

## Anomalous language in sexual assault trial judgments

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**ABSTRACT.** We analyzed the language in a random sample of recent Western Canadian trial judgments in cases of sexual assault. We discovered five anomalous themes: erotic/affectionate characterization of sexual assault; sexual assault as distinct from violence; appropriate resistance by the victim; the good character of the offender; and grammatically omitting the agent of the assault. These themes are illustrated in context by a detailed analysis of one of the judgments. We propose that such themes may occur because, while there are interpretative repertoires for stranger rape and consensual sex, there is virtually no accurate vocabulary or narrative structure for the more common cases in which the assailant is not a stranger to the victim. The language currently used springs from—but also contributes to—establishing a false dichotomy between stereotypical stranger rape and consensual sexual contact; that is, either the sexual assault meets all of the characteristics of a stereotypical stranger rape or it is described as sexual contact and not as a sexual assault.

**KEY WORDS:** discourse analysis, interpretative repertoire, language, law/legal, rape, sexual assault

A man entered a room where a woman lay sleeping and inserted his penis into her mouth. In the trial judgment, this was described as 'the act of offering his penis' [2].<sup>1</sup> In this paper, we investigate such curious word usage as the verb 'offer' to describe an alleged sexual assault.<sup>2</sup>

There is an obvious but underdeveloped affinity between discourse analysis and the practice of law. Language and texts are central to the practice of law, which can be said to consist primarily of discourse. Written judgments, in particular, *express* the state of the law at any given time. Furthermore, they *affect* not only the litigants but also the future shape of the law and society at large. The language used in legal judgments is not merely a reflection of individual thought; it is important in and of itself. Indeed, a particular judge's language may be drawn from counsel, witnesses, previous judgments or broader social discourse. It is this public discourse (and not uncommunicated thoughts, attitudes or motivations) that has an impact and is acted upon. Language affects events and creates versions of reality.

Other researchers, especially Danet (1980), have studied the legal process as discourse. Danet examined how language was used in a particular trial, that is, 'how participants in the legal process *fit words to deeds*' (Danet, 1980: 189; italics added). Danet concluded that:

One cannot separate what happened from the language that it used to describe or explain what happened. When the meaning of the act is ambiguous, the words we choose to talk about it become critical. (1980: 189)

Like Danet, we argue that in describing the acts involved in sexual assault, particularly when the accused is not a stranger to the victim, the language used to 'fit words to deeds' creates their meaning.

In 1983, Canada attempted to shift the emphasis of sexual assault law away from its historical definition of rape as a sexual or moral issue to treating it as an assault (see Boyle, 1985; Gunn and Minch, 1988; Ruebsaat, 1985; and Smart, 1989). However, 'courts have had trouble shifting their focus from morality to violence' (Ruebsaat, 1985: 107), and the old terminology used by the judiciary may trivialize the violent nature of sexual assault (Boyle, 1985; Gunn and Minch, 1988; Ruebsaat, 1985).

Also, Canadian courts have had difficulty defining the term 'sexual' as used in the term 'sexual assault'. As Boyle remarked,

If sex is stolen rather than willingly shared, then in a world in which sex was understood to be a truly consensual activity, [stolen sex] would not be sex. Yet the law obliges us to label what has been stolen as sexual. (1985: 104)

Thus, combining the two words 'sexual' and 'assault' has resulted in the oxymoron 'sexual assault'.

Certainly, there is widespread dissatisfaction with how the legal system deals with sexual assault. An act amending the Criminal Code (passed 15 June 1992) explicitly expressed concern about 'the prevalence of sexual assault against women and children' (p. 1). In a recent report on gender equality in the law, the Law Society of British Columbia Gender Bias Committee concluded:

Notwithstanding the justice system's efforts to identify wife assault and sexual assault as serious crimes, the system is failing battered women and victims of sexual assault. (1992: 3; see also Estrich, 1987, 1992; Henderson, 1992; Torrey, 1991)

We suspected that the language used in such cases could be one of the problems, so we examined trial judgments in an attempt to understand how sexual assault is described within our justice system.

### THE SAMPLE

We used Quick-Law (a computerized database of written Canadian legal judgments) to draw all 563 judgments in the province of British Columbia and the Yukon Territory between 1986 and January 1992 that contained

the terms 'sexual' and 'assault' anywhere in the written text. We initially selected a completely random 10 percent of these cases, printed out the judgments, and used them to establish further selection criteria. Eliminating duplicates and cases where the charge was other than sexual assault reduced the 56 cases to 41. We then excluded cases that were not the initial trial judgment, such as appeals (which focus on issues of law rather than describing the assault itself). This left 12 trial judgments, which had the characteristics required for our analysis: they were all sexual assault cases, and they contained descriptions of the assaults with the judges' reasons and decisions. The 12 cases included acquittal decisions (two cases), convictions (five cases) and guilty pleas (five cases). There were 10 different judges, nine male and one female.

All of the accused were men. The victims of the sexual assaults were women in six cases and children in six cases (three of which involved girls, one involved a boy, and two cases involved both girls and boys). In 10 cases, the accused and complainant(s) definitely knew each other; in one, the assailant was a stranger; and in the remaining case, it was not clear whether the accused and his victims knew each other.

## RESULTS

In our detailed analysis of the 12 sample trial judgments, we found a number of themes that were strikingly anomalous. That is, the language used to 'fit words to deeds' created unexpected (and perhaps unintended) meanings and implications. Five of these themes will be described here.

### *Erotic/affective characterization of sexual assault*

In trial judgments we would expect the sexual assault itself to be described in neutral or negative terms, and these usages did occur. For example, a judge sentencing a man who had pleaded guilty wrote that the 'commission of a sexual assault on a woman . . . is an extremely serious offence because **the sexual integrity of that individual has been violated**' [4]. (The latter phrase is directly from the Canadian Criminal Code: see *Martin's Annual Criminal Code*, 1992).

Another judge characterized a teacher's behavior of sexually assaulting schoolchildren as '**an assault for the purpose of his sexual gratification**' [10]. Similarly, a judge summarized another case as 'the offence involved the re-occurrence of a large number of acts of **assault**' [12]. This language was consistent with the 1983 law which defined sexual assault as assault, not as sex (see above).

However, to a surprising degree, the vocabulary used to describe the sexual assault was often more suitable to consensual acts than to assault. Table 1 presents the terms used in cases where assault had been legally established, that is, excluding the acquittals.

Sexual assaults were often described as sexual events. For example, the

TABLE 1. List of terms used to describe sexual assault (excluding acquittals)

What occurred	Legal finding	Terms used by judges
Forced vaginal penetration	Sexual assault	Engage in sexual intercourse
	Sexual assault	Brief intercourse
	Sexual assault	Bout of intercourse
	Sexual assault	Two bouts of intercourse
	Sexual assault	Acts of intercourse
	Indecent assault	The sexual act
	Sexual assault	A form of bondage
	Sexual assault	Attacked her and had sexual intercourse with her
	Indecent assault	Indecent assault
	Indecent assault	Indecent assault
Non-consensual manual-genital contact	Sexual assault	Fondle
	Sexual assault	Fondling
	Sexual assault	Brief touching
	Sexual assault	Arm beneath her blanket
	Sexual assault	Hand beneath her panties
	Sexual assault	Placed his hand in the area of her vagina
	Sexual assault	His thumb touching her vagina
	Sexual assault	Advantage taken of a situation
	Indecent assault	Acts of a sexual nature
	Gross indecency	Act of masturbation
Forced oral contact	Gross indecency	Required to perform acts of masturbation
	Sexual assault	Acts of assault
	Indecent assault	Indecent assault
	Gross indecency	Gross indecency
	Sexual assault	Attempted unsuccessfully to kiss
	Sexual assault	Attempted unsuccessfully to kiss
	Sexual assault	Attempted unsuccessfully to kiss
	Sexual assault	Attempted unsuccessfully to kiss
	Sexual assault	Attempted unsuccessfully to kiss
	Sexual assault	Attempted unsuccessfully to kiss
History of assaulting children	Indecent and sexual assault	Sexual appetite
	Sexual assault	Obvious sexual difficulty
	Sexual assault	Obvious sexual difficulty
	Sexual assault	Obvious sexual difficulty
	Sexual assault	Obvious sexual difficulty
	Sexual assault	Obvious sexual difficulty
	Sexual assault	Obvious sexual difficulty
	Sexual assault	Obvious sexual difficulty
	Sexual assault	Obvious sexual difficulty
	Sexual assault	Obvious sexual difficulty
Forced oral-genital contact	Sexual assault	Acts of oral sex
	Gross indecency	Act of fellatio
	Sexual assault and gross indecency	He caused them to commit acts of a sexual nature
	Gross indecency	Required to perform the sexual acts of fellatio
	Sexual assault	Forced her to fellate him
	Sexual assault and gross indecency	An assault made for the purposes of his sexual gratification
	Sexual assault	Forced acts of huggery
	Sexual assault	Forced acts of huggery
	Sexual assault	Forced acts of huggery
	Sexual assault	Forced acts of huggery
Forced anal penetration	Sexual assault	Forced acts of huggery
	Sexual assault	Forced acts of huggery

term 'intercourse' was frequently used to describe rape, even though its dictionary definitions emphasize the mutuality and communion of this act. In a case involving a man who was found guilty of raping a woman whom he had known for about two years, the sexual assaults were not described as rapes; instead each was described as a 'bout of intercourse' [11]. Another judge described the rape of a woman as 'brief intercourse' [3]. Furthermore, some judgments described the act of violently assaulting someone in a sexualized manner as 'intercourse with' [2, 6] her. Quite clearly, 'intercourse' is a term borrowed from our vocabulary for describing consensual sexual acts. It carries no connotations of a unilateral, violent behavior done by one person to another. Calling rape 'intercourse' is like describing someone's punching another as 'mutual touching' or 'caressing'.

Descriptions of particular details of the assaults were also sexualized, sometimes to the extent that these descriptions would not be out of place in erotic literature. For example, in sentencing a man for sexually assaulting a 10-year-old girl, a judge ambiguously described the assault as 'brief touching' [5]. Touching conveys none of the unwanted or intentional nature of the assault. Similarly, unwanted and inappropriate touching of a girl's vagina was described as 'fondling' [1]. Yet, it is clear that the sexual assault was not an affectionate display. The victim of the 'fondling' was not 'treated with fondness', she was not 'doted upon' or 'pampered' (*Shorter Oxford English Dictionary*, 1970). More accurate and less sexual verbs to describe the assault would have been 'handled' or 'molested'.

Sometimes the same act was cast in very different terms. When (as described above) a judge described a defendant acquitted of rape and forced fellatio as having entered the room of a sleeping woman and 'offer[ed] his penis to her mouth' [2], the phrasing creates a very different view of what happened than when the same judge used the term 'inserted' [2]. 'Offered' implies something quite positive, which could be accepted or refused; 'inserted' is neutral or even negative and implies a passive receptacle, with no choice.

The sexual assault was often attributed to a sexual rather than violent impetus. In sentencing a man who pled guilty to having sexually assaulted two children about six years earlier, the judge remarked that 'the accused has been able to control his sexual appetite over the years since these deprivations [sic] took place' [1]. Here the judge placed the assault in the domain of sexuality. 'Sexual appetite' implies that the man had a biological hunger that he needed to satisfy (extending this idea, controlling or not fulfilling his appetite would be the unusual behavior). Another judge said that a man who sexually assaulted a girl had 'obvious sexual difficulty' [8]. Not only did both of these phrases sexualize the assault, but they also described the assaults less accurately and less negatively than would phrases such as 'the accused has been able to control his sexualized violence . . .' or 'he has obvious difficulty with violence'.

The use of erotic or affectionate terms and phrases put the violent acts that were at issue into a framework of normal sexual activity, rather than into a framework of assault on parts of the body that, on other occasions,

might be sexual. Using inappropriate and inaccurate terminology to describe sexual assaults created a misleading description of events. If we talk about sexual assault as if it were sexual intercourse or any other sexual act (i.e. use the same language), then sexual assault and consensual sexual activity are in danger of becoming indistinguishable. As shown in Table 1, there was a paucity of phrases such as 'the sexual integrity of that individual has been violated' [4], which managed to capture how precisely non-sexual such an assault is.

### *Sexual assault as distinct from violence*

The trial judgments also contained a vocabulary that made distinctions between kinds and degrees of violence. Frequently, sexual assault was clearly distinguished from violence. Again, this usage was particularly surprising in view of the explicit intention of the 1983 Canadian law to treat sexual assault as violent per se.

For example, in a case where a man pled guilty to sexually assaulting a young girl and boy, the judge remarked that 'the indecent assault against the young girl is less serious because it involved **no violence**' [1]. When sentencing a man convicted of sexually assaulting a girl, a judge noted that 'there was **no violence** and **no physical force, no coercion or intimidation**' [5]. In these cases, the language suggested that when someone sexually assaults another person, this behavior is not violent.

Even when sexual assault was characterized as violent, it was commonly set apart from other kinds of violence as being of lesser degree (or as part of normal sex). For example, when sentencing a man for two counts of sexual assault, a judge stated that one of the counts '[involved] less in the way of an **actual physical assault**' [7]. In another case, where a man had pleaded guilty to sexually assaulting an acquaintance, the judge commented when passing sentence that 'in mitigation, certainly, is the fact that there was **no external violence** committed upon her; that is, there [were] no physical blows struck, she was not hit, she was not bruised' [4]. Later in this same judgment, it became clear that if there was no 'external violence', the (internal) sexual assault was not violent: 'there was **no violence** attributable to you' [4]. Essentially, the assaultive character of this sexual assault was negated, which suggests that the accused had simply had sex with the complainant.

Much less often, and usually in cases involving children, the judgment contained descriptions of sexual assault *as assault*, that is, as intrinsically violent. For example, in a case where a man sexually assaulted his stepson, the judge described the rapes as 'the re-occurrence of a large number of acts of **assault**' [12]. In the case of the schoolteacher who sexually assaulted several of his students, the judge noted the offense 'was an **assault**' [10]. These descriptions of sexual assault as violent were infrequent; yet it contradicts the definition of assault, including sexual assault, to describe the critical behaviors involved as other than violent.

### *Appropriate resistance*

The trial judgments frequently included a description of how the complainant resisted the assault. Many judgments also included statements about what the complainant *should have done*, that is, they defined 'appropriate' resistance. In these judgments, a generic category of physical 'struggling' was frequently mentioned. For example, one judge, paraphrasing a complainant's testimony, stated that 'she **struggled**, only ceasing to **struggle** when he put the knife to her neck' [9]. Another judge also used this verb in summarizing a series of events in a sexual assault: '[they] rolled off the couch onto the floor, where they **struggled**' [11].

Sometimes, there was comment on the complainant's not continuing to struggle. In giving his reasons for acquitting a man of sexual assault, one judge stated that 'the complainant **did not seize the opportunity** to push the accused off her ... [although] she **had been able to do so earlier** with her back and her legs' [2]. The clear implication is that she should have continued with actions that had not worked. Moreover, one judge interpreted the victim's ceasing to struggle as acquiescence: 'She testified that after the first bout of intercourse she **stopped struggling** and that she **acquiesced** in the second bout, although the intercourse was still without her consent' [11].

Generally, there seemed to be a continuum being defined, from continued physical struggling, to initial struggling only, to crying out for help, to saying 'No' in word or deed. The last form, purely verbal refusal, was often described negatively: '[that] she went to the door and opened it to **invite him out does not have the ring of authenticity about it**' [9].

This language of appropriate resistance seemed to us to be drawn from male-male combat between equals, where continued fighting is appropriate, rather than from asymmetrical situations (e.g. prisoners of war or victims of school-yard bullies) where physical resistance would lead to little chance of success and a high probability of further harm. Our interpretation was supported by the fact that there was no criticism of *children* who did not resist physically. Moreover, there were no instances in our sample where a clear verbal refusal from an adult was described as sufficient and appropriate resistance. This finding has obvious implications for the 1992 amendment to the Canadian sexual assault law (the so-called 'No means no' law), which requires that consent must be established prior to sexual contact and that an unsupported belief about consent is no longer admissible as a defense. Judges' talk about resistance should change as this new law is implemented, that is, purely verbal refusals should now be taken as evidence of non-consent, and persistent physical struggling should not be required.

### *The character of the offender*

Recall that most of our sample cases were convictions or guilty pleas, so one would expect to find the perpetrator described in somewhat critical terms. However, the pattern was that after a brief, general, pejorative

characterization of the act, the convicted defendant was described positively.

In sentencing a man convicted of raping a woman two times, a judge stated that 'this man is of **impeccable** character' [11]. Similarly, a judge who sentenced a man for sexually assaulting his stepson mentioned 'the **exceptional** character of the offender' [12] as a mitigating factor in sentencing.

The contradiction between guilt and good character was sometimes handled by 'isolating' the criminal act. For example, the behavior of raping a woman twice was seen as an aberrant act: 'this incident was an **isolated one, entirely out of character**' [11]. And, in the case of the man who sexually assaulted his stepson over a three-year period (and attempted to do so again later), the offenses were also described as an '**isolated incident**' [12]. Thus, the criminal act itself was not usually described as relevant to character. However, character was seen as relevant to sentencing. For example, in the case just described, the judge stated: '**because of the exceptional character** of the offender ... I am imposing as short a sentence as I think I can' [12].

(There is a widespread belief that the moral character of the *complainant* is frequently attacked in a sexual assault trial. To prevent this, Canada has a 'rape shield' law that limits information about the complainant's previous sexual history. We had the impression that, in our cases, the character of the adult female complainant was disparaged in more subtle ways; an example will be given in the case analysis below.)

### *Avoiding agency for the assault*

In grammatical terms, the clearest description of any action is subject-verb-object. That is, the description would contain a person (agent) who is the *subject* of the action, the *action* in appropriate verb form, and the *object* or victim of the action (if any). For example, '**The accused attacked her**' [6]. However, the judges frequently nominalized the acts instead. The acts themselves were simply 'there', with no apparent agents or victims:

there was an abuse of this trust [8]

Who abused whose trust?

they were both forced acts of buggery [1]

Who committed forced buggery upon whom?

there was advantage taken of a situation which presented itself [5]

Who took advantage of whom and how? Also notice that, in this construction, the *situation* became the agent: it **presented itself**. (In this case, the accused had assaulted a 10-year-old girl in her bed in her house where he was a stranger, having entered the house late at night, he said, by mistake.) Similarly, the *struggle* became the subject of the following sentence:

the struggle got into the bedroom [3]

Who struggled? How did they get into the bedroom? Neither the actor nor

the victim appears in any of these sentences, which could have been written in alternative ways that would make responsibility clear (e.g. 'He abused their trust', 'He took advantage of her situation', etc.).

Indirect language is probably not limited to sexual assault cases. In a combined assault and sexual assault case, the victim and her bruises were the focus of the statement,

Ms [X] sustained some bruises and a temporary limp [3]

How did she get the bruises? Given that the accused had been convicted and was now appearing before the judge to be sentenced, this statement could have been phrased as 'The accused hit Ms [X] hard enough to inflict some bruises and a temporary limp.'

To summarize these five themes, we found acts that had been legally established as sexual assaults were often described as erotic, non-violent acts; they involved (but were not necessarily the responsibility of) persons of good character; and they had been insufficiently resisted by the victim.

#### INTERPRETATIVE REPERTOIRES

Our calling these themes 'anomalous' does not mean that they are oddities in the judgements. In our view, the phrases we have identified are not like wrong notes in a piece of music or scratches on the surface of a painting. They may be inconsistent with the law and with the victims' experience, but they are well integrated into the texts in which they occur. To explain this view, we will invoke Wetherell and Potter's concept of *interpretative repertoires*, which are

... building blocks speakers use for constructing versions of actions, cognitive processes and other phenomena. Any particular repertoire is constituted out of a restricted range of terms used in a specific stylistic and grammatical fashion. Commonly these terms are derived from one or more key metaphors and the presence of a repertoire will often be signalled by certain tropes or figures of speech. (1988: 172)

Our data suggest that the interpretative repertoires available for describing sexual assault are limited to and therefore juxtapose stranger rape and consensual sex. On the one hand, there are terms for describing unspeakable acts violently imposed by an itinerant stranger on a woman who immediately recognizes her danger and resists with utmost physical struggle. The alternative repertoire is consensual sex, which is erotic, affectionate and mutual—albeit sometimes fraught with misunderstandings. Neither repertoire fits the fact that the vast majority of sexual assaults are so-called 'acquaintance rapes' by a familiar, often trusted person who arranges to be alone with the victim in a presumably safe place and then assaults him or her, often while calling this affection or mutual sex. By default and for lack of a well-developed repertoire for non-stranger rape,

the language adopted often fits consensual sex, which is the language of the perpetrator, not of the victim.

#### SAMPLE JUDGMENT

We will illustrate the wider narrative context in which the themes we have identified occur by examining the first half of one of the judgments in our sample. In this case [11], a jury had found the defendant guilty of sexual assault, and it was now the judge's duty to decide upon a sentence. (Square brackets and ellipses indicate where identifying information has been summarized or omitted; paragraph numbers have been added.)

- (1) The jury in this case found the accused guilty of having committed a sexual assault upon a woman in [month, year]. The circumstances surrounding the offence and the parties themselves are somewhat unusual and in my view cannot be ignored in determining an appropriate sentence.
- (2) The accused is 40 years of age and was approximately 37 or 38 years of age at the time the offence was committed. He is an individual who was born and raised in [a European country] and together with an older brother left [that country] in [a date that is 15 years before the offence] to join their older brother in [another country]. From there, the brothers immigrated to [a Canadian province] and eventually to British Columbia where they settled in [a date that is 12 years before the offence]. The family is apparently a closely-knit family. All of the family members have worked hard and there is no history whatsoever of difficulty with the law.
- (3) I mentioned this history of the accused's [foreign] background and his relatively recent immigration to Canada since it does bear in some way in this matter of sentencing. In any event, after first immigrating to [the first province] the accused worked steadily as a carpet layer and eventually worked with a large carpeting firm after his arrival in the [area of B.C. where he now lives]. He had trained as a young man as a fireman in [his country of birth] and later achieved the rank of corporal in the [country's] army. In addition, he had trained as a diver in [the other country]. In approximately ..., after settling in British Columbia, he began working as a diver/fisherman and eventually bought his own boat.<sup>3</sup> He was employed in this capacity as a fisherman when he met the complainant.
- (4) It appears that the accused met the complainant approximately two years prior to the offence. The complainant's brother-in-law, who is the accused's best friend, invited both the accused and the complainant to his home for dinner with her [sic] and his wife. At that time the complainant lived [elsewhere in B.C.]. Some time later the two met again for lunch. There were some telephone calls but they had not formed a relationship of any kind prior to the offence. What was clear, however, was that the accused had indicated in various ways that he was attracted to the complainant and that he was certainly interested in developing a relationship. In the interim, the complainant had moved to [the same city] to pursue [a particular course at an educational institution for Native Indians]. She testified that he telephoned her on several occasions at some point in time when he was to be off fishing for an extended period. He suggested that she live with him or take over his apartment and she declined. He continued to telephone and she finally agreed to go out with him on the night

in question provided she be returned home by approximately 11 p.m. for a particular telephone call which she expected to receive.

- (5) At this point I should mention that the complainant is a woman in her early 30s. She is divorced and has I think one child who lives with the other parent [in the area the complainant had moved from]. She is an articulate and apparently well-educated individual.
- (6) The couple went to a local restaurant in [an affluent district of the city] and enjoyed a full meal together with cocktails before dinner, wine with dinner and after-dinner coffee liqueurs. After dinner the accused invited the complainant back to his apartment [in the same district] to share some marijuana. She agreed. On the way to his apartment they stopped by the liquor store and bought some liqueur and wine for the evening. At his apartment they drank the wine and liqueur and smoked two joints, that is two marijuana cigarettes.
- (7) According to the complainant, whose version of the evidence I must assume the jury accepted, they discussed political and philosophical issues for hours, during which period he encouraged her to remove her shoes and sit on the couch with her legs up across his lap. While she maintained that she was 'pinioned' in this position for up to two hours, she nevertheless admitted that she was even then generally enjoying the evening, the company and the discussion.
- (8) After they had both consumed a fair amount of alcohol and smoked the two joints of marijuana over several hours, the complainant testified that the accused suddenly lunged at her, that they groped and finally rolled off the couch onto the floor where they struggled and he attempted unsuccessfully to kiss her while she pushed her hands into his face. Even at this stage the complainant testified that she was making what she considered to be inappropriate statements declaring that he loved her and that he wanted to marry her—declarations which she found bizarre. He carried her bodily into the bedroom and there, she says, against her will and notwithstanding her struggling, he forced her to fellate him and then to engage in sexual intercourse. She testified that after the first bout of intercourse she stopped struggling and that she acquiesced in the second bout, although the intercourse was still without her consent.
- (9) While he did hold her hands or wrists, there is no evidence that the accused ever struck the complainant or threatened her in any way. There is no evidence of any violence apart from the holding of the hands or the wrists.
- (10) The medical evidence indicated no signs of violence or force apart from a small two centimetre bruise on the inside or outside of one thigh and some tenderness of the labia and breasts, both of which may have been consistent with vigorous intercourse and the onset of menstruation. In any case, the complainant obviously did not fear the accused since, even after the two bouts of intercourse, she asked him to drive her home to her apartment in [a working-class area of the city]. He declined saying that he had had too much to drink and was unable to drive. He however gave her \$20 for cab fare and she went home. She admitted openly that she was most angry about his refusal to drive her home. She reported the incident the next day to a teacher at [her educational program].
- (11) In my view, even adopting the complainant's evidence concerning the events of that evening, the circumstances of this case are somewhat exceptional. Throughout the trial, I was left with the impression that the accused, being a recent immigrant, is perhaps unfamiliar with Canadian social mores or the rules of social interaction. His inappropriate invitation

for the complainant to live with him when she really did not know him and his declaration that he loved her and wished to marry her all in the middle of what we would all view as a sexual assault—both have caused the complainant, it would appear, and myself to question this man's social perceptions. Indeed, I note that in the body of the pre-sentence report, the probation officer quotes the complainant as saying that the accused would probably not benefit from a period of incarceration since he is, to use her words, 'socially ignorant'. While these remarks may all seem trite, I have paid particular attention to them here since all of the evidence points to the fact that this man is of impeccable character and that this incident, unless it is indeed the reflection of a different set of social expectations, is completely out of character.

In the interests of space, we omit the second half of the judgment, which is devoted to further details of the offender's good character and poor social skills, with very brief and abstract reference to deterrence and the impact of the assault on the victim. The sentence was 90 days, to be served on weekends, and two years' probation.

#### ANALYSIS

In the following, we stress only the most obvious examples of our anomalous themes; the reader will undoubtedly notice many others. From the outset, our attention is drawn to 'the circumstances surrounding the offence and the parties themselves', because they are 'somewhat unusual'. We suggest that this refers to the absence of a stranger-rape scenario: The offender was not an itinerant, unemployed stranger, and he did not seize her in a dark alley. The default repertoire is a misunderstanding about consensual sex, and each of the themes identified above reflects the choice between these two repertoires.

To a remarkable extent, and in spite of the legal style, there is an *erotic/affectionate*, romantic story-within-a-story in this judgment. Let us simply use fictitious first names instead of 'complainant' and 'accused' and elide certain parts without otherwise changing the text:

Colette's brother-in-law, who is Adam's best friend, invited both Colette and Adam to his home for dinner with he and his wife. . . . Some time later the two met again for lunch. There were some telephone calls. . . . Adam had indicated in various ways that he was attracted to Colette and that he was certainly interested in developing a relationship. . . . Adam telephoned Colette on several occasions. . . . He suggested that she live with him or take over his apartment. . . . He continued to telephone and she finally agreed to go out with him. . . .

The couple went to a local restaurant . . . and enjoyed a full meal together with cocktails before dinner, wine with dinner and after-dinner coffee liqueurs. After dinner Adam invited Colette back to his . . . apartment. . . . At his apartment they drank the wine and liqueur and smoked two joints, that is two marijuana cigarettes. . . .

They discussed political and philosophical issues for hours, during which period he encouraged her to remove her shoes and sit on the couch

with her legs up across his lap. . . . Colette was . . . generally enjoying the evening, the company and the discussion. . . .

Adam attempted unsuccessfully to kiss her. . . . declaring that he loved her and that he wanted to marry her. . . . He carried her bodily into the bedroom . . . [engaged] in sexual intercourse . . . the first bout of intercourse . . . the second bout. . . . vigorous intercourse.

Clearly, the style, terms and tropes of this embedded story are those of a romance novel; note also what a large proportion of the judgment is devoted to these details.

In contrast, the judgment deals briefly with the arguably more relevant issue of *violence*, which is dismissed both implicitly and explicitly. The description of the assault (in paragraph 8) is not specific but vague and equivocal. Indeed, details disappear rapidly as the narrative proceeds from the struggle on the couch, which we as readers can at least visualize, to the unknown means by which he forced his penis into her mouth and then, twice, into her vagina. Here, we only know (from paragraph 9) that **'he did hold her hands or wrists'** and that she struggled until nearly the end. In contrast to the detail invested in their date and his work history, this key scene of violence and struggle is sketchy. He was very likely the stronger, especially after years of heavy work as a commercial fisherman; how was he using this greater strength? Exactly how did he counter her self-defense? How did he subdue her struggle and lift her bodily? How did she feel? What did she say? The missing details are made more equivocal by the sexualized description of the acts: **'kiss her'**, **'fellate him'**, **'bout'** of intercourse (a term that can connote either combat or enthusiasm). Paragraph 9 is devoted to enumerating specific acts of violence the offender did *not* engage in (**'there is no evidence of any violence apart from'**) and paragraph 10 to *discounting* the physical evidence of violence. Thus we can see the reciprocal nature of the erotic/affectionate and no-violence themes. It is as if an interpretative repertoire of violence (stranger rape) were being weighed against the erotic/affectionate one; when one is chosen, the other must be explicitly dismissed.

In these same key paragraphs (8 through 10), her *struggle* is evaluated in now-familiar terms. Her two years of clear verbal refusals to enter a relationship are not included, nor is there any description of what she *said* when he lunged at her and thereafter. Instead, the focus is on specific acts of physical combat (**'she pushed her hands into his face'**) and on how long she continued to struggle. Note especially that when she finally **'stopped struggling'** (after an indeterminate time and both oral and vaginal rape), she is said to have **'acquiesced'**.

The emphasis on the *'impeccable' character of the offender* is obvious. This theme begins and indeed dominates the judgment, to the exclusion of other issues equally relevant to sentencing, such as deterrence and victim impact. *'Impeccable'* (used in paragraph 11) means without fault or flaw, but as applied here to the offender's character, it seems to exclude the crime and to be limited to selected details of a good work record, upward mobility and a closely-knit, law-abiding family (described in paragraphs 2

and 3 and throughout the second half of the judgment). His sole flaw is having questionable *'social perceptions'* because he is an immigrant (paragraph 10). This attribution is arguably inconsistent with his business success, not to mention the apparent implication that his behavior would have been acceptable in his country of origin.

As noted above, Canada has a *'rape shield'* law intended to protect the complainant from attacks on her character. However, this judgment illustrates how subtle questions can still be raised. In paragraph 4, the spurious identification of her educational institution lets us know that the victim is a Native Indian—a member of a group plagued by problems of drugs, alcohol, prostitution and lack of education. Paragraph 5 interrupts the narrative to include the implication that she is a mother who has abandoned her child. The last sentence of paragraph 5 is faint praise, especially when it is statistically rare for Natives to achieve higher education in the face of barriers much more serious than those that face an immigrant.

Finally, we examine how the above themes are supported *grammatically*; in particular, how the writing depicts (or deflects) the offender's responsibility for his actions. Paragraphs 2 and 3 depict the offender as the author of a succession of admirable actions. He **'left'** the Old World and, with his brothers, **'immigrated'**, **'settled'** and **'worked hard'**. He **'worked steadily'**, **'had trained'** (not *'was trained'*), **'achieved'** a rank, **'began working'** at various occupations, and eventually **'bought his own boat'**. When the topic concerns good aspects of his character, he is unambiguously responsible for his own actions—but when the topic is the offense, he disappears as agent. We will focus on three ways in which grammatical choices avoid the offender's agency: (i) by passive or other indirect phrasing; (ii) by adding the complainant as co-agent of the actions, creating the two of them as a (discursive) unit, engaging in actions as a couple; and (iii) by omitting, mitigating or presenting positively the negative actions of which he is clearly the agent.

Indirect phrasing appears in the first sentence, in which the accused (now convicted) becomes the object of the jury's actions: he was **'found . . . guilty of having committed'** (vs *'the jury found that the accused committed'*). Similarly in paragraph 2, the one phrase referring to his assault uses a passive construction in which he does not appear, **'the offence was committed'**. Indeed, nowhere in the judgment is the convicted man the direct agent of his crime.

The second anomalous form is the use of plural forms that depict the complainant as well as the accused as agents of the action. This not only diffuses his individual responsibility but creates them as a couple, a construction that makes consensual sexual relations more plausible. Once the complainant's brother-in-law has **'invited both'** to dinner, the writing continues to treat them as a pair: **'the two met again'** but **'they had not formed a relationship'**. In the very pleasant description of the early evening, they are a unit: **'The couple went to a local restaurant . . . and enjoyed a full meal together'**, **'they stopped . . . and bought'**, **'they drank . . . and smoked'**, **'they discussed'**. We do not dispute that both he and she may have engaged in

these actions. The question is whether they did so as a couple (as he desired) or as two separate individuals (as she intended); here, not only the content but the syntax make this a romantic story. With the discursive spotlight thus focused, it is difficult to envision an alternative but equally plausible scenario in which he may have schemed and manipulated to get her alone and vulnerable.

When the offender is the agent of a negative action, it is usually mitigated or cast in a positive light. For example, the only syntactic hint of his unilateral and unwelcome persistence is the sequence (in paragraph 4) in which 'he telephoned her' several times and 'he suggested' that she live with him, etc. However, the actions of which he is agent are presented as appropriate to the male role of suitor or even as generosity which 'she declined'. In the last paragraph (11), judicial comment on the fact that he suggested that she live with him when she scarcely knew him and was refusing even to go to dinner with him is nominalized to 'his inappropriate invitation' and mitigated as poor 'social perceptions'.

In paragraph 6, an incidental illegal action is described not as 'possessing and providing marijuana' but rather in terms of genteel hospitality, as he 'invited' her back to his apartment 'to share some marijuana'. The complainant's testimony that he effectively 'pinioned' her during their discussions is put in passive voice (and in quotations as the complainant's opinion), in contrast to 'He encouraged her' to be comfortable, which is in active voice (and given as fact rather than opinion).

When (in paragraphs 8, 9 and 10) we come to the central legal issue, the assault itself, all three of these techniques come into play. Paragraph 8 begins with a long sentence predicated on a description of mutual responsibility and action ('they had both consumed ... and smoked'; 'they groped and finally rolled off the couch' where 'they struggled'). Most acts of which he is the agent are cast in erotic/affectionate vocabulary: 'he attempted unsuccessfully to kiss her', 'he loved her', 'he wanted to marry her', 'he carried her bodily into the bedroom'. In contrast, subsequent negative acts (his lunging at her and forcing her) are qualified as her version; nor do we know what he did when 'he forced her'. From this point on, he disappears again, replaced by a frisky 'bout of intercourse' with no actor and by her eventual defeat, when 'she stopped struggling' and 'she acquiesced'; 'he' is not in this sentence.

The offender reappears in paragraph 9, where specific actions he might have engaged in are denied. We learn for the first time that 'he did hold her hands or wrists' but that this is 'violence apart from' other violence. Then he disappears again, in paragraph 10, which is devoted to the aftermath. We could have been told that 'he inflicted' bruises and soreness that were medically evident at least a day afterwards. Instead, the agent is 'the medical evidence', which 'indicated no signs of violence or force', with certain small exceptions. Now (in contrast to the assault) the discourse is detailed and pedantic. The specific evidence of non-consensual contact is co-opted simultaneously into (consensual) 'vigorous intercourse' and (unsubstantiated) 'onset of menstruation'. The offender only reappears

when he responsibly refuses to drive while intoxicated and instead pays for cab fare: 'He declined saying that he had had too much to drink [but] gave her ...'.

Post-script: When we chose and were analyzing this judgment, we had no information about the judge who wrote it. Subsequently, we learned that she was the only female judge in our sample. Startling as this may seem at first, it confirms that such discourse is not the product of individuals or of one gender but rather reflects the choice between two equally inappropriate interpretative repertoires.

## DISCUSSION

In our data, sexual assault by someone known to the victim was presented in discourse that does not have a refined language for unwanted penetration or pseudo-sexual contact in familiar surroundings by someone who was trusted. Nor do we seem to have a language for violence that does not resemble combat, or for hard-working members of the community who have none of the characteristics of the jobless, anonymous rapist. If the only alternatives seem to be 'stranger rape' versus 'consensual sex', it is not surprising that we find anomalous descriptions in the trial judgments, as their authors struggle with an insufficient vocabulary for fitting words to these deeds. We recommend that a new vocabulary needs to be developed to describe sexual assault accurately.

We examined only British Columbia and Yukon cases. However, given that Canadian sexual assault laws are federal, we believe that these findings would generalize to other provinces and territories in Canada, with the possible exception of Quebec (because of its different legal system). In order to establish this generalization empirically, we intend to extend this analysis to sexual assault trial judgments across Canada. It will also be valuable to examine judgments *after* the 1992 amendment to the Criminal Code has taken effect, to see whether the discourse in these trials differs from the language found in the present study. This amendment clearly placed legal consent into the domain of discourse, in that the accused must show that consent was given, either through word or conduct.

## APPENDIX: SAMPLED TRIAL JUDGMENTS

1. The accused pleaded guilty and was sentenced to a total of 18 months; he was an acquaintance of the complainants, who were a girl and a boy.
2. The accused was acquitted; he was probably an acquaintance of the complainant, a woman.
3. The accused was convicted and sentenced to three years; he was the husband of the complainant.
4. The accused pleaded guilty and was sentenced to 15 months; he was an acquaintance of the complainant, a woman.
5. The accused was convicted and sentenced to eight months; he was a stranger to the complainant, a girl.



6. The accused was convicted and sentenced to five years; he was an acquaintance of the complainant, a woman.
7. The accused pleaded guilty and was sentenced to a total of 18 months; one of the complainants was a girl, but it is not clear from the judgment whether he knew her, and another complainant was not described.
8. The accused pleaded guilty and was sentenced to nine months; he was the uncle of the complainant, a girl.
9. The accused was acquitted; he was the cousin of the complainant, a woman.
10. The accused was convicted; the sentence was not given in this judgment; he was the teacher of the complainants, 10 boys and one girl.
11. The accused was convicted and sentenced to 90 days to be served on weekends; he knew the complainant, a woman.
12. The accused pleaded guilty and was sentenced to six months; he was the stepfather of the complainant, a boy.

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#### NOTES

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1. The numbers in brackets identify individual trial judgments. Some features of each case are given in the Appendix, and fuller details and citations are available from the authors.
2. The term 'sexual assault' encompasses many offenses including rape, molestation and forced fellatio. Although we are inclined to think that physical descriptions (e.g. forced vaginal penetration) are more accurate, we will also be using more familiar terms, both colloquial (e.g. rape) and legal (e.g. sexual assault); see also Table 1.
3. An investment equivalent to buying a small business.

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