

# SEXUAL MOTIVES AND SENTENCING Judicial Discourse in Cases of Child Sexual Abuse

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*The motives ascribed to offenders in the sentencing of sexual abuse crimes can be highly contentious. Some critics claim that sexual assaults are acts of power and violence and that reference to sexual motives minimizes violence and the seriousness of the offense. The present study examines 74 Canadian judicial sentencing decisions (1993-1997) involving offenders who had sexually abused children and adolescents. Using discursive social psychology, the authors analyze judicial explanations for the offenses, and their implications for mitigation and aggravation. Violent attributions were rare. Sex-based explanations predominated, variously invoking the selfish gratification of offenders' sexual desires, sexual impulses, pedophilia, and offenders' attraction to victims. However, in contrast to critics' claims, these explanations are used by judges to emphasize the seriousness of these crimes. The findings highlight the importance of analyzing discourse in relation to action sequences rather than in isolation. The authors discuss the implications for the study of sexual assault and legal discourse.*

**Keywords:** *attribution; discourse analysis; sentencing decisions; sexual abuse; sexual offenders; violence*

The sentencing of sexual offenders can be highly contentious, in part because of the treatment of the sexual aspects of these offenses by the criminal justice system. Some critics claim that the inherent violence of sexual assaults necessitates that the motivations of offenders be described in terms of power and violence. Reference to sexual motives or explanations is seen to minimize violence and the seriousness of the

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offenses. Such arguments are part of a larger debate about the risks of viewing rape as a sexual crime. Cahill (2000) discusses the rationale behind influential feminist recommendations (e.g., Brownmiller, 1975), that rape be purged of its sexual content. The hope was that strategic desexualization of this crime would make moot any attempts on the part of the court to hold female victims responsible.

At first blush, it might seem that such arguments are relevant only in cases of adult sexual assault, not child sexual abuse. Defense arguments about complainants' consent to sexual activity are not legally relevant in cases involving child complainants (Sas, Wolfe, & Gowdy, 1996). However, in general discussions about patriarchy and sexual violence, it has been argued that the placement of children in a separate category of abuse ignores the continuities between the experiences of women and children (Kelly, 1988). Furthermore, the burden of secrecy and the self-incrimination that accompanies disclosure of sexual assault are viewed as binding women and children together in a false sense of culpability regarding their victimization (Lloyd, 1996).

Some social psychologists have conducted research that supports the separation of sex from violence in crimes against both women and children. Coates (1997) studied naturally occurring causal attributions in sexual assault trial judgments and sentencing decisions in 70 sexual assault cases in British Columbia, Canada, for the years 1986 to 1994. Independent raters inductively coded causal attributions for the offenses. Most judges attributed offenses to nonviolent causes such as sexuality or alcohol use; Coates interpreted this finding as evidence that sexual assaults are not considered violent. Furthermore, few attributions treated the offenses as volitional. There were frequent externalizing attributions, reported to reduce the agency of offenders by describing them "as succumbing to externalized psychological forces or to circumstances (e.g., being alone with children)" (Coates, 1997, p. 293). References to pervasive sexual causes of the offenses, such as pedophilia, were frequent. These ascriptions were seen to minimize offenders' responsibility for their crimes. There was a significant correlation between sentence length and attributions; lower sentences were found in judgments containing nonviolent attributions. Coates also reported that legal sentencing principles were violated in breach-of-trust cases involving child victims.

Bavelas and Coates (2001) analyzed the language of 75 sexual assault judgments in British Columbia from 1986 to 1992. Cases included women and child complainants. Eight analysts categorized the discourse of the judgments in terms of whether sexual, violent, physical, disapproving, or oxymoronic descriptions of the offenses were used. Sexual descriptions were found to be the most frequent. Bavelas and Coates claimed that the use of erotic or sexual language minimizes the intrinsic violence of the assaults and "strongly implies mutuality and consent" (p. 29).

Coates and Wade (2004) analyzed psychological explanations or causal attributions for sexual assault in 64 trial judgments from British Columbia and the Yukon from 1986 to 1993, using some of the British Columbia cases previously featured in Bavelas and Coates (2001) and in Coates, Bavelas, and Gibson (1994). Complainants were women and children. Analysts categorized the explanations given for the assaults into different types of attributions. Coates and Wade reported that most judges accounted for the crimes by drawing on psychological explanations that reformulated deliberate acts of violence into non-deliberate and nonviolent activities. The authors argue that the only acceptable attributions for sexual assaults are those that construct these crimes as involving premeditated, deliberate decisions by perpetrators to commit violence. Any other kinds of explanations, including references to offenders' sexual drives or psychopathology, are viewed as inaccurate and unjust because they conceal the inherent violence of the offenses and mitigate the responsibility of the offenders.

Bavelas and Coates (2001) suggest that some judges (and others) may see it as appropriate to view sexual offenses in sexual terms because the motives for the offenses are sexual. Bavelas and Coates reject this position on the grounds that the motives should not be seen as sexual, an argument for which they provide several sorts of support, for example, previous research on links between other sorts of violence and rape, and the characteristic vulnerability of targeted populations. They claim further that attributions involving sexual motives, which are presumed to be judged as less problematic than violent motives, represent "the perpetrator's version and language" (Bavelas & Coates, 2001, p. 32). The implication is that to adopt this language is to collude with perpetrators; such language disguises (and hence, normalizes) the offenses as involving sex.

The work of Coates and colleagues (Bavelas & Coates, 2001; Coates, 1997; Coates et al., 1994; Coates & Wade, 2004) makes important contributions. It stresses the constitutive role of discourse in legal activities and the ways in which language constructs versions of reality, the rhetorical consequences of which may have serious implications for social justice. Moreover, this research studies naturally occurring attributions. It thus provides a welcome alternative to most social-psychological research on attributions, which relies on experimental procedures that do not illuminate the functions and actions performed by such attributions outside the laboratory (Antaki, 1994; Edwards & Potter, 1992).

However, Coates (1997), Bavelas and Coates (2001), and Coates and Wade (2004) used coding, categorizing, and quantitative analyses. These techniques abstract discursive attributions from the sequences in which they are embedded, the effects of which may be to limit our understanding of the flexibility of such attributions in use. Even when detailed qualitative analysis is conducted, as when Coates and Wade

provide an illustrative discourse analysis of a single case, the meanings of particular lexical choices are divorced from the institutional actions performed by the descriptions in the judgment. For example, Coates and Wade criticize the following judicial description as reformulating the sexual assaults committed as nonviolent: "Neither in the circumstances here nor in the fantasies has there ever been any violence or anything more than touching" (p. 518). The authors fail to acknowledge the particular judicial action performed by this description. That is, judges are institutionally obligated to consider possible aggravating factors, including whether sexual assaults involve collateral violence, the application of force, or additional violence beyond that inherent in the crime of sexual assault. And although Bavelas and Coates are careful not to blame judges for the sexual references they use, their claim that sexual terminology inevitably connotes mutuality and normality runs up against the idea that the meaning of language is inextricably bound up with the particular contexts in which it is situated and used (Garfinkel, 1967).

The purpose of the present study was to explore the situated use of judges' explanations for offenders' conduct in cases of sexual abuse of children and adolescents. We examined sentencing decisions in such cases to see whether and how judges oriented to the reasons for these crimes. We chose the methodology of discursive social psychology because discourse analysis of this type can elucidate the particular actions performed by such explanations and descriptions in use. Our goal was to analyze the kinds of explanations drawn upon and the actions performed by these explanations, with particular attention given to sex-based explanations for offenders' conduct.<sup>1</sup> Rather than presume that sexual motives by definition minimize the seriousness of the crimes they are used to explain, we wanted to see whether and how such elements were employed in judges' discourse.

## METHOD

### DATABASE

The data consisted of 74 sentencing decisions in criminal cases of sexual abuse offenses taken from Quicklaw, an electronic Web site containing databases of Canadian legal judgments, for the years 1993 to 1997 in Ontario, Canada. The cases were selected to cover all possible sexual offenses against child and adolescent victims aged 17 or younger except those involving appeal cases, which focused on legal rather than substantive issues. Both extant offenses and repealed offenses (those no longer included in the Canadian Criminal Code) were included so that cases of both historical sexual abuse and recent offenses could be examined. Each judgment included the judge's decision and reasons

for the decision, though judgments varied in the amount of detail provided. Charges involved such crimes as sexual assault and indecent assault, buggery, rape, and sexual exploitation and, in some cases, nonsexual offenses in addition to the sexual offenses. Only one of the offenders was female.

#### **DISCURSIVE SOCIAL PSYCHOLOGY AND ATTRIBUTIONS**

Discursive psychology applies notions from discourse analysis to key research topics in psychology such as attribution (Edwards & Potter, 1992). More particularly, discursive social psychology (DSP) takes topics in social psychology and respecifies these as actions performed in and through discourse (i.e., talk and texts, studied as social practice) (Potter & Edwards, 2001). The analytic focus is on the actions performed through discourse as part of situated practices.

Three important theoretical features of DSP help us contrast it with more conventional approaches to the study of causal attributions (Potter & Edwards, 2001). First, discourse is situated: it is both occasioned and rhetorical. By “occasioned” we mean that discourse is embedded in a particular context as part of some kind of sequence.<sup>2</sup> For example, a judicial description of an offender’s motivation in committing an offense may be embedded in a larger discussion of the judge’s reasons for sentence, which collectively serve to argue that the penalty is appropriate in this case. Discourse is also pervasively rhetorical (Billig, 1996). A factual description of an offender’s motives may be designed to uphold a particular version of offender responsibility and to counter alternative versions, including alternative sentencing outcomes.<sup>3</sup> This brings us to the second feature of DSP: it treats discourse as action-oriented (Potter & Edwards, 2001). Concerns about fact and interest and about accountability dovetail with a focus on the actions performed by judicial explanations for offenders’ conduct (see Edwards & Potter, 1992).<sup>4</sup> Causal inferences and their implications are frequently performed indirectly through such constructions as event and person descriptions, factual accounts, and descriptions of mental states that are treated as members’ concerns and activities (Edwards & Potter, 1992). The third theoretical feature of discourse is that it is constructed (Potter & Edwards, 2001). DSP is constructionist in two senses. First, discourse constructs certain versions of the world that do certain things, such as argue that a particular offender should be incarcerated for an indefinite period of time. Second, discourse is constructed from words, figures of speech, descriptions, narratives, and so on, which can be studied in order to understand how the discourse is built to perform certain actions.

Unlike the categories-and-counting approach used in previous research, DSP does not separate the actions of discourse from how it is

built and how such actions are achieved. This methodology overcomes the false dichotomizing of sex-based and violence-based accounts promulgated in previous research because DSP can show links, as well as contrasts, between various kinds of attributions and how they might work together. Because of our interest in debates on the appropriateness of invoking sexual motives as reasons for sexual offenses, we attended particularly to sex-based explanations and the sorts of event and person descriptions with which such attributions were bound up. We focused on action, fact-and-interest, and accountability (Edwards & Potter, 1992; Potter, 1996), drawing as appropriate on other analytic notions (Wood & Kroger, 2000). What kinds of explanations for the offenses did judges draw upon, and what kinds of discursive devices were used to construct these explanations as plausible or factual? What kinds of institutional actions in the decisions were performed through judicial references to explanations for the offenses? That is, how did judges employ these explanations to warrant the sentences they handed down? Given claims in previous research that sex-based explanations minimize offenders' responsibility (e.g., Bavelas & Coates, 2001), we wanted to explore whether and how attributions for the crimes were linked to judicial assessments of offenders' agency and accountability. We also wanted to know whether judges oriented to the normality or deviance of the offenses.

## ANALYSES

### GENERAL FINDINGS

We found that explanations for the offenders' actions were not always explicitly oriented to in the sentencing decisions. In 28 of the 74 cases, explanations for the crimes were not provided. In such cases, as in almost all of the cases in our corpus, judges laid out the reasons for their decisions, including aggravating and mitigating factors and the sentencing principles observed. However, reference to the offenders' motives or other explanations for the crimes was not included: rather, aggravating factors might include such concerns as breach of trust and the psychological effects of the offenses on the victims. The causes of (or reasons for) offenses would not appear to be a necessary justification for particular sentences.

In the remaining 46 cases, judgments oriented to an assortment of causes of or reasons for offenders' crimes. These explanations were variously presented as the opinions of defense counsel, of the Crown (the prosecution), of experts such as psychiatrists or psychologists, or as those of the judges themselves. Explanations for offenders' conduct were drawn upon in a variety of actions. Judges used such explanations to assess various mitigating and aggravating factors; sometimes



the explanations themselves were treated as aggravating or mitigating factors. Judges also drew on these explanations when orienting to a range of sentencing principles and concerns, including general and specific deterrence, rehabilitation, and denunciation.

#### SEX-BASED EXPLANATIONS

The most frequent kinds of explanations invoked sexual dimensions such as the offenders' gratification of their sexual desires and impulses. Only four of the decisions included explicit references to aggression, violence, or power as explanations for the offenses. There were 32 judgments that invoked various sexual aspects to explain the reasons for the crimes. We focus here on the most frequent.

*Sexual gratification.* In 17 of the 74 decisions, offenders were variously described as being selfishly motivated by their own sexual pleasure, as using children either to gratify their own sexual desires or to satisfy depraved desires. Such references typically contrasted the offenders' experiences of the assaults with victims' experiences. These ascriptions were used to denounce the offenses and to emphasize aggravating factors such as the young age of the victims, the negative psychological effects of the abuse on victims, and breach of trust. Explanations sometimes referred to how the crimes demeaned and degraded victims whose own needs and interests were sacrificed in order to satisfy offenders' sexual desires. Consider this excerpt from Case 8. A jury had convicted the offender of indecent assault of his nephew.

#### Excerpt 1, Case 8:

[para11] There are many aggravating factors indeed. Mr K.'s actions involved a serious breach of trust. D.G. was his nephew and when these events first occurred, he was a very young child, 11 years old only. The actions continued through and into middle puberty, surely a very sensitive and difficult time for any adolescent, such difficulties clearly exacerbated by the activities of a much older and extremely selfish man whose only motive could have been his own sexual gratification at the expense of a young boy.

The fact-constructive device "indeed" indicates the undeniable presence of aggravating factors. Adjectival intensifiers upgrade the gravity of a crime involving not merely aggravating factors and breach of trust, but "many aggravating factors" and a "serious breach of trust" (involving the familial category "nephew"). Moreover, other lexical aspects construct rhetorical contrasts (Edwards & Potter, 1992) between the ages, relative power, and interests of nephew and uncle. The use of developmental and age-based categories, extrematized through the addition of adjectival and adverbial intensifiers, contrasts the victim

at the time the offenses began (“a very young child, 11 years old only,” “a young boy”) with the offender (“a much older . . . man”). The vulnerability of the child victim to exploitation by the adult offender is thereby underscored.

A different kind of developmental vulnerability is drawn upon to describe this same victim in adolescence. A sexual offense perpetrated on an adolescent may be viewed by some as less serious than an offense involving a younger victim, perhaps in part because of the relative sexual and physical maturity of the adolescent victim and, concomitantly, his or her possible interest in sexual activity. This judgment wards off such a categorization by using an extreme case formulation to describe this time of life as “surely a very difficult and sensitive time for any adolescent.” An extreme case formulation uses extreme points on relevant dimensions to argue a particular claim (Pomerantz, 1986). Here, in combination with the use of the adjective “surely,” which underscores the facticity of such a claim, the extreme case typifies adolescence as a period fraught with difficulty for “any” and all teenagers, without exception and even in optimal circumstances. The upshot is that no specific case for the vulnerability of this particular boy needs to be made. The natural difficulties of adolescence, ignored by the offender, are cruelly compounded for the victim, as they would be for any victim. His developmental needs have been sacrificed to satisfy the desires of the “selfish” offender, “whose only motive could have been his own sexual gratification at the expense of a young boy.” The impossibility of mutuality and the inevitable psychological costs of the abuse for the victim are thus promoted. The use of a modalized verb (the conditional form “could”) defines the statement as judicial conjecture, not as part of the evidence established during the proceedings. Nevertheless, the extreme case formulation (“only motive”) upholds the epistemic certainty of such a conjecture on the grounds that there are no other logical motives available to explain why the offender committed this crime.

We note that the expression “at the expense of a young boy” is not itself a sexual description but is grammatically connected to and completes the sentence referring to the offender’s motive of “sexual gratification.” References to sexual motives and to their serious effects (the violation of victims) are mixed together in the same description. This finding is in line with Edwards and Potter’s (1992) critique of conventional attribution theory and experimental research in which situational causes and personal causes are set up as mutually exclusive alternative explanations. In contrast, discourse analysis shows how in naturalistic accounts consisting of people’s everyday narratives, situational and personal attributions often occur together.

*Sex drives or impulses.* In 12 cases, explanations involving offenders’ sexual drives or sexual impulses were referred to in either explicit or



implicit terms. Explicit references described offenders acting on the basis of sexual drives, sexual impulses, or as being unable to control their sexual impulses or themselves. Implicit references described offenders having undergone interventions (chemical or physical castration) or consisted of recommendations that such interventions be carried out. As noted by Coates (1997), constructions of sexual drives and impulses may attenuate the agency of offenders by suggesting that their conduct lies beyond their volition or control. In some of our cases, the risk of future offending could be minimized through constructions of this loss of control as momentary rather than as part of an ongoing or repetitive pattern of conduct that is premeditated in nature. In Case 53, such a description forms one plank in a defense argument recommending a noncustodial sentence. The offender pleaded guilty to sexual assault of two girls who were the daughters of close family friends.

#### **Excerpt 2, Case 53:**

[para16] Moreover the offender has undergone counselling and therapy for 14 months. Dr. Kafato's report included in the documentation filed by counsel, indicates that the offender suffers no psychological disorders and poses no danger to the community, including children. The psychiatrist states that the offender is remorseful and that a repetition is unlikely. He ascribed the offender's conduct to momentary loss of control.

[para17] The crown countered that Dr. Kafato's report is flawed insofar as the offender down played the sexual gratification of his behaviour and has not fully acknowledged responsibility for his actions. The crown also pointed out that while the offender pleaded guilty, it was only at the eleventh hour after the preliminary inquiry.

Analysis of this excerpt illustrates the rhetorical affordances associated with qualifying the offender's loss of control as "momentary." The potentially mitigating aspect is enhanced when placed in the context of psychiatric testimony about the absence of a psychiatric disorder, absence of future risk, remorse on the part of the offender, and the amount of time already spent in rehabilitation. The amount of time the offender spent engaged in the offenses is minimized and contrasted with the amount of time spent rehabilitating himself. We might reflect further on the rhetorical effects of the adjective "momentary" as compared with an alternative, "temporary." "Momentary" is perhaps the more potentially persuasive lexical choice because it reduces the period of time of the offense to a single "moment" in time, after which the offender presumably restrained himself and ceased his offenses.

Such a description also avoids explicit mention of motive, motivation, or interest on the part of the offender in committing the crimes. In this regard, reference to "momentary" loss of control is a kind of motive-less explanation for the offenses. However, this very aspect

allows the judge to draw upon the prosecution's counter-argument. Paragraph 17 reports the stance of the Crown, which argues that the offender has "down played [sic] the sexual gratification of his behavior and has not fully acknowledged responsibility for his behavior." The logical sequencing of these two elements, the offender's minimization of his experiences of sexual gratification and its role as a signal of his incomplete assumption of criminal responsibility, trades on the notion of sexual gratification as a taken-for-granted motive in cases of sexual abuse (recall our analyses of Case 8 in Excerpt 1). In Case 53, the judge goes on to accept the remorse of the offender as genuine and indicates that a repetition of the offenses is unlikely; however, the aggravating factors of breach of trust and the psychological consequences of the offenses for the victims are also noted. Drawing upon the principle of general deterrence, the judge decides that a period of incarceration is needed to denounce this crime to the public.

In other cases, offenders' loss of control over their sexual impulses was constructed as an enduring problem, the chronicity of which points to offenders' prior failure to rehabilitate themselves and the ongoing threat they pose to children. These descriptions were often part of judicial evaluations of the dangerousness of offenders. For example, in Case 54 the offender had a prior criminal record of sex crimes involving children. He pleaded guilty to eight counts of sexual offenses and was convicted on six of these. The victim was a boy who disclosed multiple episodes of abuse after he learned that the offender had just been jailed for sexually assaulting a girl. After describing the offender as being "unable to control his sexual impulses," the judge provides a warrant for the imposition of "some rigid future control" (Paragraph 17):

**Excerpt 3, Case 54:**

[para18] It is clear from the evidence that the offender's conduct establishes a pattern of repetitive behavior showing a failure to restrain his behavior that shows a likelihood that he will cause severe psychological damage to others. The evidence also clearly sets out that the offender actively pursues and makes contact with potential victims. He persists in doing so in an aggressive manner and demonstrates a substantial degree of indifference to the consequences inflicted upon his targets. The offender is clearly a threat to the mental well being of children.

The initial sentence in this paragraph uses "dummy it" (Penelope, 1990) and empiricist accounting (Edwards & Potter, 1992) to refer to the clarity of the evidence regarding the repetitious nature of the offender's conduct and its implications in predicting future crimes ("it is clear from the evidence"). The description of the offender's "pattern of repetitive behaviour" is a script formulation (Edwards, 1994, 1995) that works up as ongoing the offender's "failure to restrain his behavior." The diminution of agency promoted by this description is tied to

the assessment of the dangerousness of the offender, emphasized in the context of judicial conjecture about “a likelihood that he will cause severe psychological damage to others.” The adjective “severe” intensifies this damage, stressing the concern.

However, claims about the offender’s lack of self-control open the door to a different kind of possible inference, namely, that this “failure to restrain his behavior” can be explained with reference to disinhibiting situational factors, the temporary or random nature of which might call into question the soundness of judicial predictions about the likelihood of re-offending and the need for strong external control. The judgment is carefully designed to thwart such an inference through incorporation of descriptive elements that ascribe agency, not only to the offender, but also to the evidence itself: “The evidence also clearly sets out that the offender actively pursues and makes contact with potential victims.” The verb choice “pursues,” when modified by the adjective “actively,” promotes the agency of the offender who is described as strategically grooming his “potential victims.” Note that the seeking out of victims is not treated as compelled by impulses beyond the control of the offender but is expressed in agentic terms. Employment of the present tense (“pursues,” “makes contact”) signals the presence of a script formulation of the offender’s conduct as enduring or routine, suggesting that such conduct may extend into the future, beyond the offenses of which he has been convicted. Again, we see here the way in which these sorts of comments are tied to the actions being performed in the judgment, namely, the declaration that the offender in Case 54 is dangerous and requires life-long monitoring. The inclusion of additional features of his conduct (his persistence, aggressiveness, and lack of empathy regarding the psychological outcomes for his victims) contributes to this portrait of a person who, in perceptualist terms (“clearly”), is adduced to be “a threat to the mental well being of children.” He is sentenced to an indeterminate period of incarceration.

*Pedophilia.* Elsewhere in Case 54, the offender’s diagnosis as a bisexual pedophile is outlined. Constructions of lack of control over sexual impulses frequently occurred in cases in which pedophilia was raised. In our sample of 74 cases, 11 decisions oriented to pedophilia or pedophilic aspects of behavior as part of the explanations given for the offenses. In contrast to sexual gratification, a common-sense motive about which judges freely conjectured, the category of pedophile was invariably introduced only in the context of expert evidence cited from psychiatric or psychological assessments. Indeed, this pattern obtained even if the particulars of the cases in question might suggest the appropriateness of such a diagnosis. In cases in which medical evidence was not available or was not definitive, either the offender was described as presenting some pedophilic tendencies or his conduct was described in

terms such as having “some of the markings” of a pedophile. This caution is understandable, given that pedophilia is a disorder that can be diagnosed only by licensed professionals.

Some descriptions of pedophilia explicitly categorized offenders as suffering from a psychological illness. The category entitlement (see Edwards & Potter, 1992) associated with this identity works to reduce the agency of offenders whose deviant behavior can be attributed to their underlying disorder. In this sense, judges could, and sometimes did, treat a diagnosis of pedophilia as a mitigating factor. However, the category of pedophilia can simultaneously suggest a variety of aggravating factors when offenders’ criminal conduct is worked up as enduring. The presence of multiple offenses and victims, the tender age of victims (who are prepubescent in cases of pedophilia), offenders’ lack of motivation to seek treatment and the frequent failure of treatment were variously raised as aggravating factors or serious concerns.

To exemplify some of our analyses, we next consider Case 30 in which the offender pleaded guilty to sexual assault and counseling sexual touching. His multiple victims were all young boys. The judge indicates that “the accused has been diagnosed as a paedophile” (Paragraph 16):

**Excerpt 4, Case 30:**

[para17] The accused was not deterred by 12 months imprisonment, parole revocation or probation and did not respond to treatment. He acknowledges that he is unable to control his sexual impulses towards young boys.

[para18] There is a substantial risk that this accused will reoffend. Although paedophilia is a psychiatric disorder which tempers the sanction to be applied to the accused, the need for protection of the public, namely the young boys of the age who have repeatedly fallen victim to the accused, is a factor to be given substantial weight, having regard to the failure of the accused to respond to the previous penalty. This accused constitutes a significant danger to young boys.

We see laid out in Paragraph 17 the kinds of inferences that the previously mentioned diagnosis of pedophilia makes available and understandable, including the pedophile’s characteristic resistance to rehabilitation. Here, the judge evaluates the risk of reoffending by enumerating a variety of worrisome pieces of evidence regarding the specific deterrence of the offender. There is a three-part list testifying to lengthy and varied responses of the justice system (“12 months’ imprisonment, parole revocation or probation”), which have all failed to deter the offender. Lists can be used to work up the comprehensiveness or generality of a certain state of affairs (Jefferson, 1990); in this context, the list suggests the utter failure of the offender to respond appropriately to criminal punishment. To this list is appended another

concern, the offender's failure to respond to therapeutic intervention: "and did not respond to treatment." In sum, the offender has shown resistance to rehabilitation in both penal and therapeutic contexts.

These failures are made understandable in the context of pedophilia as a disorder. The offender is described as acknowledging that "he is unable to control his sexual impulses," which speaks to the strength of such impulses even in the wake of punishment and even in the presence of a certain amount of self-awareness. The description of his victims ("young boys") underscores their vulnerability and the gravity of the offenses. The present tense ("is unable") treats the risk to the public as current. We note that this is one of the judgments in which the sense of risk is emphasized by implicitly characterizing the offenses as multiple and as occurring over a long period of time: "the offences are not the momentary failure to resist an impulse." The judge enrolls a dispositional formulation of the offender as an ongoing risk. The guesswork associated with predicting a future event is reduced through the employment of an externalizing construction (Potter, 1996) that asserts this risk as a matter of fact: "There is a substantial risk that this offender will reoffend." This is a much more emphatic kind of statement than would be the case had the judge used hedging devices (e.g., "in my opinion") or modalizing devices (e.g., "the offender might reoffend"). And the risk is "substantial," a lexical choice that underscores this claim. Immediately following this assertion, there is careful acknowledgment of pedophilia as a mitigating factor. However, the mitigation is counterbalanced by the substantial weight given to the need to protect society. Repeating in Paragraph 18 the category of victims described in Paragraph 17 ("young boys"), the judge delineates the requirement to protect "young boys of the age who have repeatedly fallen victim to this accused."

In contrast to Case 30, pedophilia is treated as an aggravating factor in Case 72. The judge counters the defense position that the offender's abusive actions were situational or opportunistic, and that his diagnosis of heterosexual pedophilia was an illness he could not control. The offender had pleaded guilty to a variety of sexual offenses against his stepdaughter, his infant foster daughter, and his adoptive daughter L. M., confined to a wheelchair with spina bifida:

**Excerpt 5, Case 72:**

[para45] In my opinion, the diagnosis of heterosexual paedophilia is an aggravating as opposed to a mitigating factor. These are not the actions of a person reacting poorly to a situation of stress or to an abuse of alcohol. Rather, this is a man acting out on his sexual attraction to children that he has been cognizant of and aware of since he himself was 11 or 12 years old. As such, there is a danger to the community if his disorder is not treated on a perpetual basis.

“In my opinion” particularizes the statement about pedophilia as aggravating by personalizing it as the stance of this judge. The contestable nature of this claim projects possible disagreement on the part of those who would treat pedophilia as mitigating. The judgment defends against such dispute by using a negation that introduces hypothetically mitigating features that do not pertain to the conduct of this offender: “These are not the actions of a person reacting poorly to a situation of stress or to an abuse of alcohol.” The judge thereby displays an awareness of and readiness to consider mitigating factors in principle. Such a display serves to counter arguments that this judge may be unwilling or unable to identify mitigating aspects of cases. These hypothetical examples, in which sexual offenses are categorized as reactions to temporary conditions that precede and facilitate them, are contrasted with the current case. Here, the offender “is acting out on his sexual attraction to children that he has been cognizant of and aware of since he was 11 or 12 years old.” The lexical choice, “acting out on,” positions him as an agent or actor, not a patient, with respect to his deviant condition. (“Acting out” may suggest more strongly a sense of some underlying uncontrollable force than does “acting out on.”) The sense of the offender’s responsibility is further stressed through emphasis on his awareness of his condition, expressed in the form of the doublet (“cognizant of and aware of”) and the lengthy amount of time he has known about it (“since he was 11 or 12 years old”). By implication, the judge argues that the offender has had many opportunities, never taken, to seek treatment. The deviant character of pedophilia, involving “sexual attraction to children,” demands moral action on the part of the person suffering from the affliction. Thus, the offender may not be responsible for experiencing the disorder of pedophilia but he is held responsible for obtaining treatment and for preventing victimization of children.

*(Sexual) attraction.* Constructions of pedophilia allowed judges to stress the seriousness of such crimes not only in terms of their harmful consequences but also in terms of their inherent deviance. The aberrance of adult sexual attraction to male or female children provided the basis for viewing this condition as a disorder or illness. However, there were two judgments involving adolescent female victims and male offenders (a teacher in one case and a sports coach in another) in which sex-based explanations described attraction in more normalized ways. That is, not all explanations invoking attraction carried with them evaluations of extreme deviance.

Let us consider Case 6. The offender, J. B., was a teacher convicted of sexual exploitation of his female student, B. O., an adolescent at that time. The acts constituting the offense consisted of manual touching and what was described as a “French kiss” perpetrated by the offender. The judge acknowledged that the offender had offered support and



comfort to his student over the course of several years. The following excerpt comes after the judge has commended the offender for his professional dedication in helping others, including (presumably) the victim. The judge describes the offender as having “allowed himself a few liberties which he ought not have done” (Paragraph 7):

**Excerpt 6, Case 6:**

[para8] I have struggled with this problem during the course of the trial and since. Obviously, a troubled, young, sensitive, attractive girl can attract, as it must have attracted, the sympathy and compassion of the accused. It is not a big step to go from sympathy, compassion to affection and obsession, and I can only assume that this is what led B.(J.) to approach O.(B.) in the way [sic] did. It was a human failing and he has paid dearly for it. One that is understandable not justifiable. No matter what the situation, the inevitable last step before one may fantasize and one may actually commit the impugned conduct is a very long step. It is not committed without some planning and premeditation. Those things do not just happen on the spur of the moment over a period of years.

The judge’s first-person description of struggle in this case foregrounds its complexity and attributes any objections to the sentencing outcome to the challenges of the case rather than to an absence of care on the part of the judge. The judge thereby displays conscientiousness in deciding on a penalty for an offense that is at the low end of the scale but which occurred in the context of breach of trust and caused the victim great psychological distress.

In other cases involving prepubescent children, the attraction of the offenders to the victims was explained in terms of the deviant characteristics of the offenders. In Case 6, however, victim characteristics are drawn upon to render the offender’s attraction to her understandable. And it is not the characteristics of this particular girl that are invoked, but rather a script formulation of a generalized victim and accompanying scenario that is broadly recognizable in terms of the canonical trajectory of its narrative. The common-sense elements of this scenario make judicial conjecture about the reason for the offender’s conduct seem logical: “Obviously, a troubled, young, sensitive, attractive girl can attract, as it must have attracted, the sympathy and compassion of the accused.” The adverb “obviously” normalizes the offender’s “sympathy and compassion” in response to “a troubled, young, sensitive, attractive girl.” The list of adjectives describing the victim includes details that promote an understanding of both the offender’s desire to help her (someone “troubled, young, sensitive”) and how he came to commit the offenses (perpetrated on an “attractive girl”). Attractiveness, a property of the victim, serves to normalize the offender’s reaction to her. “Sympathy and compassion” are laudable responses evoked in the offender, rather than morally problematic ones.

The sympathy of the offender toward the victim is echoed by the apparently sympathetic stance of the judge toward the offender in Case 6. The judgment draws on a metaphorical reference ("not a big step") to document the shift of the offender's responses, from "sympathy, compassion to affection and obsession," as one that is not difficult to comprehend. The understandable aspects of the offender's conduct, and the sympathetic stance of the judge, are further promoted through categorization of the offense as "a human failing." It invites identification with the offender whose actions are described in terms of the universal capacity of human beings to fail or err. "Failing" is a far cry from "crime." This depiction departs from those in other judgments in which offenders' actions were described as "monstrous" or "depraved." Moreover, reference to the severe consequences already experienced by this offender, "who has paid dearly" for his behavior, implies that a harsh penalty is not required. Indeed, the offender receives a suspended sentence plus 3 years of probation.

All these discursive elements operate together to project the rationality of a light penalty in this case. However, the judge is careful to contrast the small step taken by the offender (from sympathy and compassion to affection and obsession) with the "very long step" from "fantasy" to "the impugned conduct." This rhetorical contrast is used to stress the responsibility of the offender by affirming the premeditated aspects of the offense: "It is not committed without some planning and premeditation. Those things do not just happen on the spur of the moment over a period of several years." Note that these conjectures are expressed using negations that reject alternative versions, presumably defense versions that would seek to minimize the gravity of the offender's conduct by positing it to be the expression of a sudden, impulsive, momentary loss of control. In this regard, the judge draws on the long-term nature of the relationship between the offender and the victim, which itself provides the basis for the charge of sexual exploitation, as the context within which the offender's obsession with the victim developed over time. At the conclusion of Paragraph 8, the judge defends against possible claims that the explanation offered for the offense is tantamount to condoning it: the conduct is described as "understandable but not justifiable."

Various characteristics of this case may promote the normalization of attraction on the part of the accused toward the victim: her developmental stage as an adolescent; the heterosexual aspect of the male teacher-female student relationship; the undeniable support given to the victim by the offender over the course of several years prior to the offense; and the relative lack of physical intrusiveness of the particular actions of the offender. Together, these characteristics may render understandable the attraction or obsession on the part of the accused, though the judge is careful to differentiate between the feelings of the offender (over which he might have little control) and his actions,

which the law requires him to control. Case 6 thus differs from some other cases involving prepubescent victims, homosexual, heterosexual, or bisexual pedophilia, incest, and/or physically intrusive activities by the offenders. It should be noted that the idea of sexual attraction as a reason for the offense in Case 6 is implied. The term *sexual* is not explicitly used in this excerpt to describe either *obsession* or *fantasy*, both of which are used to hypothesize about internal states of the offender precipitating the offense.

#### SUMMARY

Explanations of the offenders' crimes, when these were offered, did not often refer to violence or power. Rather, judges most frequently invoked sex-based explanations for the offenses. Such explanations included descriptions of offenders' sexual gratification, their sex drives or sexual impulses, pedophilia or pedophilic tendencies, and the attraction of offenders to their victims. Although in one case the offender's attraction to his victim was rendered understandable (with possible normalizing implications here), in the other judgments the deviance of the offenders' sexual interests in victims was emphasized. That is, sex-based explanations for the offenses were typically used to signal the morally problematic nature of the offenders' conduct. Analyses demonstrated considerable pragmatic flexibility in terms of how such explanations could be drawn upon to uphold or minimize the agency or responsibility of offenders. For example, pedophilia as a psychological or psychiatric disorder was variously treated as mitigating and aggravating. We also noted the flexible and multiplex nature of these explanations in terms of their action orientation. For example, reference to sexual motives could be used to denounce the depravity of an offence and the need for general deterrence; a description of an offender's difficulties in controlling his sexual impulses might be used to justify recommendations regarding the need to protect the public or the need for specific deterrence in the form of rehabilitation.

#### DISCUSSION

Bavelas and Coates (2001) insisted that the language of sex in legal judgments inevitably connotes mutuality and consent, thereby minimizing the seriousness of sexual offenses against women and children. However, in our discourse-analytic study, judicial descriptions of sexual motivations or other kinds of sex-based explanations for child sexual abuse were primarily employed to underscore the severity of the crimes. For example, some offenders were described as using children to gratify offenders' sexual desires, such that a depiction of the sacrificing of children's interests, not mutuality, was associated with sexual

language. Even in the one case in which the explanation for the offense seemed to normalize the offender's attraction to his adolescent victim (Excerpt 6, Case 6), our analysis demonstrated that the judge was careful to separate understanding of the reasons for the crime from justifying or otherwise condoning it.

Bavelas and Coates (2001) argued that the dependence and vulnerability of populations typically targeted by sexual offenders provide compelling reasons for viewing offenders' motivations in terms of power, violence, or control rather than in terms of sex. But let us recall our analyses of Excerpt 1 in which breach of trust was described as an aggravating factor. Such analyses demonstrate how judges could use sex-based explanations (such as sexual gratification) to emphasize the illegitimate use of power exercised by an offender to exploit a vulnerable child. The flexibility of language in use means that sexual terms can be employed to foreground a perpetrator's misuse of power. Judges also oriented to the interrelationship between sex and power recognized in offenses like sexual exploitation.<sup>5</sup>

Bavelas and Coates (2001) also suggested that adoption of sexual motives to explain offenders' behavior draws on offenders' own explanations for their conduct, and thus colludes with offenders' minimization of their responsibility for their crimes. Judges in our study accepted sex-based explanations for the offenses but still treated the conduct as wrongful. Moreover, we found that sexual motives were not exclusively drawn upon by offenders but were frequently offered as the opinion of psychiatric or psychological experts or of the judges themselves. And such opinions did not always concur with those of the offenders cited in the decisions. Indeed, some offenders who were convicted after pleading not guilty were described as denying that the crimes took place at all, whereas other offenders were described as denying the sexual components of the crimes, instead categorizing their actions as affectionate exchanges. In the realm of child sexual abuse, it seems, the admission of sexual motives toward children typically has inculpatory implications.

Let us revisit the particular legal context in which influential arguments against the sexualization of rape occurred. Brownmiller's (1975) stance was a reaction to a particular defense argument arising in rape trials involving women as complainants. The defense position is that consensual sex, not sexual assault, occurs in these cases, making women responsible for their (presumed) participation in sexual activity.<sup>6</sup> This argument is very different from that typically adopted by the defense in cases of child and adolescent sexual assault in which complainants of that age by definition cannot consent to sexual activity with adults. It might be agreed that the patriarchal society in which we live has created a range of experiences of sexual violence (Kelly, 1988) perpetrated on both women and children. However, there is discontinuity between women and child victims in the kinds of defense

arguments available when these cases enter the criminal system. In cases of child sexual abuse, the sexualization of such crimes during the sentencing phase works to emphasize the seriousness of these offenses, in part because of the rhetorical affordances associated with the category “child” and the related antimony between children and sexuality in our culture (see MacMartin, 2004).<sup>7</sup>

In this respect, it would be beneficial in future discourse analyses to compare judicial explanations for sexual offenses involving women and child victims respectively. Our own findings are restricted to the study of child and adolescent cases. Our study is also limited in its focus on sex-based explanations. Future analyses might examine the interplay of various explanations, including power-and-violence-based explanations, references to alcohol use, cognitive limitations, and distortions, as well as more distal explanations such as offenders’ early histories of abuse. Finally, it would be helpful to expand the corpus of decisions to include other jurisdictions and more recent sentencing decisions. For example, a prospective study in the wake of criminal law reforms instituted in Canada in 2004 (Bill C-12) could investigate the impact of the federal government’s decision to increase Criminal Code penalties in cases involving the sexual exploitation of children.

Discursive social psychology emphasizes the study of language use in context. We need to consider not only the way in which particular explanations figure in the context of the overall decisions but also the larger institutional context. It makes sense that sex-based explanations for the crimes might predominate in our analyses because sexual or carnal elements are considered intrinsic aspects of sexual offenses under Canadian law (Mewitt & Manning, 1994). Other aspects of judicial discourse (e.g., the separation of elements of the crime) also reflect the requirements of the legal system. In turn, discourse analyses of legal discourse can contribute to the broader study of legal language and the possibilities for change in the legal system. At the least, our analyses suggest that we must go beyond categorizing and counting in order to understand the complexities of judicial language and the implications of such language for offenders and victims. A responsible approach to social justice demands nothing less.

## NOTES

1. We use the term *explanation* here rather than *cause*, *motive*, or *motivation* because of its inclusiveness of these other terms. There are complex philosophical issues associated with the terminology of causes, motives and motivation, and different models of the person that these terms conjure up; some concerns have to do with the question of whether self-awareness on the part of the actor is required and whether we view people’s moral conduct as mechanistic responses elicited by external causes (e.g., see Peters

[1963] on the difference between “causes” and “reasons”). Moreover, concepts such as “motive” are not necessarily worked up in the same way in psychology and law.

2. This idea comes from conversation analysis and the study of two or more speakers’ talk-in-interaction (Hutchby & Wooffitt, 1998), but it is equally important in the study of seemingly monological discourse such as written sentencing decisions.

3. In this sense, a discursive approach to attributions in sentencing emphasizes not only how offenders’ responsibility or accountability for their crimes is described, but also how these descriptions are bound up with the judges’ rhetorical management of their own responsibility, interest, and accountability in making these attributions.

4. Attributions for the offenses may be part of an assortment of judicial activities; these may include evaluating mitigating and aggravating factors and offender responsibility, and assessing the need to protect the public from dangerous offenders, the need and capacity for offender rehabilitation, and so on.

5. More generally, judges were sensitive to the complexity of sexual behavior; they did not attempt to reduce sexual offenses to a single motive, but frequently included multiple possible explanations, for example, alcohol use and abuse, depression, cognitive limitations or distortions, limited insight, poor judgment, personal or familial stress and background factors such as a history of childhood abuse. One cannot identify multiple or combined motives if one uses conventional, single-category coding systems.

6. Brownmiller (1975) offers a much more nuanced position than a dichotomous treatment of sex and violence as mutually exclusive explanations for the rape of women. Her insistence that rape be viewed as a crime of violence (i.e., that violence is an integral part of rape) was not designed to challenge the notion of rape as a crime of sex but of rape as mutual sexual intercourse.

7. The issue of whether to view the sexual violation of women and children as the same or as different, both inside the court system and outside of it, is a matter too complex to be given sufficient attention here. We wish only to point out that in relation to our findings on cases of sexual abuse involving child and adolescent victims, the rhetorical affordances of judicial descriptions of sexual motives do not appear to include depictions of mutuality and consent (as has occurred in legal arenas involving the sexual assault of women victims).

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