injury

The discourse of Excerpt 5 evaluates the seriousness of the offence by drawing on the perspective of victims for whom the event was “terrifying” and “repulsive.” Excerpts 1, 3, and 4 construct the severity of child sexual abuse in terms of the psychological or emotional damage incurred. In all, 13 of the 74 decisions included metaphorical extensions of physical damage wherein the mind, psyche or the emotions were implicitly or explicitly described as entities as vulnerable to injury as the physical body. A lexicon of scars, carnage, and other devastation was employed. It has been argued that “bodily experience is a source of vocabulary for our psychological states” (Sweetser, 1990, p. 30).⁵ The basis of such metaphors is articulated in Excerpt 6, which comes from Case 34 and immediately follows the segment in Excerpt 5 above:

Excerpt 6, Case 34:

K. was also physically stimulated by her father’s fondling. That triggered both fear and repulsion at her own body, and continued to be a source of shame and embarrassment for her, even after the abuse stopped. This is violence upon a child’s psyche that this court considers as real and as tangible as physical violence inflicted upon a child’s body.

A simile is used to promote the facticity of the psychic violence of incest as a phenomenon as real as “physical violence inflicted upon a child’s body.” In other decisions, so taken for granted is the referent of the psyche or emotions in this figurative discourse

⁵ According to Young (1995), the extension of the term “trauma” to include mental injury occurred for the first time in the 19th century when British physicians diagnosing and assessing injuries and other symptoms attributed to railway accidents found that certain patients displayed symptoms of nervous shock without accompanying evidence of physical injury. This development may parallel the extension of “sickness” from physical illness to include mental illness (see Sarbin, 1990).

that at times the adjective “emotional” or “psychological” is excluded; recall that in Excerpt 1, Case 16, “most [sexual assaults] leave lasting scars.” This represents a script formulation, a discursive device that constructs an enduring, general or expected state of affairs (Edwards, 1994). Traumatic consequences are to be expected (see Excerpt 1). The scripting of psychological trauma also appears in Excerpt 7, Case 2 (one segment of which was featured earlier in Excerpt 2).

Excerpt 7, Case 2:

[para 6] I believe it goes without saying that such events cause trauma and emotional scars, and leave many issues to be dealt with in adult life.

This fascinating bit of text treats trauma as a taken-for-granted or routine consequence of sexual abuse. The judgment articulates a state of affairs so beyond refutation that it needs no articulation (“it goes without saying”). A scar is visible, usually persisting over time. The rhetorical power of this metaphor lies in its ability to transform something potentially abstract and possibly inaccessible (the internal emotional or psychological state of another person) and make it susceptible of observation. This metaphor, therefore, has fact-constructive potential in an institutional context in which the evidential basis of claims must be securely grounded (see Potter, 1996, on fact construction in talk).

Cases 16 and 2 were among seven cases in which references to scars, emotional scars or psychological scarring occurred. Such descriptions may be persuasive because they can rhetorically counter defence minimization of the seriousness of the offences on a variety of grounds, such as the absence of physical injury or a defence claim that the acts constituting an incident of abuse were not as physically invasive as in other cases. A rhetorical contrast was created between the absence of physical bodily harm and the presence of psychological or emotional harm. As we have seen, in some of these decisions references to scars were part of script formulations about the expected effects of sexual offences on victims in general. In other decisions, descriptions of scars were related specifically to the experiences of the particular complainants whose victim impact statements were entered into the court records.

The lexicon of impact describing victims’ responses is itself a metaphorical extension of the notion of physical force or the act of physical striking applied to the realm of the psyche. Several decisions used the terminology of emotional impact. For example, consider an excerpt from Case 23 in which the

offender pleaded guilty both to manslaughter (stabbing a man to death) and to the sexual assault of a 12-year-old girl:

Excerpt 8, Case 23:

[para 6] The sexual assault conviction, while it did not violate the physical integrity of the victim to the extent seen in many sexual assaults, involved the brandishing of a knife, the killing of another human being, and threats to the physical integrity of that young woman that must have had a ripping impact on her emotional and psychological well-being.

A concession in this decision (that the degree of violation of physical integrity in this case was not as severe as in other cases) is qualified by the appearance of a three-part list (“the brandishing of a knife, the killing of another human being, and threats to the physical integrity of that young woman”). Three-part lists occur in a variety of speech situations, including courtroom interactions (Drew, 1990) and everyday conversations (Jefferson, 1990). Here, the list establishes the scope and seriousness of the multiple traumatic facets of this crime. The vivid description draws on a metaphor of psychic laceration: “a ripping impact on her emotional and psychological well-being.” This metaphor counters any possible minimization of the offence on the grounds that it did not involve as serious a violation as seen in other sexual assaults (i.e., those involving penile penetration in the form of vaginal rape).

This elliptical reference is an instance of systematic vagueness (see Edwards & Potter, 1992), a discursive device that avoids mention of the kinds of acts constituting the sexual assault in this case. Nowhere in the decision is there reference to the specific sexual acts perpetrated by the offender. The judgment thereby dismisses their importance in relation to the seriousness of the crime, foregrounding instead the serious traumatic experiences of the victim, including the threat to her physical integrity. Similarly, Case 52 draws metaphorically on the notion of “psychological and emotional carnage” to denounce the offences perpetrated by Mr. L. who pleaded guilty to gross indecency committed on his daughter and to indecent assault on three of his daughter’s friends.

Excerpt 9, Case 52:

[para 6] Victim impact statements have been filed on behalf of each of the complainants. While I do not intend to detail their contents, each, in its own way, is a testament to the psychological and emotional carnage left in the wake of Mr. L.’s grossly inappropriate and unlawful conduct.

One possible defence argument regarding the use of victim impact statements is that the psychological damage displayed or expressed by complainants, particularly those in adulthood at the time of sentencing, cannot readily be attributed solely to the experience of sexual abuse given other intervening life events. In several cases, this argument was conceded in the text of the judgments. For example, in Case 73, the judgment acknowledged this possibility but then underscored the deleterious effects of breach of trust on one of the victims. The offender had been convicted on charges of sexual assault, indecent assault, and having sexual intercourse with his two stepdaughters.

Excerpt 10, Case 73:

[para 12] . . . I agree with Counsel for the accused that not all of the hurt or the harm, the psychological damage occasioned, can be attributed to the count number one which is the act of indecent assault. And it would be impossible for the Court to say that this is because of that, but suffice it to say that the Court has concluded that the indecent assault was significant and continues to be a significant contributor to the psychological hurt occasioned by Debbie. Her statement, as I say, is a classical illustration of the hurt that is done to vulnerable children who really are, when their parents abuse them, left confused and without direction. I have drawn the analogy to being put on Highway 401 in a vehicle without a steering wheel. . . .

Reference to the victim’s statement as a “classical illustration” is part of a script formulation. Debbie’s case is typified as an instance of a general category of undeniable effects of breach of trust on “vulnerable children who really are . . . left confused and without direction.” The image of a child driving a car without a steering wheel on a major highway invokes extreme danger. The analogy invites identification on the part of adult listeners through description of a situation that would exceed the capacities of adults, let alone “vulnerable children,” to survive. What is also interesting about this description is its implication that incest is tantamount to parental abandonment.

Breach of Trust

The previous section examined how the violence of sexual offences was categorized in the decisions. Excerpt 3, Case 44, Excerpt 4, Case 34, and Excerpt 10, Case 73 included references to psychological damage in the form of incest and the breach of trust it entails. As noted earlier, references to violence and to breach of trust were interwoven in some decisions.

Descriptions of breach of trust could be used to construct psychological violence; descriptions of psychological violence could be used to construct breach of trust as an aggravating factor. In such cases, reference to the psychological damage caused by breach of trust provided an alternative basis for acknowledging the seriousness of child sexual abuse in the absence of additional force, physical violence or physical harm. In this section, constructions of breach of trust as an aggravating factor are explored in detail. In all, 56 sentencing decisions in the sample indicated some degree of breach of trust as an aggravating factor. Figurative devices were one means by which breach of trust was invoked to underscore the seriousness of the offences.

Metaphors of theft. Case 52 (see Excerpt 9) was one of 15 decisions containing similes or metaphors of theft, robbery, stripping, and deprivation. Such descriptions addressed the consequences of breach of trust in terms of the irreversible effects of sexual abuse on its victims. The categories of objects or aspects stolen from victims in these figurative constructions variously included “innocence,” “childhood,” “birth right to a wholesome childhood,” “the bulk of [her] childhood and at least half of [her] adolescence,” “youth,” “dignity,” “self-respect,” “normalcy,” and “normal sexual awakening.” With respect to the discursive notion of rhetorical symmetry (Edwards, 1995), these metaphors not only construct the offences and the victims in particular ways; these descriptions simultaneously construct implicit identities for the offenders as thieves or robbers (see MacMartin & Wood, 2003). Consider Case 38 in which the offender was convicted of sexually assaulting a girl multiple times while he babysat her over the course of several years. The judgment cites prior case law to characterize the gravity of the current offence as similar to that in another case:

Excerpt 11, Case 38:

[para 33] As set out in the Harrison case at page 518, the sexual assaults in that case were odious crimes facilitated by an authoritative relationship which robbed the victim of a normal sexual awakening.

This excerpt includes not only reference to robbery but to another metaphor, that of waking versus sleep, as a means of describing the premature sexualization of the victim. The implication is that the sexuality of children is normally dormant, in a sleep-like state as is appropriate to their stage of development. The trauma of such ruptures in developmental trajectories was frequently expressed through descriptions of

irreversible transformations of the identities of the victims. In the next excerpt, the judge in Case 55 addresses Mr. T. who pleaded guilty to sexual assault of his daughter:

Excerpt 12, Case 55:

[para 5] The facts are indicative of a person, Mr. T., that [sic] engages in behaviour, that as soon as her mother left the house to go to work, to go to the store, you seized on that opportunity to have sex with your daughter. You have taken something from your daughter that you nor she will ever be able to replace, and that is her childhood. . . .

The decision in Case 43 similarly uses the theft metaphor to invoke the irreversible effects of incestuous sexual assault, arguing that an important purpose of sentencing in that case was general deterrence: “While the courts could not restore a stolen childhood, they could make it very clear to the public, by way of general deterrence, that sexual assaults on children simply would not be tolerated.” In that decision (as in others in the sample), the judge quoted from a victim impact statement that deployed the robbery metaphor. The offender pleaded guilty to sexual assault of his daughter committed over a one-year period:

Excerpt 13, Case 43:

[para 17] . . . As a victim my childhood was robbed of an innocence that every child is entitled to. My father not only manipulated my life as influential child but betrayed a trust and corrupted a bond. . . .

In this decision and several others, “innocence” is constructed as a birthright, an entitlement of childhood. This entitlement is embedded within familial or other relationships of dependency in which adults have role obligations that include the safeguarding of children’s innocence. “Innocence” in such descriptions refers not only to sexual innocence but to the dependency and trusting nature of children who are vulnerable to exploitation within the context of such relationships. Indeed, in Excerpt 13, a three-part list specifies in detail the facets of breach of trust comprising this “robbery” of childhood: manipulation of an influential child, betrayal of a trust, and corruption of a bond.

Family as “fabric.” Metaphors of robbery were not the only figurative devices used to describe breach of trust as an aggravating factor. In several cases of incestuous abuse, the effects of breach of trust were extended to the family unit itself. For example, in

Case 41, excerpted below, the offender was convicted of buggery and gross indecency committed on his 7-year-old daughter. The judgment described the offences in the following manner:

Excerpt 14, Case 41:

[para 29] The predatory sexual nature of this crime by a father against his unsophisticated, vulnerable and captive daughter violates law and nature. The parent's trust and authority has been violated. The innocence and protection of society's basic unit has been destroyed. Sexual exploitation of children within the family is a grave offence abhorred by society, *R. v. Clayton* 69 C.C.C. (2d), 81. . . .

It is as if the child-as-victim can function metonymously for the family-as-victim in cases of incest. Not only the innocence and protection of the individual complainant, but also the innocence and protection of the family – “society's basic unit” which “has been destroyed” – are the casualties of familial sexual abuse. In this regard, several decisions employed the metaphorical construction of the family as fabric. For example, Case 33 involved an offender who had pleaded guilty to indecent assault of his granddaughter. After discussing the psychological trauma and impact on the victim as one aggravating factor, the judge goes on to discuss breach of trust:

Excerpt 15, Case 33:

[para 14] Of course, another aggravating factor is the breach of trust. Breach of trust, as Mr. Justice Corey referred to in the case *Regina v. Clayton, O.C.A.*, and I quote Justice Corey, “...it constitutes a breach of the greatest trust of his children...”, which principle, of course, extends to the grandchildren. He goes on to say, “...it constitutes a tearing of the foundation fabric of society for it can change the family from a unit generating support and love to a unit fostering mistrust and loathing.”. . . .

In Excerpt 15, the destructive effects of sexual abuse involve the tearing or rending of the family. Breach of trust in a legal sense pertains to the protection of society's basic institutions (see Ruby, 1994), including, in this context, the family. The description of family as fabric, with its interwoven yet disparate threads vulnerable to destruction, is part of a long history in which cloth has been a symbol of the institutions or conditions of society. According to Wilford (1993), “poets and anthropologists alike have employed cloth as a metaphor for society, something woven of many threads into a social fabric that is ever in danger of unraveling or being torn” (C1).

In one of the cases, the “tearing apart of the family” referred not only to issues of trust and divided loyalty following disclosure of the abuse but also to the dissolution of the family as a separate aggravating factor. The next excerpt is taken from Case 27 in which the offender pleaded guilty to multiple offences, including sexual assault of the daughters of his common-law partner:

Excerpt 16, Case 27:

[para 12] The period of incarceration must reflect the gravity of the offences and society's abhorrence to such conduct involving the sexual abuse of young children. There are some aggravating factors, serious aggravating factors, in this case. There's the breach of trust, the young age of these children at the time of the occurrence of these incidents, the number of incidents over a period of some fifteen (15) months. Something which I find repugnant and further aggravating is the fact that on one of these occasions he played with both these young girls at the same time. Certainly another extremely aggravating factor is the tearing apart of the family and the removal of the children from the mother and being placed in foster homes.

Evaluation of the seriousness of the crime included an instance of judicial self-repair (see Hutchby & Wooffitt, 1998) that upgrades the seriousness of the offence (“some aggravating factors, serious aggravating factors”), a three-part list (“the breach of trust, the young age of the children at the time of the occurrence of these incidents, the number of incidents over a period of some fifteen (15) months”) and the vivid foregrounding of one especially “repugnant” event, the joint victimization of the stepdaughters. The violence implied by the “tearing apart of the family” refers specifically to the trauma of children separated from their mother, which underscores and multiplies the kinds of victimization they have experienced.

Summary

With respect to assessing the violence of the offences, 14 of the 74 decisions in the sample described the presence of additional violence as an aggravating factor. There was considerable variability in the kinds of actions categorized as additional violence. These activities ranged from hitting and whipping of victims and vaginal rape (leaving one victim bleeding profusely) to threatening looks by offenders. In 12 decisions, the inherent violence or violent quality of the offences was described. The functions of such descriptions varied across the decisions. In some cases, mention of intrinsic violence was included in statements rejecting defence argu-

ments about the relative lack of seriousness of the offence being sentenced; in other cases, orientation to the violence inherent in sexual assault was included in the context of judicial acknowledgment of the lack of instrumental violence as a significant consideration. In 25 of the decisions, the absence of instrumental violence was described, but not always as a mitigating factor.

One means by which certain judgments qualified the mitigating effects of the lack of additional force and physical harm was through descriptions of the psychological harm experienced by victims. In some cases, script formulations constructed emotional trauma as a frequent or inevitable outcome of abuse. Figurative descriptions of the traumatic effects of the offences were sometimes used in the discourse of denunciation. Rhetorical devices included metaphorical extensions of physical injury (e.g., reference to psychic scarring) and metaphors of robbery depicting breach of trust and the irreversible loss of childhood innocence in cases of intrafamilial abuse. In several incest cases, the category of victim was enlarged to include the family unit. The violent effect on families was promoted in a number of these decisions through employment of a fabric metaphor that conveyed the action of the rending or tearing apart of the family.

Discussion

Renner et al. (1997) reported that the typical characteristics of sexual offences (including the lack of physical harm and the close relationship between the offender and the victim) were used by Nova Scotia courts to mitigate the seriousness of the crimes. The present discourse analysis of recent Ontario sentencing decisions provides a somewhat different picture. Judicial descriptions, including metaphorical constructions, denounced child sexual abuse and censured offenders on the basis of breach of trust and the frequent, if not inevitable, psychological harm visited upon victims. In a number of decisions, the absence of physical harm was used to create a rhetorical contrast that emphasized psychological trauma instead. Perhaps there is gradually increasing awareness in the courts of the typical dynamics and contexts of child sexual abuse.

For example, in my sample of 74 Ontario sentencing decisions (1993-1997), there were 12 references to the offences in particular (or to sexual offences generally) as inherently violent or as having the quality of violence or threat. In Bavelas and Coates' (2001) sample of 75 judgments from British Columbia (1986-1992), there were 22 decisions that included references to the presence or absence of violence; only one of these decisions described sexual assault as inher-

ently violent. It is difficult to know if the disparity between the two studies is due to jurisdictional differences, the different time frames of the judgments, or sampling error associated with the different sizes of samples of sentencing decisions. My Ontario judgments consisted only of sentencing decisions, while Bavelas and Coates (2001) studied trial and sentencing decisions. Only 22 of their judgments included references to the violence of the offences. Perhaps these were the only sentencing decisions in the sample, with the remaining 53 judgments consisting of trial proceedings that were unlikely to have involved assessments of violence or the seriousness of the offences. However, there is also the possibility that recent appeal decisions (e.g., *R. v. G.M.*, 1992) recognizing the inherent violence of sexual assault have had an incremental effect in shifting the court's awareness.

One manifestation of this possible alteration in awareness concerns breach of trust. The previous social justice research on which recent commentary is based leaves the reader with the impression that breach-of-trust issues in the sexual assault of women and children continue to be routinely and pervasively ignored by the justice system (e.g., Alksnis, 2001; Coates, 1997). The finding in the present study that 56 decisions treated breach of trust as an aggravating factor was therefore unexpected. In many cases, opportunities to offend afforded by caregiving roles were viewed by judges as increasing the seriousness of the crime.

A discursive device acknowledging breach of trust and the effects of abuse in such cases was the metaphor of the robbery of childhood innocence. According to Scott, Jackson, and Backett-Milburn (1998), "fears for children tend to be expressed through the idiom of children robbed of their childhood" (p. 697). These authors argue that:

The sexualisation of risk anxiety focuses on risks which are relatively rare as opposed to the all-too-common dangers posed by abusive fathers and other male carers. When children are sexually abused, this is frequently constructed as a despoliation of innocence rather than as an abuse of power. (p. 702)

The present study suggests, in contrast, that the despoliation of innocence can itself be used rhetorically to stress the seriousness of crimes involving the abuse of power. The metaphor of robbery appearing in the sentencing decisions resonates with Renner and Yurchesyn's (1994) conception of sexual robbery, though different actions are performed by the descriptions in the sentencing decisions. Renner and

Yurchesyn (1994) recommended that the metaphor of sexual robbery be used to assist both women and child victims of sexual assault through the replacement of a model of physical assault with a metaphor that makes rational the absence of struggle or resistance on the part of victims. The sexual integrity of the victim, whether adult or child, is viewed as akin to a property right such that sexual assault is analogous to the theft of personal property. In the present study, it is the category entitlement of “child” (see MacMartin, 2002) that provides the rhetorical affordances for denunciation.

In Western culture, childhood is viewed as a natural state at perpetual risk (Scott et al., 1998). Normal childhood involves a state of innocence inimical to sexuality; children’s innocence must be preserved and protected (Jackson, 1982; Jackson & Scott, 1999). Sexual abuse introduces the child prematurely to the adult world of sexuality. Access to sexual knowledge functions as a boundary marker between childhood and adulthood (Jackson, 1982), which may be why a permanent change of the victims’ identity was implicated as an effect of sexual abuse in some of the sentencing decisions in the present study. The judicial discourse in Excerpt 1, Case 16, along with other decisions in the sample, emphasized the serious effects of abuse through reference to its occurrence at a vulnerable stage in the life of a child or adolescent. Judgments drew on contemporary cultural notions about child development, which stress that there is a particular age at which children are to develop certain competencies and assume particular rights and responsibilities (Jackson & Scott, 1999).

In their study, Bavelas and Coates (2001) reported that erotic or affectionate terms dominated descriptions of the offences regardless of the kind of charge, the complainant’s age or the outcome of the trial (guilt or innocence). Terms such as “caressing” and “fondling” were criticized for constructing experiences of victimization as “positive, consensual, mutually pleasurable, erotic and even affectionate” (Bavelas & Coates, p. 31).⁶ It is argued that the association of sex with violence hides the victim’s trau-

matic experience of these acts as crimes. But in the present study, descriptions of the psychological effects of the offences upon victims demonstrate that the very sexualization of violence against children can be used rhetorically to treat these offences as grave violations. For example, we may recall in Excerpt 5, Case 42, the descriptions of “fondling” as “brutish” and “intimidating” and of “hugging and rubbing actions that could be nothing but terrifying and repulsive.”

This discourse draws on the cultural antimony between childhood and sexuality, suggesting that there may be one sense in which the erotic language in judgments identified by Bavelas and Coates (2001) demonstrates the deviance of the actions so described. The title of their article, “Is it sex or assault?” implies that sexual terminology and violence are mutually exclusive. But the experience of child sexual abuse is complicated, and not only by the child’s relationship with an abuser who is frequently a caregiver on whom the child is dependent. As exemplified by Excerpt 6, Case 34, part of the assault for some children may involve their sexual arousal as a response. Thus, the sexualization of the interaction between the perpetrator and the child can be constitutive of the violation inherent in such offences. The conflation of children, adults, and eros in such discursive constructions may abnormalize the actions so depicted. Consequently, the transgressiveness of the offences might be underscored by the use of such language, at least in Western cultures in which the category of children is associated with pre-sexual innocence.

The qualitative research reviewed earlier (e.g., Bavelas & Coates, 2001; Renner et al., 1997) is commendable in that it has used actual judgments rather than experimental simulations to explore legal decision-making. The discourse-analytic studies in particular (Bavelas & Coates, 2001; Coates et al., 1994) sensitize us to the possible ideological effects of judicial descriptions that minimize the violence of sexual offences against women and children. But it is not sufficient to identify the general themes contained in such descriptions; such analyses abstract those descriptions from the judicial practices in which they are situated, underestimating the flexibility of discourse and the multiplex rhetorical affordances of language in many judicial decisions in the present study and elsewhere. Discursive social psychology examines participants’ orientations and the involvement of descriptions with situated social practices (see Potter, 1998; Wood & Kroger, 2000). Discourse analysis of this type asks what actions the participants (the judges) are performing with their descrip-

⁶ Bavelas and Coates (2001) are careful not to blame judges for the use of erotic language in descriptions of sexual assault: “The judge has an obligation, in the judgment, to summarize the trial, so the language used could have been introduced during the trial by counsel or witnesses and then quoted or adopted by the judge” (p. 32). I would go one step further in arguing that sexualized language in offence descriptions may have an important performative function under Canadian law, which requires the demonstration of the sexual or carnal aspects of sexual assault in order to prove that this offence has occurred (Mewitt & Manning, 1994).

tions in particular instances. The resulting explication of the functions of discursive details in situated use demonstrates the complexity, subtlety, and creativity of judicial decision-making, which otherwise may not be apparent to the public.

There are limitations associated with the present study. First, analyses examined whether and how discourse was used to construct the offences as serious crimes; social justice advocates might well argue that more crucial indices of whether such crimes are treated seriously are the types and lengths of sentences handed down to offenders. Second, the study focused on particular discursive devices, such as metaphorical expressions. Although analysis of these devices was contextualized in terms of how these devices were incorporated in judicial evaluations of specific aggravating and mitigating factors, the study did not give an overall picture of how aggravating and mitigating factors were assessed in relation to each other within each case and to sentences. However, sentencing outcomes were not the main focus of this study. As Coates et al. (1994) have argued, study of the written discourse of legal judgments is important in and of itself because such texts express current law, as well as shape future law and society. Third, if we are interested in the implications of the findings for the Canadian courts as a whole, we must remember that the present sample is limited in a number of ways. It employed a small, selective database over a restricted time span from one provincial jurisdiction. In order to determine whether the awareness of the courts is changing with respect to the sexual abuse of children, wider sampling of the discourse from many more decisions across time and region is required.

But the judicial constructions identified in the present study show us what certain judges have done; the analysis points to the powerful potentialities of figurative language at the interface of law and wider society. For example, metaphor, the act of describing one thing in terms of another, can generate the emotional intensity required to perform denunciation. Although metaphors can be employed to legitimize the status quo, they can also be associated with new kinds of social practice, serving as agents of social change (Gergen, 1990). One heartening implication of the present study is that judicial language can and does engage with broader cultural psychological and clinical discourses on the negative effects of sexual victimization. The question remains as to whether such metaphorical descriptions are part of a larger social shift in which we may be finding new ways to think about and talk about crimes that have often been described as unspeakable.

The author thanks the editor, two anonymous reviewers, the late Rolf O. Kroger, and Linda A. Wood for their helpful comments on previous drafts of this article. An earlier version of this paper was presented in June 2003 in C. MacMartin (Chair), *Discourse and Rhetoric: Research Objects, Social Practice* at the annual meeting of the Canadian Psychological Association in Hamilton, Ontario. This research was supported by a Social Sciences and Humanities Research Council of Canada Postdoctoral Fellowship.

Correspondence concerning this article should be addressed to Clare MacMartin, Department of Family Relations and Applied Nutrition, University of Guelph, Guelph, Ontario, Canada N1G 2W1 (E-mail: cmacmart@uoguelph.ca).

References

- Alksnis, C. (2001). Fundamental justice is the issue: Extending full equality of the law to women and children. *Journal of Social Distress and the Homeless, 10*, 69-86.
- Antaki, C. (1994). *Explaining and arguing: The social organization of accounts*. London: Sage.
- Bavelas, J., & Coates, L. (2001). Is it sex or assault? Erotic versus violent language in sexual assault trial judgments. *Journal of Social Distress and the Homeless, 10*, 29-40.
- Billig, M. (1996). *Arguing and thinking: A rhetorical approach to social psychology* (2nd ed.). Cambridge, UK: Cambridge University Press.
- Coates, L. (1997). Causal attribution in sexual assault trial judgments. *Journal of Language & Social Psychology, 16*, 278-296.
- Coates, L., Bavelas, J. B., & Gibson, J. (1994). Anomalous language in sexual assault trial judgments. *Discourse & Society, 5*, 189-206.
- Coffey, A., & Atkinson, P. (1996). *Making sense of qualitative data: Complementary research strategies*. Thousand Oaks, CA: Sage.
- Drew, P. (1990). Strategies in the contest between lawyer and witness in cross-examination. In J. N. Levi & A. G. Walker (Eds.), *Language in the judicial process* (pp. 39-64). New York: Plenum Press.
- Edwards, D. (1994). Script formulations: An analysis of event descriptions in conversation. *Journal of Language and Social Psychology, 13*, 211-247.
- Edwards, D. (1995). Two to tango: Script formulations, dispositions, and rhetorical symmetry in relationship troubles talk. *Research on Language and Social Interaction, 28*, 319-350.
- Edwards, D., & Potter, J. (1992). *Discursive psychology*. London: Sage.
- Furniss, T. (1991). *The multi-professional handbook of child*

- sexual abuse: Integrated management, therapy and legal intervention*. London: Routledge.
- Gergen, K. J. (1990). Metaphor, metatheory, and the social world. In D. E. Leary (Ed.), *Metaphors in the history of psychology* (pp. 267-299). New York: Cambridge University Press.
- Hutchby, I., & Wooffitt, R. (1998). *Conversation analysis: Principles, practices and applications*. Cambridge, UK: Polity.
- Jackson, S. (1982). *Childhood and sexuality*. Oxford, UK: Basil Blackwell.
- Jackson, S., & Scott, S. (1999). Risk anxiety and the social construction of childhood. In D. Lupton (Ed.), *Risk and sociocultural theory: New directions and perspectives* (pp. 86-107). Cambridge, UK: Cambridge University Press.
- Jefferson, G. (1990). List construction as a task and resource. In G. Psathas (Ed.), *Interaction competence* (pp. 63-92). Lanham, MD: University Press of America.
- Johnson, M. J. (1987). *The body in the mind: The bodily basis of meaning, imagination, and reason*. Chicago, IL: University of Chicago Press.
- Lakoff, G., & Johnson, M. (1980). *Metaphors we live by*. Chicago, IL: Chicago University Press.
- MacMartin, C. (2002). (Un)reasonable doubt? The invocation of children's consent in sexual abuse trial judgments. *Discourse & Society*, 13, 9-40.
- MacMartin, C., & Wood, L. A. (2003). *Judicial constructions of sexual abuse offenders in sentencing decisions*. Unpublished manuscript, University of Guelph, ON.
- Mewitt, A. W., & Manning, M. (1994). *Mewitt and Manning on criminal law* (3rd ed.). Toronto, ON: Butterworths.
- Nofsinger, R. E. (1991). *Everyday conversation*. Newbury Park, CA: Sage.
- Pepper, S. C. (1942/1961). *World hypotheses: A study in evidence*. Berkeley, CA: University of California Press.
- Pomerantz, A. M. (1986). Extreme case formulations: A new way of legitimating claims. *Human Studies*, 9, 219-230.
- Potter, J. (1996). *Representing reality: Discourse, rhetoric and social construction*. London: Sage.
- Potter, J. (1998). Discursive social psychology: From attitudes to evaluative practices. In W. Stroebe & M. Hewstone (Eds.), *European review of social psychology: Vol. 9* (pp. 233-266). Chichester, UK: Wiley.
- Potter, J., & Edwards, D. (2001). Discursive social psychology. In W. P. Robinson & H. Giles (Eds.), *The new handbook of language and social psychology* (pp. 103-118). Chichester, UK: Wiley.
- Potter, J., & Wetherell, M. (1987). *Discourse and social psychology: Beyond attitudes and behaviour*. London: Sage.
- R. v. G. M. (1992) 77 C.C.C. (3d) 310.
- Renner, K. E., Alksnis, C., & Park, L. (1997). The standard of social justice as a research process. *Canadian Psychology*, 38, 91-102.
- Renner, K. E., & Yurchesyn, K. (1994). Sexual robbery: The missing concept in the search for an appropriate legal metaphor for sexual aggression. *Canadian Journal of Behavioural Science*, 26, 41-51.
- Ruby, C. C. (1994). *Sentencing* (4th ed.). Markham, ON/Vancouver, BC: Butterworths.
- Sarbin, T. R. (1990). Metaphors of unwanted conduct: A historical sketch. In D. E. Leary (Ed.), *Metaphors in the history of psychology* (pp. 300-330). New York: Cambridge University Press.
- Sas, L. D., Wolfe, D. A., & Gowdy, K. (1996). Children and the courts in Canada. *Criminal Justice and Behaviour*, 23, 338-357.
- Scott, S., Jackson, S., & Backett-Milburn, K. (1998). Swings and roundabouts: Risk anxiety and the everyday worlds of children. *Sociology*, 32, 689-705.
- Smith, R. C., & Turner, P. K. (1995). A social constructionist reconfiguration of metaphor analysis: An application of "SCMA" to organizational social theorizing. *Communication Monographs*, 62, 152-181.
- Spohn, C. C. (1994). A comparison of sexual assault cases with child and adult victims. *Journal of Child Sexual Abuse*, 3(4), 59-78.
- Sweetser, E. (1990). *From etymology to pragmatics: Metaphorical and cultural aspects of semantic structure*. New York: Cambridge University Press.
- Wilford, J. N. (1993, July 13). Site in Turkey yields oldest cloth ever found. *The New York Times*, pp. C1, C8.
- Wood, L. A., & Kroger, R. O. (2000). *Doing discourse analysis: Methods for studying action in talk and text*. Thousand Oaks, CA: Sage.
- Young, A. (1995). *The harmony of illusions: Inventing post-traumatic stress disorder*. Princeton, NJ: Princeton University Press.

Received December 17, 2002

Revised May 27, 2003

Accepted August 21, 2003