Is it Sex or Assault? Erotic Versus Violent Language in Sexual Assault Trial Judgments

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This research examined the language used to describe sexual offenses in 75 British Columbia trial judgments. Since 1983 nonconsensual sexual contact is legally termed as "sexual assault" in Canada, so we tested whether the language in the judgments depicted sexual activity or assault. The most frequent characterization was in sexual (erotic or affectionate) language, which strongly implies mutuality and consent, whereas language depicting force, violence, or unilateral action was much less common—regardless of guilt or innocence, the nature of the charge, and the age of the complainant. We propose that sexualized descriptions minimize the inherent violence of sexual assaults and hide the survivors' experience.

KEY WORDS: sexual assault; rape; language; discourse analysis.

INTRODUCTION

Language can never be neutral; it creates versions of reality. To describe an event is inevitably to characterize that event. For example, the media term comfort women refers to a group of primarily Korean women who were young during World War II when, in the usual description, they were "recruited" to "work in brothels." In fact, they were kidnapped from their homes, taken by force to the front, imprisoned, and serially raped by soldiers. The euphemism comfort women conveys none of this brutality. Instead, it conjures a vision of affectionate care and consolation, consistent with both the dictionary definitions of the word comfort and the traditional role of women. We cannot know whether the soldiers received...
comfort from raping these prisoners, but that is the perspective being imposed by the term, while the women's ordeal of violence is silenced and hidden.

In this paper, we will focus on alternative ways of describing and therefore characterizing a sexual offense, for example, as assault, penetration, or intercourse. We propose that the choice of term profoundly affects how we see the crime and its consequences. Language has a particularly important role in the legal system. From the testimony of witnesses to the trial judge's summary to the historical precedents found in case law, the language in which events are described becomes the official version of those events, in the courtroom and beyond.

In 1983, the Canadian Parliament made major changes in the law governing adult sexual offenses, including a change of name from "rape" to "sexual assault." One of the clear intentions of this change of language was to characterize the crime differently. That is, the definition of rape focused on the penetration of a vagina by a penis and, all too often, the courts viewed this act as primarily a sexual or moral lapse. Sexual assault focuses on the inherent violence of the act, characterizing it as an assault and a violation of a person's right to govern access to his or her body. However, several authors have pointed out that the courts have had difficulty in shifting from the old to the new focus (i.e., from sex to violence), and that the courts are not considering sexual assault as a serious crime (Boyle, 1985; Gunn & Minch, 1988; Ruebsaat, 1985; Smart, 1989).

We have proposed in a previous study (Coates, Bavelas, & Gibson, 1994) that the language of legal judgments—which may incorporate and reflect the language of witnesses, counsel, previous judgments, or society at large—is often an anomalous description of events. In that study, we examined a small, random sample of British Columbia legal judgments and found that, among other incongruities, the judgments often described sexual offenses in erotic, nonviolent terms, for example, as intercourse or fondling. It is immediately apparent that such terms evoke a euphemistic and minimized version of an assault. More subtly, but perhaps even more importantly, such terms also imply mutuality, as outlined in the following section.

**UNILATERAL VS. MUTUAL ACTS**

What is apparently the same act can often be done either by one individual alone or by two individuals together (Clark, 1996). For example, singing can be done by one individual (a solo) or by two (a duet); one person can play solitaire whereas it takes two to play cribbage. Of particular interest to us are those actions where two individuals are always involved, but where the acts can be either unilateral or mutual (Coates, 1996). For example, when one person approaches another on the street and asks for money that is freely given, these mutual acts can be described as donating or sharing. However, when the first person demands the money with threat of violence, the act becomes robbery. When two individuals freely step into a ring and mutually consent to hit each other, it is boxing, but when
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one individual has not consented, the same action is beating. Robbing and beating are not mutual acts because, even though two individuals are involved, one person has not consented to the acts in question. Instead, the actions are unilateral, with the victim treated as an object of the perpetrator’s actions.

Similarly, only when both individuals agree to participate in sexual activity can their actions be accurately called, for example, intercourse. In contrast, if one of them has put a body part inside the body of the other without his or her consent, then the action is more accurately described as an assault or forced penetration. It is a unilateral rather than mutual activity even though the same parts of the body and somewhat similar actions are involved. Similarly, consider the difference between describing certain acts as touching or rubbing versus describing them as fondling or caressing. What has been added in the latter terms is a characterization of the acts as positive, consensual, mutually pleasurable, erotic, and even affectionate. The second set of terms ignores the difference between sexual activity and the crime of sexual assault.

Only when the acts are mutually consensual should they be described in sexual terms, because these terms inevitably connote mutuality and consent. If the same term is used to describe both consensual and nonconsensual acts, then a crucial distinction in the law has been obscured. In the law and in the complainant’s experience, sexual assault is unilateral. An assault is accomplished by physical force, threat, or abuse of power. In an assault, one person uses the body of another, who thereby loses control over the most intimate access to his or her body. One person imposes his or her will and body upon another and violates that person’s right to control access to his or her body.

One might argue that it is appropriate to describe sexual assaults in erotic terms because the perpetrator’s motive is sexual. Coates (1996, 1997) found that judges typically attributed these offenses to a sexual motivation. However, there are two rebuttals to this reasoning. First, we should question the initial assumption that the perpetrator’s motivation is in fact sexual rather than, for example, power, control, or violence. Several studies have linked (nonsexual) animal abuse with subsequent interpersonal violence, including rape (e.g., Flynn, 1999; Kellert & Felthous, 1985). It has even been reported that 48% of convicted rapists admitted to having abused animals when they were younger (see Globe & Mail, 1999). Why not attribute a common motivation of violence to the two kinds of crime? Or, consider sexual offenses against children and the handicapped. Society has, unfortunately, accepted the term “pedophilia” (whose roots mean “child loving”), therefore implicitly accepting that some individuals have erotic fixations on children’s bodies. However, very high proportions of physically and mentally handicapped children and adults, especially in institutions, are also victims of sexual abuse (Final Report: The Canadian Panel on Violence Against Women, 1993). The common denominator for each of these groups is vulnerability. Children, the handicapped, and often women are simply physically weaker and more dependent and therefore more vulnerable to those who would abuse their power. It is more
plausible and a better fit to this wider set of data to treat the perpetrators' motivation as power, control, or violence.

The second rebuttal is that, even if the motivation of the perpetrator were in fact sexual (or if power and violence were sexually arousing to some individuals), it would be irrelevant. There is no reason for the perpetrator's view to have precedence over all others. Suppose one individual forcibly robs another and is arrested. Should the robber be able to explain or even excuse the crime by saying he or she just needed money? It is unlikely that the robber's motivation would have much effect in court. The victim did not want to part with (or share) the money, and the victim's view, in this case, would undoubtedly dominate. Thus, a robbery is not a financial interaction just because one person proposes that motivation, and a sexual assault is not a sexual interaction just because the perpetrator describes it in that way. In our view, these are not "sexual" assaults (an oxymoron) but rather sexualized assaults, that is, assaults disguised as sex if we accept the perpetrator's version and language. In the research described in the next section, we examined what kind of language was used in a large set of trial judgments describing sexual assaults and other sexual offenses.

DISCOURSE ANALYSIS OF TRIAL JUDGMENTS

Database

We obtained British Columbia trial judgments for sexual offenses from Quick-Law for the years 1986-92. Quick-Law (http://qsilver.queensu.ca/law/lrm9900/firstyr/q199.htm) is a computerized database that contains all available written judgments. Although only a small fraction of trial judgments are available in written form, they tend to be more important cases, often because they were appealed and may therefore set legal precedents. The search parameters were sexual and assault. Duplicates and cases where the charge was other than sexual assault were eliminated. Appeal cases were eliminated because they tended to focus on issues of law and did not involve descriptions of the assault. The charges in the 75 cases that fit these criteria are described in Table I. All of the accused were male. In 77% of the cases, the accused was found or pleaded guilty of at least one charge, and in 14% the accused was acquitted of all charges. Of the complainants, 20% were women, 67% were girls, and 12% were boys.

It is important to emphasize that we analyzed judgments, not judges. That is, we did not assume that the choice of language necessarily reflected an individual judge's attitudes or beliefs. The judge has an obligation, in the judgment, to summarize the trial, so the language used could have been introduced during the trial by counsel or witnesses and then quoted or adopted by the judge. In a few cases, the language used was explicitly disowned by the judge. Still, no matter how the language came to be in these texts, they are the official version of the events at trial.
Table 1. Charges of the Cases Analyzed

<table>
<thead>
<tr>
<th>Charge</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual assault</td>
<td>66</td>
</tr>
<tr>
<td>Sexual assault with a weapon</td>
<td>3</td>
</tr>
<tr>
<td>Sexual assault causing bodily harm</td>
<td>2</td>
</tr>
<tr>
<td>Aggravated sexual assault</td>
<td>2</td>
</tr>
<tr>
<td>Rape</td>
<td>1</td>
</tr>
<tr>
<td>Anal intercourse</td>
<td>1</td>
</tr>
<tr>
<td>Indecent assault</td>
<td>10</td>
</tr>
<tr>
<td>Gross indecency</td>
<td>10</td>
</tr>
<tr>
<td>Sexual intercourse with person</td>
<td>4</td>
</tr>
<tr>
<td>under 14</td>
<td></td>
</tr>
<tr>
<td>Sexual intercourse with a person</td>
<td>2</td>
</tr>
<tr>
<td>over 14 but under 16</td>
<td></td>
</tr>
<tr>
<td>Attempted buggery</td>
<td>1</td>
</tr>
<tr>
<td>Sexual interference</td>
<td>1</td>
</tr>
<tr>
<td>Incest</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>104*</td>
</tr>
</tbody>
</table>

*Many offenders were charged with more than one offence.

Analysis

Our eight analysts followed a detailed set of definitions and rules (Bavelas, Chovil, & Coates, 1993; available from the first author). In order to ensure objective application of these rules and to assess interanalyst agreement, each step of the analysis for each case was conducted independently by two different analysts.

The first step was to locate the places in each trial judgment where the judge was describing the assault itself, that is, the acts for which the defendant was charged. We excluded legal terms (e.g., sexual assault or indecent assault) because they must be used and are not free to vary. We also excluded descriptions of other violence ("he hit her"), references to previous convictions, pronominal forms without a clear referent ("what happened" or "the only reason it was not completed"), and other references that were too vague to analyze ("this type of behaviour," "the incident"). The average agreement for this step by the independent pairs of analysts was 96%, with 100% agreement for 83% of the cases. The research team resolved disagreements together, using a common interpretation of the definitions and rules. A total of 793 excerpts were located, an average of 10.57 per judgment, with a range of 1–74 per judgment.

The second step was to identify the kind of language being used to characterize the assault in these excerpts. Again, there were explicit rules, which relied heavily on dictionary definitions of the denotations and connotations of the words used. We found five main categories:

1. Sexual language portrayed the acts in erotic or affectionate terms, for example, "he kissed her holding her tight," "caressing her," "fondled her
breasts,” “they had sex on the bed,” “the first episode of intercourse,”
sexual relations,” “French kiss,” “oral sex.”
2. Violent language portrayed the acts as an assault, as a forced or unwanted
act against the body of the complainant, for example, “he was violating
her,” “forced him to grasp and squeeze his penis,” “the attack,” “con-
tinued abuse.” We also included the term rape because of its dictionary
definition.
3. Physical descriptions had neither sexual or violent connotations; they sim-
ply described which body parts were where, without either sexual or violent
connotations, for example, “his left arm was also under her gown,” “putting
his tongue in her mouth,” “rubbed his penis on top of her stomach,” “he
ejaculated on a towel.” We included both specific physical descriptions,
such as the examples just given, in which it was possible to visualize
the scene being described, and ambiguous physical descriptions, which
could not be precisely visualized, for example, “he held her in the chest
area,” “rubbing movements,” “he was feeling her personal areas with his
hands.”
4. The other major possibility was language that was primarily morally or
socially disapproving (without the connotation of violence), for example,
sordid conduct,” “perversion,” “acts of depravity.”
5. Finally, some descriptions combined two of the preceding descriptions in
one phrase. The most interesting of these were oxymorons, which com-
bined sexual and violent characterizations, for example, “intercourse with
her against her will,” “forced her to kiss him.”

Table II illustrates how these different kinds of language choices could be used
to describe the same act. The average agreement between pairs of independent
analysts for this second step was 95%, and disagreements were resolved by the
team based on the rules and dictionary definitions.

The judgments varied considerably in length and therefore in the number
times the charged acts might be described, so we quantified our analysis of
each kind of description by expressing it as a percentage of the total number of
descriptions analyzed in each judgment. Thus, there were eight different measures,

<table>
<thead>
<tr>
<th>Erotic</th>
<th>Violent</th>
<th>Physical</th>
<th>Disapproving</th>
<th>Oxymoron</th>
</tr>
</thead>
<tbody>
<tr>
<td>“kiss”</td>
<td>“forced his/her mouth onto his/her mouth”</td>
<td>“put his/her mouth onto his/her mouth”</td>
<td>“disgusting act”</td>
<td>“forced him/her to kiss him/her”</td>
</tr>
<tr>
<td>“intercourse”</td>
<td>“forced penetration”</td>
<td>“penis in vagina”</td>
<td>“heinous crime”</td>
<td>“forcible intercourse”</td>
</tr>
</tbody>
</table>
adding to 100%:

- percentage of sexual descriptions
- percentage of violent descriptions
- percentage of physical descriptions
- percentage of descriptions expressing disapproval
- percentage of descriptions combining sexual and violent elements (oxymorons)
- percentage of descriptions combining sexual and disapproving elements
- percentage of descriptions combining violent and disapproving elements
- percentage of unanalyzable descriptions

RESULTS

Our main interest was in how the judgments tended to characterize these offenses, especially in whether the language cast them as sexual or as violent acts. As shown in Fig. 1 and the first column of Table III, the most frequent description was in erotic or affectionate language; the judgments regularly contained phrases such as “had intercourse,” “French kiss,” and “the accused started to caress you.” The next most frequent were physical descriptions, such as “acts of vaginal penetration” and “tried to put his tongue in my mouth.” Violent descriptions were a distant third; they included statements such as “you then violated her vagina with your fingers” or “the man attacked the complainant.” Disapproving characterizations occurred slightly less frequently, for example, “acts of depravity” or “the offender’s action . . . was loathsome and despicable and must be strongly condemned.” There were also a small but noteworthy number of sexual-violent oxymorons, such as “She stopped struggling and . . . acquiesced . . . , although the intercourse was still without her consent.”

Effect of Legal Parameters on Language

Clearly, the legal status of the case (guilt or innocence) should affect the characterization of the acts involved, so we divided the cases into those where the defendant (a) was found or pleaded guilty of one, some, or all charges or (b) was acquitted of all charges or all charges were dismissed. As shown in Table III, this variable did not have the effect one would expect on the frequency of sexual versus violent language. That is, there was no statistically reliable effect of the legal status of the act on its characterization. Acts that had been legally established as assaults and acts that had been deemed consensual and noncriminal were equally likely to be described in sexual terms. For example, in passing sentence on a man convicted of sexual assault, one judge remarked

He did not attempt intercourse and did not insert anything into their vaginas. He said basically it was fondling their breasts or vaginas and their bodies.
Fig. 1. Average percentages of language used to describe sexual assaults (all cases). Note: “Other” includes Sexual+Disapproving, Violent+Disapproving, and unanalyzable descriptions.

Table III. Mean Effects of Trial Outcome on Language Used to Describe the Acts

<table>
<thead>
<tr>
<th>Language</th>
<th>All cases</th>
<th>Guilty</th>
<th>Not guilty</th>
<th>p</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual</td>
<td>36</td>
<td>35</td>
<td>41</td>
<td>.67</td>
</tr>
<tr>
<td>Violent</td>
<td>14</td>
<td>14</td>
<td>11</td>
<td>.69</td>
</tr>
<tr>
<td>Physical</td>
<td>28</td>
<td>28</td>
<td>31</td>
<td>.71</td>
</tr>
<tr>
<td>Disapproving</td>
<td>11</td>
<td>11</td>
<td>15</td>
<td>.54</td>
</tr>
<tr>
<td>Sexual+Violent</td>
<td>8</td>
<td>8</td>
<td>4</td>
<td>.54</td>
</tr>
<tr>
<td>Violent+Disapproval</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>.45</td>
</tr>
<tr>
<td>Sexual+Disapproval</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>.53</td>
</tr>
<tr>
<td>Other</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>.38</td>
</tr>
</tbody>
</table>

*Expressed as a percentage of the total number of descriptions in the case.

*Found guilty or pleaded guilty of at least one charge.

*Acquitted of all charges or all charges were dismissed.

*Results of t test for difference between means; df = 68.
Moreover, although the acts in guilty cases did have a slightly higher mean percentage of violent descriptions than those in acquittals or dismissals, this difference was not statistically different from chance variation. A supplementary analysis cast further light on how the judgments treated the inherent violence of sexual offenses. First, we searched all cases for any occurrence of the root "violent" (violence, violent) and found it in one-third of the cases, of which 22 had been legally established as assaults. We then focused on those 22 cases and found that half of them contained the root words because the judgment was explicitly describing the convicted acts as "not violent" or as involving "no violence." For example,

I should say at the outset that although the actions of Mr. S. come within a physical definition of sexual assault within the Code, they were not of a violent kind.

In reading the 22 cases, it is clear that the judgments tended to use "violent" or "violence" for what we would call instrumental or collateral violence, that is, force used to subdue the complainant or force separate from the assault itself. One judgment, however, pointed out that "the sexual assault itself is physical violence."

Another relevant legal parameter is the nature of the charge. As shown in Table I, the time period of our database meant that we had cases charged under the 1983 sexual assault law as well as under the older or continuing laws (e.g., anal intercourse, gross indecency, sexual intercourse with a person under 14). If the change in the law and terminology had the intended effect, then the language used to characterize the offense should differ for cases convicted under the new law. As shown in Table IV, there were no statistically significant differences in the language used for cases convicted under the old and new laws.

Dan McGee conducted this analysis.
The Effect of Characteristics of the Complainant and Accused

We could not analyze the effects of gender because there were no female defendants and no adult male complainants. Of the child complainants, 84% were girls and 16% were boys. (Ten of the fifteen young male complainants were in one case.) There was no statistically significant relationship between the language used and the age of the complainant. That is, the abuse of children, where there was no possibility of consent, was just as likely to be eroticized as assaults on adult women, where consent can at least be legally argued. Indeed, familial assaults on children were twice as likely to be described in sexual terms as assaults by former husbands or boyfriends (35% vs. 18% sexual language).

DISCUSSION

The analysis revealed a strong tendency for these judgments to characterize sexual assaults as sex rather than as assaults. We propose that this use of a sexual vocabulary has several important effects. First, it minimizes and even hides the intrinsic violence of an assault. Describing the acts in terms ordinarily used for pleasurable and affectionate acts (and avoiding descriptions of the violence) makes it harder to visualize that they were unwanted violations. The language used does not just euphemize; it actively misleads and misdirects. Rather than naming or describing the violence, sexual language may even normalize the acts, bringing them discursively into the range of everyday human behavior. Thus, they could be seen as sexual actions that were simply somewhat inappropriate in time, place, or object. The complainant’s experience of fear, disgust, objectification, and pain is completely hidden.

As we stressed at the outset, the other major effect of sexual descriptions is to co-opt the complainant’s consent by the use of terms that denote or connote mutual acts. Because of the central importance of consent in these trials, it should not be assumed or implied at the outset. The defense would understandably invoke consent, but it would be more appropriate for the prosecution to avoid the vocabulary of consensual acts in favor of physical description. Similarly, to use consensual language in the judgment after guilt has been established obscures what the crime really was (see Coates, 1996).

Given its inappropriateness and effects, one may ask why sexual language was so common in these judgments (and, indeed, in the media and other discourses). Undoubtedly, some of the reasons are that it is familiar, available, and convenient; it is also euphemistic. As shown in Table II and throughout this paper, the physical or violent alternatives are often more awkward, unfamiliar, and graphic, and people may be less willing to use them for any or all of these reasons. But the language of sex does not capture the complainant’s experience. For example, one judgment said “He compelled her to perform fellatio upon him.” Although this superficially
objective description acknowledges the presence of compulsion, it also makes her the actor, "performing" a sexual act. A more accurate and desexualized description would be "He forced his penis into her mouth and compelled her by threats to suck on it." This more graphic description depicts events from the complainant's point of view.

The euphemistic sexual terms, especially those with affectionate connotations ("kiss," "fondle," "relationship," "hugging"), may be simply easier to bear. Victim services workers have sometimes told us that they find themselves falling into the sexual vocabulary in order not to be overwhelmed by constantly visualizing the events. However, they agree that to conceal the violence is also to conceal the victims' courage in surviving it. If the victims could endure their experience, the least we can do is to acknowledge and witness it, thereby honoring their strength and survival. Imposing the perpetrator's language inevitably privileges that view and re-victimizes the survivor mentally and socially. It imposes a version of their ordeal that co-opts their consent into a relatively harmless mutual activity, and their experience is silenced.

ACKNOWLEDGMENTS

This research was supported by a contract from the British Columbia Ministry of Women's Equality and a Strategic Grant from the Social Sciences and Humanities Research Council of Canada. We are grateful for the contributions of co-investigators Drs. Nicole Chovil and Caroline Collins and to our analysts, Norman Bendle, Kathryn Henderson, Donna Krakowec, Dan McGee, Cheryl Oates, Barb Van't Slot, and Allan Wade. Order of the authors is alphabetical.

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