ADOLESCENT SEX OFFENDING:

AN ANALYSIS OF JUDICIAL SENTENCING REMARKS

Brigitte Bouhours

(B A Criminology and Criminal Justice)

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Note: Appendix A has been removed

Statement of originality

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the dissertation contains no material previously published or written by another person except where due reference is made in the dissertation itself.

Brigitte Bouhours

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ABSTRACT

The sentencing of young people convicted of sexual violence presents a dilemma: how to reconcile the seriousness of the offence and the youthfulness of the offender? And how to censure these offences and stress their seriousness without imposing penalties that are too harsh? The literature suggests that adult sex offenders, especially those who abuse children, are dealt with in an increasingly punitive manner, but there is a lack of research on the legal treatment of youthful sex offenders. This thesis builds on an archival study of 385 sexual offence cases, which were disposed of in court and by conference and formal caution, in South Australia from 1995 to 2001. Using the sentencing remarks in all those cases sentenced by judges, this study examines the specific processes and discourses that occur during the sentencing of youthful sex offenders. I specifically explore three questions. The first asks how cases of youthful sexual offending and the offenders are characterised? Second, what are the judges' orientations and aims at sentencing? And third, what is the character of the judges' moral and personal communication with the young persons?

This study's most striking finding is the identification of a three-way typology, which runs through virtually all the findings, and captures the different ways that judges understand, interpret, and respond to the cases. Category 1 cases, which have children and siblings as victims, are viewed as most serious and thought to require an intensive therapeutic intervention. Offenders in Category 2, which contains cases of coercive sexual behaviour against peers as well as serious general offending, are not perceived as having a specific sexual problem, but it is their violent and generally antisocial behaviour, and their persistent offending that cause concern. Category 3 cases are viewed as instances of consensual underage sex, and judges believe the youths will stop offending with maturity. When sentencing, judges take a future-oriented perspective and their foremost aim is to try to stop further offending. Judges censure the offences and provide norms of conduct to the adolescents in their relationships, and stress the importance of taking responsibility for their future behaviour. There are problems with how judges address the question of victim consent. In cases with child victims (half the cases) judges do not minimise the seriousness of the harm, but in about a third of cases with older adolescent victims, judges interpret these cases as consensual underage sex, when victims had reported they had been raped. The study suggests that, in these cases, an intervention that challenges the offenders' beliefs and attitudes toward girls and women would be appropriate.

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INTRODUCTION

Masson and Morrison (1999) estimate that, in the UK, young people, the overwhelming majority of them male, commit a third to a quarter of all alleged cases of child sexual abuse. Similar figures are reported for Australia (Kenny et al. 1999). Punishing young sexual offenders, however, presents a particular challenge to the juvenile justice system. Because of their age and immaturity, they are considered more excusable and reformable than adult offenders. Yet, sexual violence perpetrated by children and youths disturbs the prevalent social construction of childhood as a time of innocence. It generates anxiety and fear that their offending will continue and increase in seriousness (Brownlie 2003; Chaffin and Bonner 1998). Sentencing sexual violence also requires a balance between censuring gendered harms and stressing their seriousness without imposing penalties that are too harsh (Daly 2002; Warner 2005).

My study consists of a detailed examination of the sentencing remarks in 55 cases of youthful sexual offending, sentenced by judges in the South Australian Youth Court, between 1995 and 2001. It builds on Kathleen Daly's Sexual Assault Archival Study (SAAS), which considers the appropriateness of restorative justice in cases of gendered and sexualised violence. My study was prompted by an interest in comparing court and conference outcomes for youth sexual violence cases. Drawing from the literature and using speech in the courtroom, the study examines the specific processes and discourses involved in the sentencing of youthful sex offenders. Specifically, I examine these questions:

- How do judges balance the seriousness of the offending and the youthfulness of the offenders?
- What is the judges' orientation when sentencing youthful sex offenders?
- What normative framework about gender and sexuality are judges giving adolescent offenders?

Brownlie (2003) points out that much of the literature on the desistance or persistence of sexual offending has focused on adult offenders and "has failed to link in with the literature on juvenile justice" (p. 507). She emphasises that the topic of juvenile sex offenders and their treatment in the criminal justice system is largely understudied. While research has been conducted on the sentencing of adult sexual offences and on the legal treatment of young offenders in general, it seems the sentencing process and its outcomes in cases of juvenile sexual offending has been neglected. As far as I know, this is the first study that examines the sentencing of juvenile cases of sexual offending.

The thesis has two parts. In Part I, I review the literature and formulate three research questions. Then, I outline the research methods used in the study, and introduce the sample of sentencing remarks. Part II presents the results of the study and discusses the findings. Chapter 3 describes how judges characterised the cases, the offences, and the offenders in front of them. Chapter 4 examines the judicial justifications for the sentences, that is, the factors that judges said they took into consideration, and the theories of punishment they used. Chapter 5 considers the moral and personal communication at sentencing by looking at what judges said to

the offenders and how they communicated their messages. Finally, Chapter 6 discusses the results and their significance, and suggests further lines of inquiry.

PART I

LITERATURE, RESEARCH QUESTIONS, AND METHODS

CHAPTER 1: LITERATURE REVIEW

The literature that informs this project is broad and diverse, and covers several themes, which are relevant to this study. I found the most useful way to conceptualise this literature was to organise it along three dimensions. The first examines how cases of sexual assault, victims, and offenders are depicted in court; the second focuses on sentencing and how judges justify the penalty; and the third considers the judicial communication with the offender. There are overlaps between these dimensions; nevertheless, they represent three distinct aspects worthy of analysis, and they inform different facets of what is happening during the sentencing process. Before I turn to these three dimensions, I review some current debates in criminal and youth justice, and describe the legal context in which my study takes place.

Criminal and Juvenile Justice: Debates and Context

Toward increased punitiveness?

Over the past 10 to 15 years, some claim that a trend has occurred in criminal justice, which shows movement away from penal welfarism and toward increased punitiveness, along with the application of actuarial justice and risk-oriented approaches (Feeley and Simon 1994; Garland 1996; Pratt 1999). For juvenile justice, the sensationalisation by the media of a few tragic but rare cases of extreme violence by children has led to demands for enacting more severe punishment of young offenders, especially those responsible for violent and sexual crimes (Roberts et al. 2003). Others argue that this trend may be more prominent in the US than

elsewhere. They point, for instance, to the growing use of diversionary practices such as cautioning and conferencing (Matthews 2005; Muncie 2005; O'Malley 1999). Even in the US, Kupchik et al.'s (2003) examination of the sentencing of juveniles transferred to adult court indicates that judges still treat these offenders somewhat more leniently than they would adult offenders. Muncie (2005) argues that fluctuations, reversals, and resistance are characteristics of the field of juvenile justice, and that changes enacted for their symbolic values at the political level may not be followed through in practice. This is evidenced in Australia, where we see that rates of youth imprisonment, contrary to general claims of increasing punitiveness, have declined nationally by over 50% in the period 1981 to 2004 (Veld and Taylor 2005: 14). Although the decline is smaller in South Australia, it mirrors the overall trend with a reduction in the rate of youth imprisonment from 41.3 per 100,000 persons aged 10-17 in June 1981 to 31.5 in June 2004 (p. 17). In the recent period, the politics of punishment have typically focused on the kind and amount of punishment that should be imposed on violent offenders, particularly sexual offenders.

Responses to sexual offending

Roberts et al. (2003) argue that the public generally believes that penalties for sexual offending are too lenient. Child sexual abuse, above all, has prompted strong public demands for harsher punishment. Politicians have responded to these demands by enacting more punitive penal responses, particularly in the UK and the US, although a similar trend has occurred in Australia. For example, in 2005, the South Australian Premier, Mike Rann, declared in Parliament that the courts must realise that "we

want a much stronger sentencing regime imposed on sexual predators" and proposed new legislation to "ensure judges sentence sex offenders in line with current community standards" (*The Advertiser* 2005: 4). Recent laws in several Australian states have extended prison terms and created the option of indefinite imprisonment for serious adult sexual offenders.[1] To date, these new powers have been resisted by the judiciary and have rarely been used (Freiberg 2005). Although these new laws apply only to adult offenders, young people who offend sexually are also perceived by the community as a cause for concern (Sutherland 1997; Wyld 2004). In the UK and US, adolescents convicted of sexual offences can be subject to community notification for extended period of times (Brownlie 2003; Richardson 2002), although no such legislation for young people currently exists in Australia. Alongside debates about the direction of punitiveness in penal policies, there are debates about the changing practices in juvenile justice.

Models of juvenile justice

Since the end of the 19th century, in all western countries, specialised youth courts have dealt with children and adolescents who offend. Informed by a welfare or needs-based approach, the ideological emphasis was not on punishing young offenders (who were seen as victims of their environment), but on reforming them. Around the world in countries like Australia and beginning in the 1980s, an effort to correct what is called the "welfare" model, with its emphasis on rehabilitation, and to move toward accountability for the offender was made with what is called the "justice" model (Bala et al. 2002; Carrington 1993; Cunneen and White 2002;

[1] The *Dangerous Prisoners (Sexual Offender) Act 2003* in Queensland, is an example.

Newburn 2002; O'Connor 1997; O'Connor and Cameron 2002; Seymour 1997; Wundersitz 2000).

Most commentators stress that this depiction of the movement between the welfare and justice models does not accurately reflect how the juvenile justice system actually operates. Pitts (1988 cited in Cunneen and White 2002: 121) argues that, in both perspectives, the aim is to ensure young people conform to social norms; each model only suggests different means to achieve this aim. As Wimshurt and Hayes (2006: 115-116) suggest, "the legacy of ambivalent views about the condition of youth continues to haunt youth justice"; in practice, both punitive and rehabilitative elements are present in the legislation, and are used when sentencing young people (Seymour 1997; Warner 1997). An empirical examination of sentencing outcomes and discourses in the New South Wales Children's Court (Vignaendra and Hazlitt 2005) reveals that while *stated policies* governing youth justice may have shifted, the *primary practices* of the court remain rehabilitation and a commitment to provide care and guidance to young offenders, in a manner reminiscent of the paternalism of earlier youth courts.

The legal framework of the South Australian Youth Court

In all Australian jurisdictions, statutes outline the sentencing principles and procedures that apply in youth courts. Variations exist between states. For the purpose of my study, I focus on the legal framework in South Australia and describe the principles and sentencing options that are used in this jurisdiction.

In South Australia, the general guidelines of the *Criminal Law (Sentencing) Act 1988* apply to sentencing in the Youth Court; however, the *Young Offenders Act 1993* specifies the particular principles, procedures, and limits that govern the sentencing of youths. The first aim of the *Young Offenders Act 1993* reflects the traditional (rehabilitation) approach to juvenile justice. It is, "to secure for youths who offend against the criminal law the care, correction and guidance necessary for their development into responsible and useful members of the community, and the proper realisation of their potential" (s.3(1)). At the same time, and reflecting a move toward accountability, young offenders are to be "made aware of their obligations under the law" (s.3(2)(a)). The general matters relevant at sentencing are listed in s.10 of the *Criminal Law (Sentencing) Act 1988* and include the circumstances of the offence, the victim and the offender, the response of the offender (e.g., remorse), the need for adequate punishment, the deterrent effect of the penalty,[2] and the need to rehabilitate the offender (s.10). Age remains a strong mitigating factor at sentencing.

The *Young Offenders Act 1993* emphasises that the Court must act in the best interests of the youths to ensure their development into responsible adults. Penalties should be the least restrictive in order not to interfere with the offenders' education and to preserve their relationship with their family. Detention must only be imposed as a last resort. The *Young Offender Act 1993* (ss.22-28) provides a hierarchy of sanctions ranging from a simple admonishment to a maximum of three years in detention. Sanctions include: good behaviour orders requiring that no further offending occurs; various obligations, such as entering into counselling or attending

[2] General deterrence (the effect the sentence may have on the general population) does not apply to the sentencing of young people for whom only special deterrence (the effect the sentence may have on the youth) is relevant (s.3(2a)(a) of the *Young Offender Act 1993*).

educational programmes; supervision of the offender by Children, Youths and Family Services (CYFS) to monitor an offender's behaviour; the imposition of fines; and the imposition of community service orders. The Youth Court has the option to sentence a youth without recording a formal conviction (s.21). This is to avoid damaging a young person's future chances of securing employment, and more generally, to avoid the stigmatising effect of an official conviction.[3]

Like other states, the South Australian Youth Court has the option of transferring youthful defendants to the adult court when their offences are particularly serious, but this happens rarely in South Australia. In the years 1999 to 2004, no sexual offender under 18 was dealt with as an adult in the South Australian District Court (OCS 2000; OCSAR 2001, 2002, 2003, 2004, 2005).[4]

Characterising Sexual Assault Cases, Offences, and Offenders

Much of the literature suggests that, during the adjudication and sentencing process, the seriousness of sexual offences is often downgraded and victims are unlikely to be vindicated. There are some exceptions, however, depending on whether the offence is committed against a child or adult victim. For adolescent sex offenders, the focus of the literature is on how the seriousness of the offending relates to the youthfulness of offenders, that is, is the offending youthful "experimentation" or does it suggest the start of more serious offending and a potentially dangerous individual?

[3] This option is normally taken when a young person appears before the court for sentence on the first or second occasion.

[4] By comparison, during the same period in New South Wales, 54 youths were transferred to the adult court for sexual assault (BOCSAR 2000, 2001, 2002, 2003, 2004, 2005).

The legal representation of sexual offences

Feminist analysts have emphasised that, through the legal process, the victim's experience of the assault is often obscured and the seriousness of the offence minimised (Boyle 1994; Kaspiew 1995; Mohr 1994; Warner 2002). Analyses of rape trials indicate that the language used is often humiliating and degrading for victims (Matoesian 1993; New South Wales Department for Women 1996; Stephen 1994). In a series of studies using court transcripts of sexual assault cases with *adult* offenders and *adult* victims, Coates and her colleagues show how rhetorical devices used by legal officers frequently tend to transform a violent and coercive event into a mutual sexual encounter. This obscures and mitigates the offender's responsibility, resulting in accounts that impede denunciation and effective intervention (Coates et al. 1994; Coates and Wade 2004). Using a similar methodology, MacMartin and Wood (2005) analysed *adult* cases of *child* sexual assault. Contrary to Coates and others, MacMartin and Wood find that such offending is not minimised, but censured more harshly. Specifically, judges do not excuse or normalise the crimes, but denounce the offenders' quest for self-gratification and their exploitation of vulnerable victims. The judges attribute sexual rather than violent motives to the offenders' behaviour,[5] but this served to accentuate rather than minimise the gravity of the crime. Based on their findings, MacMartin and Wood (2005) highlight the importance of distinguishing judicial discourses for adult and child victim cases of sexual assault.

[5] An emphasis on sexual motives often suggests an affectionate, erotic, and mutual encounter rather than a violent and coercive one.

For adult cases with adult victims, feminist analysts attribute the judiciary's gender bias to the masculinist approach embedded in the patriarchal nature of the law, the legal system, and, more generally, the social structure (Lacey 1998; Mackinnon 1992; Naffine and Owens 1997; Scutt 1997; Smart 1989). For instance, judges are more likely to convict when the case follows Estrich's (1987) "real rape" scenario (that is, rape by a stranger), than in cases of acquaintance or relationship rape. McGregor (2004) argues this occurs because court stories about rape and sexual assault, and particularly the depiction of consent, are reformulated from a male point of view, leaving no space for a woman's story. She claims that the legal definition of consent embodies a version of sexuality that accepts "male dominance and persistence and female submission and reluctance" (p. 9). As a result, the legal determinations of sexual assault cases may often deem sex was consensual if a man said that *he believed* that a woman was consenting, even when she refused and resisted his advances.

Characterising the offenders: sexual experimenters or sexual offenders?

With youthful offenders, the question shifts to how the seriousness of the offending can be reconciled with the youthfulness of offenders. In their review of the debates surrounding youthful sex offenders, Martin and Kline Pruett (1998) point out that juvenile sex offending has only recently come to be seen as a "social problem"; thus, there is a scarce literature in this area. The emergent literature suggests that because of their developmental stage and their motivations, juvenile sex offenders differ from adults. They are viewed as more similar to other delinquents and they often present similar social and individual problems. In addition, they do not form a homogenous

group, but vary in terms of the causes of their offending, their individual characteristics, the type of offences they commit, and whether they abuse strangers or people they know (e.g., Allan et al. 2002; Letourneau and Miner 2005; Masson and Morrison 1999; Rayment-McHugh and Nisbet 2003;Vizard et al. 1995).

Some argue that sexual offending during adolescence often represents a springboard to adult sexual offending. Looking at adult male sex offenders, some research has found that of these offenders had started abusing during adolescence (Abel et al. 1993; Brownlie 2003; Kenny et al. 1999) with an escalation in seriousness through adulthood. However, a more recent study, which followed adolescent sexual offenders as they grew up, has failed to confirm the link between juvenile and adult sex offending (Nisbet et al. 2004). This study supports previous research, which suggests that juvenile sex offending is part of a general pattern of antisocial behaviour and that juvenile sex offenders are at much greater risk of non-sexual than sexual re-offending (Allan et al. 2002; Association for the Treatment of Sexual Offenders 1997; Smallbone and Wortley 2001; Soothill et al. 2000). Thus, in sentencing, courts are faced with a difficult question of whether to deal with these young people as adolescent experimenters, who are likely to "grow out" of their offending, or whether they should be regarded as potential sex offenders, whose *sexual* behaviour must be controlled (Brownlie 2003).

Justifying the Penalty

The questions that judges are likely to consider when sentencing youthful sex offenders relate to the causes to which their offending can be attributed, their

potential for reform, and the future risks they may pose. These factors are likely to influence which theories of punishment judges use and which goals they try to achieve.

Attributions of responsibility

The adult literature focuses on offenders' locus of control; that is, whether external factors are used to explain the offending or whether culpability is seen as inherent (or internal) to the individual. Analysing sentencing remarks in adult offender-adult victim cases of sexual assault, Linda Coates (1997) examined judges' causal attributions. Attribution theory suggests that attributions of responsibility vary, depending on whether we approve or disapprove of individuals and their actions. When we approve of individuals, but disapprove of their actions, we tend to attribute the cause for the action to factors external to the individuals' personality; by contrast, if we disapprove of both the individuals and their actions, we are more likely to attribute the cause for their actions to factors inherent to the individuals (Nettler 1984: 159-161). Drawing on this theory, Coates (1997) classified causal motives for the sexual offending as external or internal to the person. Expectedly, she found that when judges attributed external causes for the offender's behaviour, such as loss of control or the effects of previous victimisation, the penalties were more lenient than when they attributed internal causes, such as immorality.[6] Thus, causal attributions are likely to influence judges' sentencing justifications.

[6] Coates suggests that the minimisation of offenders' responsibility in court may have a negative effect on their chances of rehabilitation. For instance, Jenkins (1998), in his work with adolescent sex offenders, emphasises that young people must take responsibility for their behaviour, in order to change it.

Theories of punishment

Theories of punishment can be conceptualised in dichotomous forms: backward-looking, where the aim is to punish the offender for past crimes, and forward-looking, where the aim is to stop the offender from committing future crimes (von Hirsch 1985). The notion of backward-looking punishment is based on the deontological principle of retribution, where an offender is punished because it is morally right to do so. Punishment is the way to assign blame and censure for the wrongdoing. Some penal philosophers, however, distinguish between the censure expressed in the pronouncement of the penalty, and a more punitive orientation contained in what Hudson (2003: 47) calls "the 'hard treatment', the pains and deprivations which are the mode through which this censure is delivered". Forward-looking perspectives on punishment, by contrast, are utilitarian in that punishment is expected to achieve some socially useful goals. These perspectives include general and specific deterrence, rehabilitation, incapacitation, and reparation. Typically, at sentencing, judicial officers draw from one or more of these theories, and they have wide ranging discretion to do so (Ashworth 1994; Daly 1994; Hudson 2003; Mackenzie 2005; Zdenkowski 2000).

The Moral and Personal Communication

The sentencing hearing has been likened to a "quasi-religious social ritual" (Tait 2002: 472) when the court, armed with the power to sanction and incarcerate, announces the defendant's fate. However, aside from the content of the sentence, interactions and communication between court officers and defendants form an integral part of the punishment (Emerson 1969; Feeley 1979; Kupchik 2004; Mileski

1971; O'Connor and Sweetapple 1988). The literature suggests that the sentencing hearing is a forum to denounce the crime and publicly reprimand the wrongdoer. It also emphasises that some modes of communication are more effective than others in fostering a change of attitude in offenders.

Expressing censure

Von Hirsch (1993) suggests that a penal sanction on its own, or the warnings and threats of further sanctions typical of Emerson's (1969) descriptions of youth court hearings, might bring compliance, but they would not develop the offender's moral agency. Thus, in his view, it is important that a moral message expressing censure and disapproval of the behaviour accompanies the sanction. Censure clearly conveys to the offenders that the act they committed was wrong and hurtful for others, and that the expected response is remorse and contrition. It also offers some redress to victims by recognising that their suffering was due to someone else's fault. Duff (2002) proposes that punishment has an educational function to help young offenders realise the significance of their actions and develop into fully responsible moral agents.

A pedagogical perspective on the youth court

Weijers (2002) goes further and advocates "a pedagogical perspective on juvenile justice". He recommends that in order to challenge the views of adolescents in court, judicial officers should actively engage in a moral dialogue with the youths and that such a dialogue could "function … as a moral reference point in the life of the young offender" (p. 145). By focusing on the harm caused by the wrongdoing and asking

critical questions that offenders may have overlooked or refused to consider, the judicial communication should try to stimulate an offender's self-reflection, and appeal to feelings of empathy, regret, and remorse. In this view, moral education should go further than expressing reprobation. It should also challenge attitudes and beliefs that support the offending behaviour.

Normative framework

In relation to sexual aggression, surveys of adolescents show that up to a third of Australian senior high school students, both male and female, hold unfavourable attitudes toward rape victims and support stereotypical rape myths (Xenos and Smith 2001). Murnen et al. (2002) highlight how boys' acceptance of traditional gender roles and sexuality is learned early and reinforced by male peers, and how support for these traditional gender roles when combined with lack of social conscience, irresponsibility, alcohol consumption, and peer pressure, may facilitate sexual assault. Friedman (1998: iv) finds that in South Australia, up to a third of young men aged 16 to 23 agreed that "it was sometimes okay to force a woman to have sex".

The prevalence of these cultural beliefs led Warner (2004, 2005) to suggest that judges ought to use the sentencing hearing as a forum in which the social and cultural attitudes that foster sexual aggression are questioned. She says, "sentencing remarks in particular could be used to challenge the dominant cultural assumptions and

perspectives on sexuality and to infuse modern ideas about normal sexuality and sex roles into the law" (2005: 248).[7]

Degradation vs reintegration

All commentators say that the aim of judicial communication should not be to degrade offenders and undermine their self-esteem, as famously depicted in Garfinkel's (1956) "degradation ceremonies". Weijers (2002) and Taylor (2002) concur with von Hirsch (1993) that humiliating and demeaning treatment of wrongdoers (whether adult or juvenile) does not encourage a positive moral response. Rather, the moral dialogue should endeavour to stimulate young offenders to distance themselves from, and condemn the offence, along the line of Braithwaite's (1989) reintegrative shaming proposition, elaborated further in Braithwaite and Mugford (1994). While Braithwaite and Mugford (1994) assume that this goal is more likely to be achieved in victim-centred restorative conferences than offender-centred court proceedings, Weijers (2002) argues that a dialogic approach during court interactions could extend the benefits of conferencing to the courtroom.

Research Questions

Based on 55 sentencing remarks for sexual assault cases sentenced in the South Australian Youth Court between 1995 and 2001, my study examines the way that judges elaborate and justify the sentences of young people who have sexually abused others. Using qualitative methods, the study addresses these areas:

[7] For example, judges could confront widespread myths about sexuality such as that women enjoy being forced into having sex or the notion that if a woman accepts that a man pays for a meal on a date, she owes him sex (Friedman 1998).

1 – *Characterisation of the cases, the offences, and the offenders*: In which ways are sexual offences committed by juveniles characterised and understood? Are the harms done to the victims recognised or minimised? How do judges assess the young person's character; in particular, do judges construct these young people as potential sex offenders or adolescent experimenters?

2 – *Sentence justification*: In sentencing youthful sexual offenders, do judges typically focus on the seriousness of the offence or the characteristics of the offender, or both? Which theories of punishment do judges use to justify the sentence and do they aim at punishing or reforming the adolescents?

3 – *Moral communication with the young persons*: What do judges say to the young people in court? In which ways and using which types of discourses do they admonish the young person during the sentencing ritual? Which, if any, construction of gender relations do judges present to the defendants?

CHAPTER 2: RESEARCH METHODS

The Context of the Study

The Sexual Assault Archival Study

My project is part of the larger Sexual Assault Archival Study (SAAS), which is examining the appropriateness of restorative justice in cases of gendered and sexualised violence, and the comparative effect of the court and conference handling of youth sexual violence cases. The quantitative SAAS data consist of *all* youth cases having at least one sexual offence at the start of the criminal process, which were finalised by police formal caution, family conference, or in the Youth Court from 1 January 1995 to 1 July 2001 (Daly 2006; Daly et al. 2005).

Sample of sentencing remarks

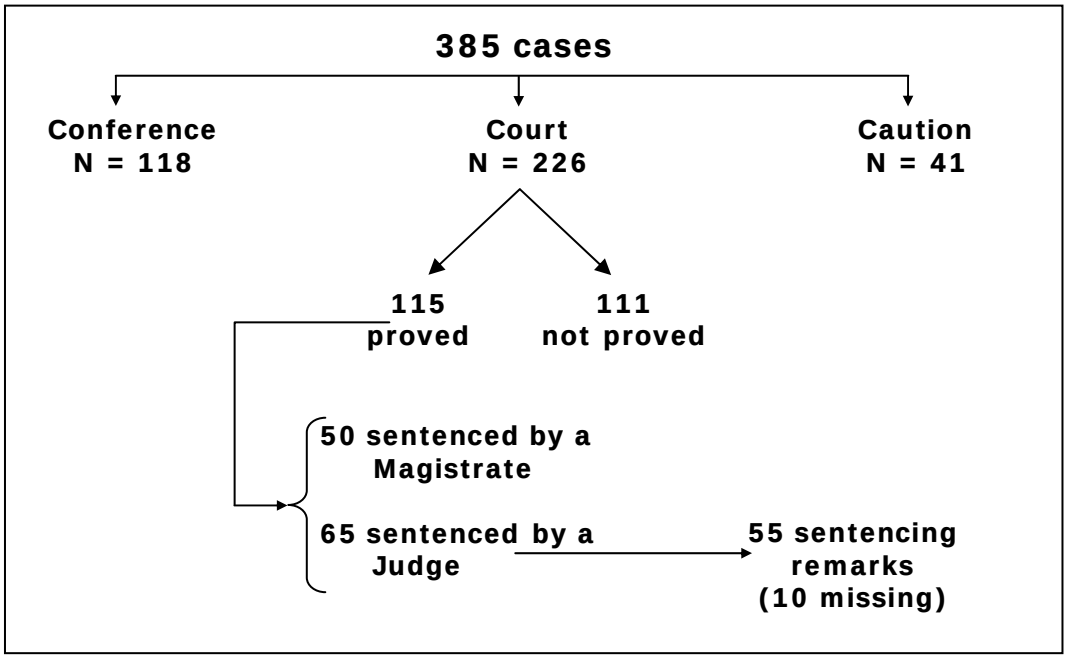
The SAAS dataset has 385 cases: 226 court cases, 118 conference cases, and 41 caution cases. In about half the 226 court cases, a sexual offence was proved. Figure 2.1 shows the flow of cases in the court and the number of judge-sentenced cases. My sample consists of 55 judicial sentencing remarks;[8] the remarks were missing for ten cases.[9] Judges typically sentenced the more serious major indictable offences,

[8] The analysis centres on judges' remarks because magistrates' remarks are not formally documented or easily available.

[9] Concerted efforts were made to track down the ten missing remarks through several visits to the Youth Court Registry, where copies are kept. I made frequent email and telephone contact with the Senior Judge's assistant, who looked through the Court's electronic filing system and asked individual judges for their missing remarks. A search was conducted through the State's Archives, but the missing remarks could not be located. An analysis of the cases for which the remarks were missing shows that the ten cases were not significantly different from the other 55. The major difference is the proportion of Indigenous offenders in cases for which remarks are missing (20%) compared to the other cases (9%).

such as rape, unlawful sexual intercourse, and incest.[10] In addition, victims in the cases sentenced by judges were significantly younger (mean = 11.5 years) compared with cases sentenced by magistrates (mean = 15.8 years). Judges were also significantly more likely to refer cases to the Mary Street Adolescent Sexual Abuse Prevention Programme;[11] judges referred over half of the cases they sentenced to Mary Street compared to just under 15% for magistrates.[12]

Figure 2.1. The flow of cases through the court and the resultant sample of 55 judge-sentenced remarks



[10] As expected, an analysis of offences type by magistrate and judge shows that the judges sentence the legally more serious cases.

[11] In the rest of the thesis, I refer to this programme as simply Mary Street. Mary Street provides an intensive therapeutic intervention to address adolescent sex offending by young people aged 12 to 17 years. The programme is based on the work of its director, Alan Jenkins (1998).

[12] A logistic regression shows that the strongest predictor of a case being referred to Mary Street is the victim's age (under 12), but that a second predictor is the type of judicial officer (that is, judge).

Documents Used in the Analyses

My analysis centres on the sentencing remarks, but other documents were used. I first describe the sentencing remarks before turning to the other documents (Police Apprehension Report, and the Court's Certificate of Record).

Sentencing remarks

The sentencing remarks consist of a verbatim transcript of what judges said to the offender, as well as any discussion that took place during the sentencing hearing.[13] They include a cover page, which lists the offender's details, the offences that were sentenced, the date of the hearing, and the names of the legal officers (judge, defence counsel, and prosecutor). Judges sometimes acknowledged the presence of the offender's parents or guardians in the courtroom, but never mentioned whether victims or their family were present. The remarks vary in length and, excluding the cover page, range from one to ten pages. An analysis of the word count shows that remarks range from just over 100 words to nearly 3,000 words, with an average of 1,000 words.

Typically, in their remarks, judges talked about the offence and described its effects on the victims and their families, and on the young person. They then justified and explained the factors they considered relevant to the sentence, citing aggravating or mitigating circumstances. Finally, they announced the sentence and outlined the specific penalties. They usually concluded the hearing by admonishing the young person and emphasising the serious legal consequences of future offending. The

[13] The sample was assembled by photocopying the remarks for the relevant cases at the Youth Court Registry. Some remarks were also obtained directly from the judges who sentenced them.

longer remarks were delivered in cases with child victims (under 12 years); these cases were seen as more serious than those involving older victims. The shortest remarks occurred when judges believed the offence was a case of consensual underage sex between those of a similar age. Short remarks were also frequent with older youths (over 19) who had offended as adolescents.

In eight cases, the transcripts of additional conversations were also available. These included discussion with Children, Youth and Family Services representatives about practical arrangements for the supervision of the young person, the judges' rejection of submissions presented by the defence or prosecution, and, in one case, the reasons for a finding of guilt at trial. This additional information gave insight into the case but was not subject to a systematic content analysis.

Other documents

The Police Apprehension Report (AP) and the Court's Certificate of Record were essential to my study because they contained the demographics of offenders and victims (e.g., age, sex, relationship), information on the offence, and a record of the case's journey through the legal process. The AP provides a record of the offence "facts" as they were reported to the police by a victim (or a family member for young victims). Although the quality of the AP varies between cases, it generally contains a short narrative of the victim's and offender's version of the events, whether the young person admitted to all or some of the alleged facts, and the initial charge(s) laid by the arresting police officer. The AP, however, does not document the subsequent police inquiry. At sentencing, judges are given a more complete picture

of the case, by the police prosecutor, which includes the evidence gathered by the police and their findings.

The Court's Certificate of Record documents the journey of the case through the court process, from the first hearing to the sentencing hearing. It contains details of the charges against the youth, whether a plea was entered, which charges were proved, and what penalties were imposed. The Certificate of Record shows how long it took for the case to be finalised, and it depicts the charges at the start of court proceedings and at finalisation. Thus, it offers a means of assessing the plea process and any reduction in the legal severity of the charges.

The 55 Cases: Demographics, Offences, and Penalties

Offenders and victims

The first thing to note about these cases is their gender structure. Of the 55 cases, all but one offender were male, but three-quarters of victims were female.[14] Tables 2.1 and 2.2 provide a profile of offenders and victims. On average, offenders were 16.8 years.[15] A quarter were 18 or older, but they were sentenced in the Youth Court because they committed the offence when they were under 18. Five offenders were Indigenous. About a third of offenders had a history of proved offending, which in three cases included a sexual offence. In 12 cases, non-sexual offences were sentenced at the same time as the sexual offence. A remarkable feature is the high

[14] Twelve cases had multiple victims. For coding purposes, a "primary victim" was identified. The decision rule was to select the victim of the most serious offence; or if the offence involved several incidents, the victim of the most serious incident. In cases of equal seriousness, the youngest victim was selected, and if everything was the same (age, seriousness), the female victim was selected.

[15] Two youths appeared twice in the sample, for different matters.

proportion (over half) of young persons with at least one problem mentioned in the sentencing remarks; these included a history of victimisation, a mental or intellectual impairment, abusing alcohol or drugs, or having a troubled family background.

Table 2.1. Profile of offenders

YP [a]	% based on N=55 % (N)
YP is male	98% (54)
Age range (years)	12.6 – 27.5
YP is 18 or over at sentencing [b]	26% (14)
Mean age at sentencing (years)	16.8
YP is Indigenous	9% (5)
YP has at least one problem [c]	58% (32)
YP has previous official offending	33% (18)
YP appears twice in the sample	4% (2)
Non-sexual offences sentenced at the same time as sexual offence	22% (12)

Notes: [a] YP = Young Person.
[b] Case is sentenced in the Youth Court, because offence was committed when the YP was under 18.
[c] Includes: substance abuse, family dysfunction, previous victimisation (sexual and other), and psychological, mental, or intellectual impairment.

Over 90% of victims were under 18, and half were younger than 12 years (Table 2.2). Of the 12 male victims, ten were younger than 12 years. They were equally likely to be victims of intrafamilial and extrafamilial offences. By contrast, under half the 43 female victims were younger than 12. They were more likely to have been the victims of friends and acquaintances rather than family members. Victims under 12 tended to be the victim of intrafamilial offences. Almost all the victims knew the offender in some way, either as a family member, a friend, a neighbour, or an acquaintance. Only two cases involved strangers.

Table 2.2. Profile of victims

Victims	% based on N=55 % (N)	Victim is female N=43	Victim is male N=12
Victim is female [a]	78% (43)	-	-
Age range (years) [b]	3.0 – 39.8 [c]	3.0 – 39.8 [c]	3.9 – 17.0
Victim under 12 at time of offence	52% (28)	42% (18)	83% (10)
Mean age at offence (years)	10.9	12.2	8.8
Offence is intrafamilial	38% (21)	35% (15)	50% (6)

Notes: [a] In one case of indecent behaviour involving vandalism in a church (case 131), no specific human victim was targeted as the individual victim; in the remarks the judge refers to "the ladies at the church" who cleaned up the damages; therefore, victim's sex was coded as female.
[b] Only three victims were 18 or over.
[c] The age of two adult victims was not specified in the AP. It was estimated based on the AP narrative and the average age of other adult victims in the full SAAS dataset (see Daly et al. 2005).

Offences and the legal process

Typically, the sentenced offences were indictable offences,[16] and included rape and attempted rape, unlawful sexual intercourse (USI), and indecent assault (Table 2.3). Charge bargaining was the most frequent for the cases initially presented as rape; these were more likely to be convicted of a lesser charge (Table 2.4). Five different Youth Court judges sentenced the 55 cases, but one judge dealt with nearly half the cases. On average, cases took 4 ½ months from the first to the final hearing, although a few cases took nearly 2 years before they were sentenced. All but two cases were finalised by a guilty plea.

[16] Offences are divided into two classes: summary and indictable offences. Summary offences include those that are not punishable by imprisonment and for which the maximum penalty is imprisonment for two years of less. Indictable offences include all other offences and are further classified as minor or major indictable. Minor indictable offences are those which are punishable by imprisonment for less than five years, or which are legally defined as minor indictable (e.g., indecent assault). All other indictable offences are major indictable offences.

Table 2.3. Most serious sexual offence at sentencing

Type of offences	Most serious sexual offence at sentencing	% on N=55 % (N)
Major indictable	Rape or attempted rape	18% (10)
	USI with victim <12	27% (15)
	Incest	2% (1)
	USI with victim 12 or over	24% (13)
Minor indictable	Indecent assault	25% (14)
Summary	Indecent behaviour	4% (2)

Table 2.4. Offences at start of proceedings and at sentencing

Most serious charge at first hearing is …	Original offence proved	Lesser offence proved	Total
Rape, attempted rape, or USI with victim <12	63% (25)	37% (15)	100% (40)
Indecent assault	100% (5)	-	100% (5)
USI with victim 12 or over, or incest	100% (8)	-	100% (8)
Indecent behaviour	100% (2)	-	100% (2)

Penalties imposed

The sentences imposed are shown in Table 2.5. In a few cases, non-sexual offences were perceived by the judge as more serious than the sexual offence (e.g., robbery was considered more serious than unlawful sexual intercourse) and the sentence applied to the more serious offence. The judges' comments, however, indicated that they were imposing a global sentence that reflected the seriousness of the young person's offending as a whole, rather than each specific offence. Thus, when this occurred, all the penalties imposed were recorded, regardless of the specific offence for which they were imposed. Detention was imposed in a third of cases, but was suspended for all but two cases. Over half the cases were referred to Mary Street, a

therapeutic programme for adolescent sexual offenders. Other penalties were mainly good behaviour orders and supervision by Children, Youth and Family Services (CYFS). In three cases no penalty at all was imposed.

Table 2.5. Penalties imposed

Penalties [a]	N=55 % (N)
No penalty	6% (3)
Mary Street counselling	58% (32)
Other counselling	15% (8)
Education/job training	22% (12)
CYFS supervision	67% (37)
Good behaviour order (median length, 52 weeks)	86% (47)
Fine (median amount, $200)	6% (3)
Community service (median length, 200 hours)	15% (8)
Detention imposed [b] (median length, 26 weeks)	33% (18)
Detention suspended (of N=18 cases with detention imposed)	89% (16)
Conviction recorded on sexual offence [c]	35% (19)

Notes: [a] In N=12 cases, other offences were sentenced at the same time as the sexual offence. In three of these cases the judges imposed a global penalty that dealt with the case as a whole.
[b] In one case, home detention was imposed, and was coded as detention.
[c] Judges have the option of not recording an official conviction. This is typically used for offenders who have had less exposure to the court, to avoid the stigma an official conviction would have on their future.

Analytical Strategies

Content analysis

I used content analysis to analyse what judges said during the sentencing hearing, adapting the techniques for content analysis described by Berg (2004) and Neuman (2006). I also drew from studies analysing a similar phenomenon to conceptualise the methods for my project; these included Daly's (1994) analysis of sentencing remarks, Easteal's (1993) analysis of mitigating and aggravating factors in homicide cases, Jeffries' (2001) review of the reasons that led to the suspension of a prison

sentence, and Vignaendra and Hazlitt's (2005) analysis of sentencing remarks in youth cases.

The coding categories were constructed using a combination of deductive and inductive approaches (Berg 2004: 272-273). Themes, such as aims of punishment, characterisation of victim's consent, or offender's remorse, formed the basis for coding the remarks. My coding was not limited to the manifest content of the text (i.e., words used by judges) but extended to the latent content (i.e., the meaning conveyed by the message). The remarks were delivered by different judges, using different linguistic styles and rhetoric.[17] As Neuman (2006: 326) points out, "the validity of latent coding can exceed that of manifest coding because people communicate meaning in many implicit ways that depend on context, not just on specific words".

Drawing from the literature, I coded the remarks according to five broad categories: 1) sentencing and justifications, 2) the offence and victim, 3) causes of offending and responsibility, 4) the young person, and 5) moral communication and admonishment. Appendix B describes the coding categories in details. I developed a coding schedule that incorporated all the themes relevant to an inquiry into judicial decision-making in cases of sexual assault. Some themes present in the literature on adult offenders did not appear in the remarks and were discarded. However, new themes were identified and incorporated into the coding schedule. Coding was an iterative process, which necessitated many readings of the remarks to expand and complete

[17] An analysis of how judicial styles varied by judges and by gender was not carried out because of concern for confidentiality. Since only five judges sentenced the 55 cases, I gave an assurance that any analysis that could jeopardise their anonymity would not be conducted.

the coding schedule. The coding schedule is presented in Appendix C. The text of the remarks was coded for frequency (was something present, yes/no), direction (positive or negative comments), and intensity (e.g., did the judge moralise not at all, a little, a lot). Coded variables were recorded in an Excel spreadsheet, which permitted both quantitative coding and qualitative note taking. Relevant variables were then transferred to a SPSS dataset, for the quantitative analyses.

Interviews with juvenile justice officers

To complement my analysis of the remarks and clarify some of the results, I conducted interviews with two of the judges who sentenced the cases in my study, a police prosecutor, a psychologist working with adolescent sex offenders, and an officer of Children, Youth, and Family Services. These interviews were conducted in December 2005, after I had carried out preliminary analyses of the remarks. My questions were prompted by a need to understand the pre-sentence processes (police inquiry and plea negotiation), the context of sentencing, and the implications of the penalties (e.g., how the supervision of young offenders operates in practice). In addition, the interviews were an opportunity to confirm the direction of some findings.

In Part II, I present the results of my study. Chapter 3 focuses on how judges characterised the cases and the offenders in their remarks. Chapter 4 examines the judges' orientation to sentencing and how they justified the penalty. Chapter 5 describes the judges' moral and personal communication during the sentencing ceremony. Finally, in Chapter 6, I discuss the findings of my study.

PART II

RESULTS AND DISCUSSION

CHAPTER 3: CHARACTERISING THE CASES AND THE OFFENDERS

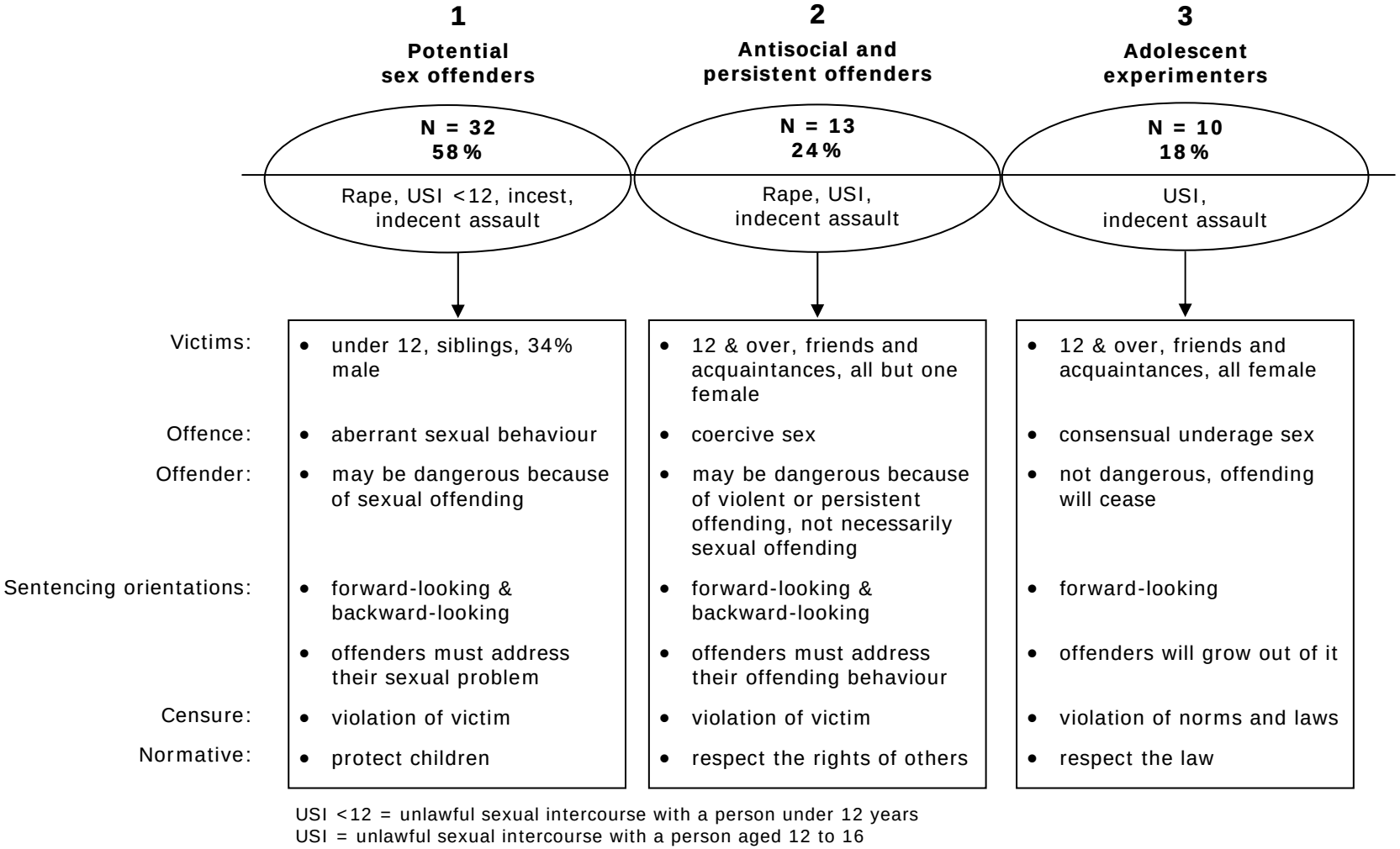
After reviewing the remarks many times, a striking result emerged that suggests that the cases can be classified into a three-way typology. This three-way typology frames the major results of my study (Figure 3.1). Each category includes a range of cases, but the judges' discourse, in each of the three categories, reflected a different set of ideas about the cases. Category 1 contains the adolescents who, the judges believed, were potential sexual offenders. Category 2 includes those the judges viewed as antisocial and persistent offenders. These offenders caused concern to judges not because of their sexual offending, but because of their criminogenic lifestyle. By contrast, the youths in Category 3 were understood by the judges to be adolescent experimenters, likely to mature out of their offending. Judges perceived Category 3 cases as the least serious. As we shall see, judges depicted these cases as consensual underage sex, but this did not match the victim's experience, when reporting the offence.

Three-Way Typology

Category 1: potential sex offenders

Category 1 comprised 32 cases in which judges believed that the offender posed a serious threat as a sexual offender in the making. Although the sentenced legal charges varied, all the offenders were referred to the Mary Street programme (Table 3.1). In these cases, judges depicted the offences as aberrant sexual behaviour, and this was linked to the characteristics of the victims (Table 3.2).

Figure 3.1. Three-way typology



USI <12 = unlawful sexual intercourse with a person under 12 years
USI = unlawful sexual intercourse with a person aged 12 to 16

Table 3.1. Offences and penalties for the three categories of cases[18]

	Category 1 Potential sex offender N=32	Category 2 Antisocial/Persistent offenders N=13	Category 3 Adolescent experimenters N=10
Most serious sexual offence at sentencing	Rape & Att'pd rape: 22% USI<12: 47% USI: 0% Incest: 3% Indecent assault: 25% Indecent behav: 3%	Rape & Att'pd rape: 23% USI<12: 0% USI: 38% Incest: 0% Indecent assault: 31% Indecent behav: 8%	Rape & Att'pd rape: 0% USI<12: 0% USI: 80% Incest: 0% Indecent assault: 20% Indecent behav: 0%
Penalty includes	Referral to Mary Street: 100% Other referrals: 13%	No referral to Mary Street Other referrals: 31%	No referral to Mary St No other referrals
	Detention: 38%	Detention: 46%	Detention: 0%

Table 3.2. Victims' characteristics and relationship with offenders for the three categories of cases

	Category 1 Potential sex offender N=32	Category 2 Antisocial/Persistent offenders N=13	Category 3 Adolescent experimenters N=10
Age	Under 12 years: 88% Mean age: 7.6 years [(a)]	12 or over: 100% Mean: 15.0 years [(b)]	12 or over: 100% Mean: 13.6 years
Gender	Male victim: 34%	Male: 8%	Male: 0%
Relation-ship	Intrafamilial: 63%	Intrafamilial: 8%	Intrafamilial: 0%
	Siblings: 38%	Siblings: 0%	Siblings: 0%
	Acquaintances and friends: 34%	Acquaintances and friends: 85%	Acquaintances and friends: 100%

Note: [(a)] This mean based on N=31 victims. One case with a victim aged 39 was excluded from the analysis because it unduly affected the average age of victims in this category.
[(b)] This mean based on N=12 victims. One case with a victim aged 39 was excluded from the analysis because it unduly affected the average age of victims in this category.

Category 1 contains *all* the cases with victims under 12 and *all* the cases where victims were the offenders' siblings; compared to the other categories, the cases were

[18] In the following tables, I tested the significance of the association between variables using Chi squares. Most of the time, the differences between categories were so stark that such a test of significance was inappropriate. When appropriate and relevant, I report the significance of Chi squares.

more likely to have male victims and intrafamilial offences. The average age difference between the offender and the victim (about 8 years) was the largest of the three categories. For the judges, the victims in Category 1 were definitely considered to be inappropriate sexual partners. Rodney's case exemplifies the judges' concern:[19]

> I consider it desirable, Rodney, not only that you undergo continued counselling, I consider it not only desirable but virtually essential, if you are to go through life with a right minded attitude to sexual behaviour… Hopefully, with such intervention ... you will not be interested in little girls like [Victim, aged 3], but will have a normal sexual outlook (case 114, Category 1).

Offenders in Category 1 tended to be younger than others. Most were described as having a variety of problems relating to prior victimisation and abuse, family dysfunction, mental or intellectual impairment, and substance abuse (Table 3.3). Just a quarter of them had a criminal history, but it was their potential sexual re-offending that concerned the judges. Although these young people were considered as potentially dangerous, judges expressed hope that, through the intervention of Mary Street, they could be reformed; and in half the cases, judges were optimistic the youths would not re-offend. Category 1 cases were of greatest concern to judges. These cases attracted significantly longer remarks, in terms of sentence justifications, admonishment, and the harm caused to the victim.[20]

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[19] Throughout the thesis, pseudonyms have been used when quoting from the remarks.

[20] The average number of words in the sentencing remarks was 1,173 for Category 1, 949 for Category 2, and 534 for Category 3.

Category 2: antisocial and persistent offenders

Thirteen cases are in Category 2. Although the judges viewed these cases as serious, they did not think the intervention of Mary Street was required. However, in one third of cases, they referred the offender to a therapeutic programme for substance abuse or mental health. In contrast to Category 1 cases, these offenders' actions were described as general antisocial behaviour rather than abnormal sexual behaviour. Victims in Category 2 cases were older (on average, 15 years old), and all but one were female (Table 3.2).[21] Most victims were friends or acquaintances of the offender.[22]

Table 3.3. Offenders' characteristics and judges' assessment of their dangerousness and reformability per category of cases

	Category 1 Potential sex offender N=32	Category 2 Antisocial/Persistent offenders N=13	Category 3 Adolescent experimenters N=10
Mean age	16.1 yrs	18.3 yrs	17.2 yrs
YP has problems	69%	62%	20%
Previous offending	25%	54%	30%
Judges say that YP may be dangerous to others	84%	23%	0%
Judges say YP is unlikely to reoffend	47%	39%	70%

Note: YP = Young Person.

Category 2 cases contains a variety of sexual and non-sexual offences. For two-thirds of these cases, the most serious offence sentenced was a sexual offence; and

[21] The one Category 2 case with a male victim case was an historical incident of child abuse, which happened 11 years before. The offender was 27 years at sentencing, and he had no subsequent re-offending. It appears the judge thought an intervention was now pointless.

[22] One victim was a relative of the offender, and one victim was a stranger.

for these sexual offences, judges believed that the victim had been coerced, even when lack of consent had not been legally proved.[23] In one-third of cases, non-sexual offences, such as robbery, were sentenced during the same hearing; these offences were viewed as more serious than the sexual offence, which was often viewed as consensual. Over half the young people in Category 2 had a serious criminal history, and many were abusing alcohol and drugs. Thus, the sexual offence was considered in the context of a criminogenic lifestyle, which explains why detention was imposed in nearly half the Category 2 cases.

Phillip is typical of the youths in this category. He had a history of violent offending and the judge described his life until recently in grim terms:

> You didn't have much potential at all. If you had any, it was being lost in a world of alcohol and drugs, and in offending. You were leading an aimless lifestyle, abusing drugs and alcohol, in a relationship, which it seems, was going nowhere, basically on a path to nowhere except, in all likelihood, to detention or gaol. … It might well be said [that] you have been given more than one chance in the Youth Court and why should you be given another, especially for such serious crimes? (case 77)

The notion that the offender presented some danger to the public was expressed in a quarter of these cases, but the fear was related to violent and dangerous offending in general, not sexual offending in particular.

[23] The legal charge of rape means the victim's lack of consent has been demonstrated. It carries a life sentence for adult offenders. The charge of unlawful sexual intercourse (USI) means that an offender had consensual sexual intercourse with a victim who was older than 12 but under the legal age of consent (17 years in South Australia). It carries a lighter penalty of 7 years imprisonment. Unless there is strong evidence that the victim did not consent to sex, pleas to USI rather than rape are permitted by the state in pre-trial negotiation with defence.

Category 3: adolescent experimenters

Category 3 includes ten cases; these were viewed as far less serious than those in the two other categories. In most cases, the sentenced offence was unlawful sexual intercourse (USI), which judges characterised as adolescent experimentation and underage sex between consenting peers, giving no hint that the victims were taken advantage of. All the victims were female, aged 12 or over, and were friends or acquaintances of the offenders. The judges' emphasis was on sanctioning the violation of legal norms rather than the harm caused to the victim. There was no concern of an alarming sexual behaviour or entrenched criminality. Judges depicted the offenders as immature and wayward, but did not see the need for a therapeutic or punitive intervention. They hoped that the adolescents had learned from their experience in court, and had matured enough to stop offending.

Case 137 is typical of the way judges dealt with Category 3 cases. The judge attributed the offence to Elliot's youthfulness and impulsivity, but expressed confidence that Elliot had grown up, and said:

> However much it might seem like a good idea at the time, you have got to think beyond that. … You have learned a lesson from it. I am sure that … there is no reason to think that you will either do anything like that again or, I would think, break the law again" (case 137, Category 3).

Less than a third of these youths had offended previously, and few had serious personal problems. This likely made the judges feel quite confident that there would be no further offending.

A major difference across the three categories is the judges' depiction of the victim's consent. This is particularly relevant to Category 3 cases, where in three-quarters of cases, I found that the depiction of consent at sentencing misrepresented the experience of the victim.

The Victim's Consent

In over half of the 55 cases, judges discussed the question of the victim's consent. Their messages were mixed and depended on the type and the context of the offences. For cases in Category 1, which involved mostly children, victim consent, although it was sometimes mentioned, was seen as irrelevant because these children were deemed unable to consent (see Table 3.4). Therefore, my discussion centres on Category 2 and Category 3, because in these cases consent was always discussed.

Table 3.4. Judges' description of the victim's consent

Judge's description of victim's consent	All cases, N=55 % (N)	Category 1 N=32 % (N)	Category 2 N=13 % (N)	Category 3 N=10 % (N)
Did not consent	31% (17)	25% (8)	69% (9)	10% (1) [a]
Consented	25% (14)	--	31% (4) [b]	90% (9) [c]
Nothing mentioned	44% (24)	75% (24)	--	--

Notes: [a] The offender pleaded guilty to indecent assault, which was described as a response to the victim's bullying. As a result, the seriousness of the offence was reduced.
[b] In one of these four cases, the judge's depiction of victim consent did not match the victim's version.
[c] Contrary to what the judges said, of the nine cases that were depicted as consensual, the victim reported she had been raped in seven; thus, in 78% of cases, the judges' version did not match the victim's version of consent.

Predictably, the victim's lack of consent was central to the three Category 2 cases, which were sentenced for rape. When the offender had admitted to unlawful sexual intercourse (USI), judges were legally bound to sentence on the assumption that the

sexual interaction was consensual, or that, at least, the offender believed it was (for the difference between rape and USI, see Footnote 23). Yet, judges were concerned that this may not have been the case. For instance, in case 163, Ralph (aged 17) had sexual intercourse with two adolescent girls (aged 12 and 13), who had ran away from home and were staying at his place. The judge acknowledged that:

> The charges, of course, haven't gone ahead as rape charges. It would have been very different if they had. They have gone ahead as unlawful sexual intercourse charges, and I have to deal with you on the basis that, at the very least, you believed that the girls were consenting.

But the judge doubted the validity of the offender's claim that the victims consented:

> But, the seriousness of all of this is that the girls were … very much under age. They were plainly immature girls. They are plainly vulnerable girls, and there is no doubt that you were, up to a point, exploiting that vulnerability and really showing them, as persons, next to no consideration. … You were interested in yourself and not the girls … [They] were girls who had their own significant problems in life … and they deserved protection and consideration rather than exploitation. That is what makes all of this so serious (case 163, Category 2).

Ralph did not have a criminal history, yet a suspended term of detention was imposed. Although this case was atypical, it suggests that judges may "sentence on the story rather than the charge" (Cretney and Davies 1995: 140) in some cases when the legal seriousness of the offence has been downgraded, but does not reflect the gravity of what the judge believed happened. Ralph's case was unusual in that most

cases of USI were regarded as "underage sex" rather than as a coercive encounter.[24] This benign interpretation was typical in most Category 3 cases.

In Category 3 cases, judges indicated that they were satisfied that the victims had truly consented to having sex with the offender, as case 185 illustrates:

> You were encouraged by her in a relationship which lasted about a month and, in the course of that relationship, you and she had sexual intercourse three times. It was your first experience of that nature, and it had not occurred to you, at the age of 16, that what you were doing was wrong. There is no suggestion that the sexual intercourse was without her consent (case 185, Category 3).

Despite what the judge said at sentencing, this case was initially charged with rape, but the young person eventually pleaded guilty to USI. This exemplifies the attrition of seriousness in the Category 3 cases that had started as rape. Of the ten cases in Category 3, nine were described as underage sex with a consenting partner. Yet, in seven of these nine cases, the victim had reported she had been raped; thus, the judges' version did not match the victim's experience of the offence.

These cases reflect the dynamics that are often seen in cases of adult acquaintance rape. Victims, all of them female, knew the offenders and may have kissed or shown affection to them, but at the same time, they indicated that they did not wish to have sex. While they reported that the young men raped them, in a private place away from witnesses, the version of the offence that prevailed at sentencing was one of consensual sex. The only unlawful element, then, was not that the youth coerced his

[24] Of the four Category 2 cases where judges described the victim as consenting, three involved genuinely consenting victims; in only one case, the victim's consent was misrepresented. In the four cases, the youths had other offences finalised at the same time, and this made the cases more serious.

sexual partner, but that she was under the legal age of consent, a relatively minor infraction.

The literature suggests that adolescents who abuse others sexually are viewed as either future sex offenders, whose sexual behaviour needs to be controlled, or as adolescent experimenters (Brownlie 2003). Judges took both perspectives. They believed that Category 1 offenders, who abused young children and siblings, had sexual problems and might become entrenched sexual offenders. By contrast, they viewed Category 3 offenders as experimenters, whose behaviour was not so problematic and was likely to disappear with maturity. An additional category, Category 2, emerged; judges considered that offenders who were violent or persisted in offending were dangerous, because of their general antisocial attitude rather than their specific sexual offending.

My study confirms previous research, which suggests that judicial officers consider the sexual abuse of children to be very serious, but tend to minimise seriousness in cases with adult victims (Coates and Wade 2004; Coates et al. 1994; MacMartin and Wood 2005). This is exemplified in how judges dealt with the question of victim's consent. In Category 1 cases, consent was rarely mentioned because child victims were deemed unable to consent, which made the cases more serious. However, in Category 3 cases, judges dealt with the question of victim consent in a way consistent to what the literature suggests happens in cases of acquaintance rape with adult victims. These cases were constructed as consensual sex, but this version did not match the victim's story, who reported she had been coerced into sex.

CHAPTER 4: JUSTIFYING THE PENALTY

The three-way typology is an effective base for analysing judicial orientations to sentencing. In justifying the penalty, judges were informed by three additional elements. First, is the attribution of responsibility, that is, whether judges attributed the cause of the offending to factors external or internal to the offender. Second, is the judicial determination of an offender's potential for change. Third, is the judicial stance of looking forward to reform the offender or backward to punish the offence. I present each of these elements before turning to an analysis of when and how detention sentences were imposed.

Attributions of Responsibility

Judges attributed one or more causes for the offending in over 80% of cases.[25] In all but two cases, the offending was attributed to reasons external to the offender rather than to reasons inherent in their character (Table 4.1). Explanations for the offending often overlapped, but I was able to distinguish three mutually excluding types of causal attributions (Table 4.2). The first related to the youthfulness of the offender and included immaturity, lack of control, and inappropriate sexual experimentation. The second related to disadvantages in the youth's life and included psychological and mental health concerns, intellectual impairment, victimisation, and family dysfunction. The third, which was rarely mentioned, related to the inherent character of the youth, that is, his selfishness and lack of regard for others.

[25] In the other 20%, judges did not attribute the offending to any specific causes.

Overall, causes of offending were attributed equally to themes one and two, youthfulness and disadvantage, which were viewed as largely beyond the control of the young people, and which judges expected would disappear with maturity, or could be remedied.[26] Attributions relating to youthfulness were more likely used in Category 3 cases. For instance, in case 48, the judge accepted the young person's ignorance of the legal age of consent, and said, "you have been genuinely unaware that this was a criminal offence". Attributions related to disadvantages in the youth's life were used more often for cases in Category 1 and Category 2. An example is case 130 (Category 1); after pointing out to Carl that children needed to be protected, the judge commented: "Now, unfortunately, I don't think you've had the benefit of that protection in your upbringing, and that, perhaps, explains a lot about why you are where you are today, and why you have done what you have done".

Internal attributions were given in just two cases, both of which were in Category 2. Both youths were sentenced for a string of offences in addition to their sexual offence, and they had extensive criminal histories. The judge pointed out that the youths had already benefited from the Court's leniency in the past, but "insist[ed] on offending" (case 44). As a result, their offending was attributed to their antisocial nature, rather than to their youth or disadvantage.

[26] Although judges attributed the causes of offending to reasons outside of the young persons' control, they tended not to minimise their responsibility, particularly in Categories 1 and 2 cases. Space limitation prevents me from presenting a detailed analysis of this aspect of the judges' discourse.

Table 4.1. Causes to which sexual offending was attributed

Cause	% based on N=46[(a) (b)] % (N)
Immaturity, youthful experimentation	48% (22)
Puberty, sexual arousal	30% (14)
Family dysfunction	28% (13)
Psychological/mental problems or intellectual disability	24% (11)
Previous victimisation (sexual or not)	22% (10)
Effect of alcohol/drug	17% (8)
Selfishness, disregard for others	17% (8)
Effect of stress/emotions	7% (3)

Notes: [(a)] At least one cause was mentioned in 46 cases, that is 84% of the sample.
[(b)] Percents add to greater than 100 because judges may mention several causes.

Table 4.2. Main cause to which judges attributed the offending

Cause related to	% based on N=46 [(a)] % (N)	Category 1, % based on N=25 % (N)	Category 2, % based on N=12 % (N)	Category 3, % based on N=9 % (N)
Youthfulness and adolescence (*external*)	48% (22)	32% (8)	42% (5)	100% (9)
Problems and disadvantages affecting the youth (*external*)	48% (22)	68% (17)	42% (5)	--
Selfishness or disregard for others (*internal*)	4% (2)	--	17% (2)	--
Total	100% (46)	100% (25)	100% (12)	100% (9)

Notes: [(a)] No cause was mentioned in seven Category 1 cases (22%), one Category 2 case (8%), and one Category 3 case (10%).

The Offender's Potential for Change

At sentencing, judges paid particular attention to the young persons' reactions after the offence, positive changes in their attitude since the offence, and any steps they had taken to address their offending.[27] For instance, in case 59 (Category 1), the judge said:

[27] Over 80% of the offenders in Category 1 cases had started attending Mary Street prior to the sentencing hearing. Police officers as well as defence solicitors encourage youths who admit to sexual offences to attend Mary Street early in the legal process. In addition, if it is feasible, judicial officers may delay sentencing in order for defendants to attend several sessions at Mary Street. This process allows counsellors to provide the Court with a meaningful report after engaging with the youth.

> Now, one of the very important things for me to take into account is your reaction to this offending and how you feel about it now … It seems that you not only realise how serious all this is … but you are now very sorry for what you have done and how it has hurt the other people, and that is very important.

By contrast, offenders who were characterised as not facing up to their responsibility caused concern to the judges. In the case of Lucas, who raped his 5-year old neighbour and excused his behaviour on the grounds of having been victimised himself, the judge decided to delay sentencing giving this reason:[28] "One of the concerns I have about your case has been what appears to be a lack of appreciation on your part of how serious your conduct is. Moreover, you have tended to excuse it, or explain it away…" (case 75, Category 1).

The offenders' reaction to the offence and their current living circumstances permitted the judges to assess if the youths were likely to change.[29] Judges were more hopeful when the young persons had the support of their family, were attending school or work, and had some prospects for the future. For instance, in the case of Mitchell, the judge decided to:

> … proceed without conviction even though this is a major indictable matter. I do so … most of all because of the committed efforts that you and others are making to ensure that there is no repetition of this. … Plenty of young people up there [youth's place of residence] don't get into trouble. I am sure plenty of

[28] Concerned by the offender's lack of remorse, the judge delayed sentencing to have more time to reflect on the case and decide which penalty should be imposed.

[29] Judges knew a lot about the youths' life circumstances through pre-sentence reports. Although pre-sentence reports are optional, at least one report was cited in all but one Category 1 cases, over 60% of Category 2 cases, but only 20% of Category 3 cases.

> them do well at school and do well at sport, and I am sure that it is what you are quite capable of (case 173, Category 1).

In three-quarters of cases, the judges' assessment was also informed by the youths' previous offending; they showed less optimism toward youths with developed criminal histories.

Looking Forward to Reform or Backward to Punish?

Judges predominantly used forward-looking theories of punishment in their sentencing, that is, they wanted to stop the young people from future offending by trying to reform them. Justifications for penalties were mentioned in all but five cases.[30] In Category 3 cases, judges believed the youths would most likely grow out of their offending, and they drew exclusively from special deterrence to justify their sentences.[31] Thus, I focus the rest of my analyses on Category 1 and Category 2 cases.

Because judges often merged special deterrence[32] and rehabilitation, I coded the judges' justifications according to two themes: forward-looking and backward-looking. Judges sometimes combined both, as illustrated in case 114 (Category 1):

> I must impose a realistic penalty, which hopefully brings home to you how serious it is [backward-looking] and acts as a personal deterrent against any repetition of such conduct [forward-looking].

---

[30] Of the five cases, four were Category 3 cases with no penalty imposed, and one was Category 2 with detention to serve imposed.

[31] A typical comment to the Category 3 cases is what the judge said to Brian (case 12): "That does not mean to say that further offending would get that sort of leniency. Once you have been warned by this Court, you should take into account that those chances fast disappear".

[32] In none of the cases was general deterrence mentioned.

Forward-looking justifications were those aimed at addressing the young person's future behaviour. They were present in all Category 1 cases and over three-quarters of Category 2 cases, suggesting that judges endeavoured, through their sentences, to address what they perceived were the causes of the youths' offending. The judicial remarks for Jake, who had a history of depression, exemplifies this stance. The sentencing judge said:

> [The] history that I read about is a very sad one and a tragic one, and it's clear that you need a lot of support. … I don't think you are in any real sense a criminal at all. I think your offending is linked very closely with your mental health and drug issues, but I'm sure you understand that they are issues that you have to try and get on top of, because there is often a very thin divide between those sorts of problems and committing crime (case 196, Category 2).

Judges also pointed out to the youths that they were giving them a chance this time, but there would no other chances:

> If you were an adult, these matters could easily result in you serving a term in prison. … I am on this occasion going to be reasonably lenient, but you should realise that this is your first and last chance to get such leniency. If you don't help yourself and make sure that this sort of thing never happens again, you can easily be facing very serious consequences. You are nearly 17, I am told, that's not far away from being 18, and then you will end up in the adult prison system if you go on offending (case 23, Category 1).

Table 4.3 – Justifications for punishment

Judicial justification	% based on N=50 [(a) (b)] % (N)	Category 1, % based on N=32 % (N)	Category 2, % based on N=12 % (N)	Category 3, % based on N=6 % (N)
Forward looking (special deterrence and rehabilitation)	96% (48)	100% (32)	82% (10)	100% (6)
Backward looking (retribution)	32% (16)	31% (10)	50% (6)	--

Notes: [(a)] Percents add to greater than 100 because several aims could be mentioned.
[(b)] No cause was mentioned in five cases: one Category 2 case (8%) and four Category 3 cases (40%).

The backward-looking justification, retribution, featured in about one-third of cases. For these cases, the judges insisted the seriousness of the past offence deserved some punishment.[33] Retributive justifications were more likely in Category 2 cases, no doubt because of the higher proportion of youths with persistent offending in this category. They were typically reserved for older offenders and those sentenced to detention, a theme explored next.

Justifying Detention

Detention was imposed in a third of cases (N=18), but suspended in all but two cases. Typically, judges followed a two-step approach. First, they imposed detention with a retributive justification (backward-looking); then, they suspended the detention, with a blend of special deterrence and rehabilitative justifications (forward-looking). For instance, in Tara's case (case 19, Category 1), the judge emphasised the offence deserved some punishment:

> The seriousness of the offence cannot be overlooked even though I have considerable concern for your own well-being and your own development. … It

[33] Note that I distinguish between the verbal communication of censure for the offence (examined further in Chapter 5 and common to all sentences) and the backward-looking justification for imposing a sanction, which was coded as retribution.

> was a particularly severe abuse, in my mind, on both occasions and obviously quite justifies the charges of rape. … There is no doubt in my mind that the seriousness of the offence and the circumstances surrounding it call for a period of detention, notwithstanding that this is the first time you have come before the Court.

Then, the judge opted to suspend the detention to allow Tara to receive some therapy:

> The grounds for suspending that order for detention exists, however, in your age, your prior good record and indeed, your own personal circumstances, which put your offending behaviour in the context of a victim who is now abusing others. I am therefore going to suspend the period of detention upon an obligation of 12 months duration and [the] condition that you attend assessment and therapy for your abuse both as a victim and as an offender.

As Table 4.4 shows, backward-looking (retributive) justifications featured mainly in these cases in which detention was imposed. However, forward-looking justifications featured in nearly all cases, as judges said their aim was to stop further offending.

Table 4.4. Justifications for sentences in cases with and without detention imposed

Justifications for sentence	Detention imposed	
	Yes N=18	No N=37
Aim is backward-looking [(a)]	61%	14%
Aim is forward-looking	94%	84%

Note: [(a)] Chi square significant at $p < .05$.

As shown in Table 4.5, detention was imposed in nearly *all* cases of rape.[34] It was significantly more likely to be imposed for youths with a history of persistent offending, and for those who failed to show remorse or change their attitude, as the judge's comments to Spencer illustrate:

> Spencer, you are a street drinking, cannabis smoking, freely intercoursing youth at only 13 years, so that your experience of life, it would seem, has led you to a stage where you are prepared to behave in public as a much older person and do unlawful things as much older offenders do. … It is unusual to sentence a 13-year-old … to a period of detention, but I am going to do that on the basis that I need to make you well aware of the seriousness of your conduct (case 3, Category 2).

Table 4.5. Factors associated with detention being imposed

Factors associated with detention being imposed [(a)]	Detention was imposed	
	Yes	No
Rape, attempted rape (yes, N=10)	90%	10%
Persistent offending (yes, N=11)	82%	18%
Lack of remorse (yes, N=8)	75%	25%
Judges say YP has not changed since offence (N=18)	67%	33%

Note: [(a)] For all associations, Chi square significant at $p < .05$.

After imposing the detention sentence, the judges then invoked the forward-looking aims of special deterrence and rehabilitation to justify suspending the term of detention and giving the offender a reprieve, a last chance to reform. Judges were principally concerned with trying to reform offenders, not punish their deeds, and

[34] The one rape case, which was not sentenced to detention (case 195), involved the rape of a sister. The siblings were still living together, and the family insisted detention would bring more hardship for both offender and victim, as well as stigmatise the family, who lived in a rural community.

they did not believe that detention would achieve this goal. For example, in case 75 (Category 1), the judge suspended detention because:

> Detention might keep you out of circulation for a time, but it will not achieve that essential change in your outlook and attitude. … A lengthy term in detention would expose you to an undesirable criminal element and hamper your long-term rehabilitation.

In suspending a term of detention, judges warned the youth that their offending must cease. For example, in case 114, the judge warned Rodney:

> Do you understand, Rodney, what is involved with suspended detention? … Youths just don't go into prison; they go into what is called detention centres; one is at Magill. I am not sending you to one today, but if you step out of line and don't comply with the conditions of the court in the next 18 months, then you will go into one, and you will go into one for the period of 18 months. Do you understand that?

Only in a handful of cases (N=2) was detention to serve imposed. This occurred when the defendant had been sentenced before, but had failed to stop offending, as in Sean's case: "… if this were a first offence, I would suspend or consider suspending any sentence of detention … but in the light of your history, I do not see it as wise to exercise any discretion to suspend that" (case 42, Category 2).

At sentencing, judges more often focused on offenders and their reformability rather than on the offence. In their remarks, the judges' foremost aim was to stop further offending by addressing its perceived causes, rather than punishing the past offence.

My findings lend support to Matthews (2005) and Muncie (2005) who argue that while a rhetorical punitiveness toward violent sexual offenders exists in the political discourse, judges do not take a punitive approach in sentencing practice. Even when detention was imposed, it was typically suspended to give youths a reprieve and a chance to reform. This supports Pitts' (1988) argument that whichever ideological perspective is said to inform juvenile justice (i.e., welfare or justice), the primary goal of the Youth Court is to stop future offending and to ensure the youths' compliance with social norms.

The next chapter examines what judicial officers said directly and personally to the young people in court, and how they used the sentencing hearing to further the adolescents' moral education.

CHAPTER 5: MORAL AND PERSONAL COMMUNICATION

Some analysts suggest that the sentencing hearing should provide an opportunity for judges to further a young people's moral education, and, in cases of sexual assault, to challenge the social attitudes that support sexual aggression (Warner 2005; Weijers 2002). This chapter considers whether these objectives are met by examining, first, what judges told offenders, and, second, the manner in which they communicated their message.

What Did Judges Tell Offenders?

Typically, judges expressed disapproval for the offence by emphasising it represented a violation of the victims and a violation of moral and legal norms. At the same time, they tried to provide moral advice to guide the youths' future relationships and their future behaviour.

Censure for the offence: violation against victims or violation against norms

In over three-quarters of cases, judges explicitly censured the offence. They did this in two ways. First, they described the offence as a violation of the victim, by stressing that the victim suffered as a consequence of the young person's action. Second, they described the offence as a violation of moral and legal norms, by saying that the youth had broken the law (Table 5.1).

Table 5.1. Ways in which judges censured the offence

Judges' expression of censure	% based on N=55 % (N)	Category 1, % based on N=32 % (N)	Category 2, % based on N=13 % (N)	Category 3, % based on N=10 % (N)
Offence was a violation	80% (44)	75% (24)	85% (11)	90% (9)
Violation of victims or against both victim and norms	51% (28)	63% (20)	62% (8)	--
Violation of moral or legal norms only	29% (16)	12% (4)	23% (3)	90% (9)

Judges were more likely to describe the physical and emotional harm caused to the victim in Category 1 and Category 2 cases. For example, in this Category 1 case, the judge said:

> Eventually [the Victim] said that he would not put up with it anymore and used the term 'torturing', an indication of the pain he felt from the physical process of you inserting your penis in his anus. … I wonder what the people who are looking after the victim would say about his progress. Very frequently in this Court, we read reports or hear evidence that the victims of abuse, when they are children, have to wear the trauma for the rest of their lives. It affects their lives. They find it difficult to trust people. They find it difficult to enter into normal friendly relationships with people because of that. The victim here is having counselling, and I don't know anymore than that, but I certainly do not take it that he has got over these incidents (case 43, Category 1).

In nine cases, the judge mentioned a Victim Impact Statement (VIS) had been prepared. [35] Sometimes, the judge quoted from the VIS to highlight what the young victim went through:

[35] All but one of the cases were a VIS was mentioned were in Category 1.

> [The Victim] says, "I couldn't look at Alex and felt sick in the tummy". He says, "I do not want to see Alex until I am big, and I don't want him to be my brother anymore. He did a very bad thing to me and shouldn't be near any other little kids" (case 174, Category 1).

Judges also explained to the offenders that their behaviour violated moral and ethical norms of conduct, as the following exchange with Trevor exemplifies:

> Judge: Yes. You realise, of course, that what you did to your sister was very wrong, don't you?
>
> Trevor: Yes, but at the time I didn't know what, like court and Magill,[36] I didn't know much about that.
>
> Judge: Yes, but you do know now. […] You must have realised that being violent …
>
> Trevor: I wasn't 100% sure that it was wrong.
>
> Judge: It has to be wrong to force other people to have sex. You can't get much "wronger" than that, can you? (case 120, Category 1)

By contrast, in none of the Category 3 cases, did the judges mention the harm done to the victim. Rather, the victims were depicted as willing participants in a sexual encounter, and judges described the offence only as a violation of legal or moral norms. They typically did this by stating the offence was wrong or by stressing the existence of the legal age of consent, as in case 181: "It is an offence and a serious offence to have intercourse with an underage girl".

[36] Magill is the main youth detention centre in Adelaide.

The normative communication

In addition to censuring the offence, in over two-thirds of cases, judges also told the youths what they should do, and provided them with a normative framework for future actions. The judicial discourse revolved around three themes, which were also combined at times: respect for others, protection of children and younger people, and the youth's responsibility for his future. Table 5.2 describes the kind of normative messages expressed by the judges.

Respecting others

In a third of cases, judges emphasised to the young people that, in their future social relationships, they must respect others and cause no harm. In rare cases, judges considered what appropriate relations between males and females should be, but overall, they focused on social relationships more generally, as in case 37: "you have to remember that you have to treat people with much more consideration than imposing what you want upon them in any way".[37]

There were just three instances when judges also talked about gender relations and respect for women. They used arguments such as, "I trust, Joseph, that in the future you will make it clear by your conduct that you respect girls, and that you take care to look after them when you are out with them…" (case 1, Category 2) or "you know you can't do that sort of thing and that it causes distress to women who are subjected to that sort of thing" (case 408, Category 1). Although the judges' comments suggest

[37] The importance of respecting others was mentioned slightly more often in cases in Categories 1 and 2, but the difference was not great.

appropriate ways that the youth should act toward girls and women in the future, they do not challenge the cultural and social attitudes that may support sexual aggression. For example, they might have said: "You have to listen and respect what your girlfriend tells you. She did not want to have sex with you and told you 'no'. You had no right to go ahead and touch her without making sure she agreed. Forcing your girlfriend or anyone to have sex when they don't want to is wrong and harmful".

Table 5.2. Kinds of normative messages given by judges

	% based on N=55 % (N)	Category 1, % based on N=32 % (N)	Category 2, % based on N=13 % (N)	Category 3, % based on N=10 % (N)
Judges provided a normative framework	67% (37)	78% (25)	69% (9)	30% (3)
Normative message relates to: [(a)]				
Respecting others	31% (17)	34% (11)	31% (4)	20% (2)
Appropriate male-female relations	6% (3)	6% (2)	8% (1)	--
Protection of children and younger people	33% (18)	47% (15)	15% (2)	10% (1)
YP's responsibility for the future	44% (24)	59% (19)	39% (5)	--

Note: [(a)] Percents add to greater than 100 because judges may use multiple normative messages.

Protecting children and younger people

When there was an age gap of several years between the offender and the victim, judges were more likely to say that adolescents should assume a protective role toward younger, more vulnerable people, act like role models, and not abuse the trust placed in them. For instance, in a case involving his 4-year-old step-sister, the judge said to the 15-year-old male offender:

> You have got to be fair to people, and you must be particularly fair and careful with young people, with someone so much younger, that you have a real responsibility for. You have to ensure that you don't do anything that is going to cause them any harm at all (case 27, Category 1).

Expectedly, this normative message was more likely to occur in Category 1 cases, because almost all the victims were under 12.

Taking responsibility for the future

In Category 1 and 2 cases, a relatively frequent feature of the judges' discourse was that the young people take responsibility for their future behaviour by addressing specific problems that the judges thought were contributing to their offending. For Category 1, judges insisted that the youths must seek counselling for their problematic sexual behaviour. For Category 2, they emphasised counselling for mental health problems, which were often linked to a history of abuse and victimisation, or to substance abuse. The judges were even more adamant that the young person needed to take responsibilities for future behaviour when they had been offered help in the past, sometimes as the result of previous offending, but had not used this support. The judge's conclusion in case 51 exemplifies this stance: "It is over to you, Richard. If you come back, you will only have yourself to blame for not taking up the help that has been offered".

In other cases, the judges' discourse was less dramatic, but conveyed a similar message. Tara (case 19, Category 1), the only female offender in the sample, had a history of sexual victimisation. She had received counselling but was not

responding. The judge acknowledged Tara's own victimisation, but pointed out that it did not reduce her responsibility for past or future behaviour:

> I can accept that the explanation for that is your own status as a victim of this sort of abuse. I can only wonder, however, why your own status as a victim would not bring about more remorse. It seems clear … that you definitely need help. Time and time again I tell young people that help can be offered, but it is not going to be successful unless you are prepared to accept it, and work with the people who are offering you that help.

The judge imposed a period of detention, but suspended it to allow Tara to attend therapy and enter a work-training programme. The judge concluded:

> I am obliged to make sure that you realise that, not withstanding your background, you have to take responsibility for your behaviour yourself. … I will view any breaches [as] a lack of cooperation on your part. I am concerned about the need to make sure you cooperate and that the appropriate assessment and therapy is offered to you immediately (case 19, Category 1).

In most cases, judges censured the offending behaviour and attempted to convey rightful norms of conduct to the youths. I turn next to the ways in which judges communicated their message, that is, did they engage in a moral dialogue with offenders or merely lectured them?

How Did Judges Communicate?

Judges addressed the offenders directly, but rarely interacted with them actively.[38] More often, the sentencing homily was a one-way discourse that blended moral lecturing with the use of threats of further legal liabilities.

Moral dialogue or moralising?

Judges spoke *to* the young people but rarely, *with* them. Typically, they raised the moral and practical consequences of the offending, and exhorted offenders to change their ways, but this mostly took the form of a moral lecture, not the thought-provoking moral dialogue recommended by Weijers (2002). For Category 1 youths, who were referred to Mary Street, a recurring feature of the judicial address was that they would have opportunities to talk about their behaviour with their counsellors in what would be a more appropriate forum to confront personal and challenging issues.

Judges asked questions of the youths in 42% of cases but these were of a rhetorical nature and were rarely meant to engage the adolescents.[39] In seven cases, however, a real dialogue took place between the judicial officer and the defendant. This seemed to relate to judicial style rather than to the character of these cases, because all were sentenced by the same judge. The judicial interaction with Malcolm (case 131, Category 2) illustrates how the judge challenged Malcolm about his drug taking.

[38] In just one case, the judge did not directly talk to the offender. Although the offender was in court, the judge referred to the youth using the pronoun "he". The offender was 21 at sentencing, had spent time in jail as an adult, and seemed to have been uncooperative during the pre-sentence proceedings.

[39] Judges typically enquired whether the youths understood what was required of them, and they always answered they did, or judges asked if the offenders wished to say anything, and they always answered they did not.

The judge persevered even though Malcolm's response was perhaps not what was expected!

> Judge: Well, do you think that you would have done it sober? Do you think you would do it now?
>
> Malcolm: No, I don't, not at all.
>
> Judge: No. Do you see a link between getting drunk and getting off your face on marijuana, and committing crime? Do you see any link between that? Do you think one thing might affect the other?
>
> Malcolm: Not really. I've smoked more marijuana than I do crime. Do you know what I mean?
>
> Judge: Well, I do. That's just as well. We wouldn't want you committing crime every time you smoked marijuana, would we?
>
> Malcolm: No.
>
> Judge: Do you think that you might perhaps commit no crime if you didn't lose your head?
>
> Malcolm: I could sort of try I suppose.
>
> Judge: I think that's right… (case 131, Category 2).

Such dialogues were rare. While judges explained to the defendants why they were required to do certain things, they more often engaged in threats and warnings.

Threats and warnings

Threats of further legal liabilities and the associated warnings of more severe treatment in the event of re-offending were made in 78% of cases. Such threats were made across the three categories of cases, although somewhat less frequently to

youths in Category 3, who were seen as less likely to continue offending.[40] Surprisingly, neither the extent of the young people's previous criminal history, nor the judges' assessment of the likelihood of future offending were associated with threats of further legal liabilities. Such threats and warnings seemed to be part of the judges' standard message when sentencing young offenders. Predictably, they occurred in all the cases when suspended detention was imposed, but they were not reserved for these cases. For instance, in case 23, a good behaviour order and counselling were imposed, and the judge said, "If you were an adult, these matters could easily result in you serving a term of prison" (case 23, Category 1). However, the judge added that, "I am on this occasion going to be reasonably lenient, but you should realise that this is your first and last chance to get such leniency". To the young people in court, the message was clear: leniency may be afforded in the Youth Court, but if the youth returned to court, the penalties would become more severe. Thus, offending, sexual or otherwise, must cease.

Degradation vs Reintegration Ceremonies

One feature of the judges' interactions with offenders was somewhat surprising. Drawing from studies of court interaction, I expected to see a great deal of castigation toward the offenders. Instead, the judges' courtroom discourse was not exclusionary (as supposed by Braithwaite and Mugford [1994]), but rather went some way toward reintegration. Judges censured the deed in almost all cases, but they were critical of the offender, as a person, in only 15% of cases. In two thirds of cases, they conferred praise and encouragement on the youths. This could be for

[40] Threats of further legal liabilities were expressed in 88% of Category 1 cases, 69% of Category 2 cases, and 60% of Category 3 cases.

their achievement at school or in sports, a more mature attitude since the offence, or the efforts they were making to come to terms with their offending. Across the three categories of cases, judges talked to the young persons with respect. They did not reject offenders, but rather showed confidence in the youths' ability to stop their sexual offending and become "good and useful members of the community". The judge's address, in case 174 (Category 1), is typical of the way in which judges suggested to the offenders that they had the ability to change and make amends for their actions:

> In other words, but for the series of incidents, which have brought you here today, you have the usual hope and aspirations of boys of your age. … You are well on the way to showing that you are truly sorry. You can show that by making sure it never happens again. You can show that by making sure that the life that you lead, the life ahead of you, is a good and useful one, a happy life, and one of which you can be proud.

In summary, I find that judges explicitly conveyed reprobation for the offence by saying it was wrong and harmful, and attempted to provide norms of conduct to guide the adolescents' future relationships, particularly that they had to take responsibility for their future behaviour. Judges emphasised to the youths that they must protect children and respect the rights of others, generally. However, the judicial address did not conform to Warner's (2005) suggestion; judges did not use the sentencing address to suggest appropriate ways that the boys and young men should act in their relationships with girls and women, or to challenge negative stereotypical beliefs about gender roles and sexuality that offenders may hold.

Judges rarely asked critical questions aimed at encouraging self-reflection or engaged in the kind of moral dialogue proposed by Weijers (2002); rather, they tended to threaten the youths with further punishment in case of non-compliance. While judges "situationally sanctioned" (Mileski 1971) offenders by admonishing them about their actions, they did not degrade and humiliate them as individuals. This aspect of the sentencing ceremony does not conform to earlier studies of youth court interactions (such as Emerson 1969), but suggests instead that the South Australian Youth Court judges speak to offenders in ways resembling those proposed by John Braithwaite (1989), that is, to shame (censure) the act, but reintegrate the offender. Thus, judges did not stigmatise the adolescents by constructing them only as offenders and reinforcing a deviant identity, but showed the possibility of a law-abiding future and encouraged them to use their strengths to desist from offending.

CHAPTER 6: DISCUSSION AND IMPLICATIONS

The Study's Major Findings

Three key questions were raised in my study. The first asked how cases of youthful sexual offending and offenders are characterised? This study's most significant finding is the identification of a three-way typology, which runs through virtually all the findings, and structures what is said throughout the sentencing remarks. This typology captures the different ways that judges understand, interpret, and respond to the cases. Category 1 cases were viewed as cases of aberrant and inappropriate sexual behaviour because they involved young children and siblings. Judges thought these offenders required an intensive intervention to address intrinsic problems with their sexuality. Category 2 cases were seen as involving coercive sexual behaviour, but judges did not perceive the offenders as having a specific sexual problem; rather, it was their violent and generally antisocial behaviour, and their persistent offending that caused concern. Category 3 cases were viewed as less serious and as instances of consensual underage sex between peers. Judges believed Category 3 youths would stop offending with maturity.

The ways in which judges characterised the offences and the harm caused to the victims are consistent with the literature on adult sex offenders. On the one hand, judges emphasise the seriousness of cases involving child victims. Children younger than 12 years seem to have a special status as innocent victims; this matches findings by MacMartin and Wood (2005). On the other hand, the ways that judges handle cases with older adolescent victims is more similar to the treatment of cases with

adult female victims, whose experience is often misrepresented and minimised through the legal process (Coates et al. 1994; Coates and Wade 2004). For example, my study suggests that in about a third of cases with victims aged 12 or over, the way the offence is depicted, particularly the version of the victim's consent that is presented at sentencing, does not represent the victims' experience but minimises the harm they suffered.

Brownlie (2003) suggests two perspectives to depict youthful sexual offenders: potential future sex offenders, whose behaviour is likely to escalate in seriousness, or adolescent experimenters, whose sexual delinquency is likely to disappear as they grow older. The judges in my study use *both* these perspectives. They consider that youths who abuse children and siblings (Category 1) have the potential to become sexual offenders unless they receive a specialised intervention to address what judges perceive are sexual problems. By contrast, Category 3 contains the cases that are described as adolescent experimentation. Judges use a third perspective, Category 2, for offenders who are seen as violent and antisocial, and in need of therapy for substance abuse or mental health problems, but not because of their sexuality.

The second question raised was, what are the judges' orientations and aims at sentencing? As the three-way typology shows, a critical factor that influences the judges' sentencing decision is the age of the victims and their relationship with the offenders. In addition, judges focus on the youths' potential for reform and willingness to change. Their response is guided by whether offenders are remorseful and are trying to address their injurious behaviour. At sentencing, the judges'

perspective is forward-looking. Their utmost concern is to stop further offending by addressing what they perceive are the underlying causes of offending, and to persuade the youths to comply with social norms. A backward-looking, retributive approach is sometimes used with serious offences (rape) and persistent offenders, but it is mostly followed by a reprieve that gives offenders another chance to reform. This finding is consistent with the literature on youth justice (e.g., Cunneen and White 2002; Wimshurst and Hayes 2006), and suggests that judges use a hybrid approach that combines welfare and justice principles.

The third question asked, what is the character of the judges' moral and personal communication with the young persons? My study finds that in most cases judges say to the young persons that their behaviour is wrong and harmful, and they censure the offence on moral and legal grounds. At the same time, they acknowledge that the offenders' youthfulness and lack of maturity contributed to the offending. The judicial discourse does not focus on responsibility for past behaviours, but instead emphasises the importance of taking responsibility for future behaviours. To achieve this aim, judges try to persuade the offenders, but they also threaten them with further legal liabilities in case of re-offending.

Despite what Kate Warner (2004, 2005) would want them to say, judges do not challenge the cultural and social attitudes that may foster sexual aggression. However, they emphasise the importance of respecting the rights of others, of protecting children from harm, and they try to create empathy for victims. Judges do not humiliate and exclude offenders, but encourage them to use their talents and

potentials positively toward a future life free of offending, and they attempt to strengthen a non-deviant identity. This finding diverges from the general claim that court hearings lead to a degrading and exclusionary experience for offenders (Braithwaite and Mugford 1994; Emerson 1969). Although Braithwaite and Mugford (1994) propose that restorative conferences are more conducive to the reintegration of offenders than court hearings, the judicial discourse, in my study, goes some way toward reintegration. However, unlike conferences, the sentencing hearing is not a dialogic event between the offender, the victim, and others, which has the potential to challenge the youth's attitudes and beliefs. The judicial address does not conform to Weijers' (2002) description of a pedagogical approach to moral communication in court; rather, it tends to be advice giving and lecturing, with little scope for deep moral probing. In this sense, it is close to the "benevolent paternalism" that Vihnaendra and Hazlitt (2005:63) describe in their New South Wales study.

Limitations and Further Studies

My study paints a picture of several important aspects of the sentencing process in cases of youthful sex offending. It provides insights into what is happening in South Australia over a 6 ½ year period. I cannot know which perspectives are used in other jurisdictions as we lack state comparisons on the sentencing of youthful offenders in Australia. One recent study of sentencing remarks in the New South Wales Children's Court suggests that judges in this court favour rehabilitation over punishment in youthful cases of non-sexual offending (Vihnaendra and Hazlitt 2005). However, the South Australia Youth Court may have a more rehabilitative

orientation for youthful sex offenders because it does not routinely transfer such offenders to the adult court as the New South Wales Children's Court does.

My study shows that judges respond differently with cases of youthful sexual offending according to the characteristics the cases, but I do not know what impact the judges' discourses may have on the attitudes, beliefs, and behaviours of the young people in court. Tait (2002) suggests that examining the effect of what he calls the judges' "court performances" would be helpful to understand the symbolic dimension of sentencing. Such an enquiry is particularly relevant for young offenders because the youth justice system is based on the assumption that adolescent offenders are more reformable than adult offenders. Young people are still developing and refining their beliefs; they may be more receptive to the judicial communication and the demands for change than adult offenders. A future study will explore variations in re-offending, using the three-way typology.

Implications for Victims and Offenders

When I started my study, I had been working with Kathleen Daly on the Sexual Assault Archival Study (SAAS) for over two years. After I read, coded, and analysed the documents relating to the 385 cases in the SAAS sample, I often wondered how victims and offenders felt about their experiences in the legal process. From Daly and Curtis-Fawley's (2006) in-depth study of conference cases, I had an idea of how the conference process affected sexual assault victims and offenders. From my analysis of the sentencing remarks, I now know how judges sentence cases

of youthful sexual offending. Next, I consider the implications of my findings from, what I suggest, would be the perspective of victims and offenders.

My study suggests that victims' satisfaction with the way that judges sentence depends on who the victim is. In about two-thirds of cases, that is, those with victims under 12 years, those involving the offenders' family members, and those where judges clearly said the sexual encounter was not consensual (broadly Category 1 and Category 2 cases), the victims and their families are likely to feel vindicated. Judges do not minimise the seriousness of these cases, and they recognise and emphasise the violation, suffering, and potential long-term harm caused to the victims and their families; in doing this, they confirm to the victims that their suffering was caused through someone else's fault. Some victims or their families might think that the penalties imposed are too lenient, and the way in which judges address offenders is too "soft"; yet, judges attempt to prevent a repetition of the injurious behaviour. Half the victims, whose case was referred to Mary Street, probably feel that the harm done to them will not be forgotten, but that offenders will have a chance to reflect on their behaviour and its injurious consequences.

Victims in Category 3 cases, however, would not be vindicated in the sentencing process because the offence is interpreted as consensual underage sex when in fact the victim's report to the police indicated this was not the case. In a process similar to what often happens in cases of acquaintance rape with adult victims, judges minimise the seriousness of these cases, because of the difficulties in proving the victim's lack of consent. Unfortunately, this leaves a space for the young men to

think their behaviour was appropriate since the law interprets it as a minor legal infringement, not as a moral wrong. As Golding and Friedman (1997: 2) point out, "helping to raise young men's understanding about their beliefs and then doing something to change those negative beliefs around sex and violence into respect and confidence is very important". This could happen during the sentencing hearing. It could also happen through a referral to an appropriate awareness programme, such as *Rape Myth-Busters* developed in South Australia by Friedman (1998).[41] More generally, since a large proportion of adolescents seem to support negative rape myths (Xenos and Smith 2001), education relating to what is appropriate and respectful sexual behaviour could be included in the school curriculum.

For offenders, the judges' use of a rehabilitative perspective and their focus on reform rather than punishment are positive outcomes. Judges attempt to balance the seriousness of the offending and the youthfulness of the offenders by censuring the behaviour and providing appropriate moral and ethical standards, yet giving the youths a chance to change. Judges also alert the adolescents to the importance of demonstrating more maturity and responsibility in their relations with others. The judges' address to the offender would, perhaps, be more effective in conveying this message if they engaged with the youths in a manner conducive to self-reflection rather than merely delivering a moral lecture. Those youths, who are referred to Mary Street will be provided with an opportunity to reflect on their actions and change their outlook. Those who engage in heterosexual but potentially coercive sex

[41] *Rape Myth-Busters* is one of the strategies developed through the Guys Talk Too Project, a peer education programme for young men aged 15 to 23, aimed at improving young men's sexual health and reduce levels of sex-related violence. It is not a therapeutic programme like Mary Street but an awareness programme, which encourages young men to develop attitudes and behaviours that do not support rape, and to have respectful sexual relationships (Friedman 1998).

with a peer would also benefit from some kind of intervention that is aimed at challenging their views on sexuality and gender relations. Unfortunately, this does not occur. Judges address all the adolescents in a way that does not exclude them further; rather, they treat them as worthy individuals who are capable of change. This is a positive step to encourage the youths' reintegration and participation in the community.

Some Concluding Comments

In the light of the recent international literature on criminal and juvenile justice and its claim of increasing punitiveness toward violent and sexual offenders, I was expecting judges to be harsh and somewhat punitive toward the young offenders, at least in their words, if not in their actions. The remarks show that this is not the case in South Australia. My study confirms some authors' argument that this trend toward punitiveness is not such a prevalent phenomenon (e.g., O'Malley 1999; Matthews 2005). The judges in my study dealt with serious cases of violent sexual offending by adolescents in a manner that is consistent with a traditional perspective on youth justice, that is, strongly future-oriented and rehabilitative. Judges took into account both the seriousness of the offences and the youthfulness of the offenders. They were sympathetic toward and supportive of most of the adolescents in court; at the same time, in most, but not all cases, they strongly condemned the offence and endeavoured to make the offenders accountable not so much for the past offence, but for their future behaviour.

It is troubling, however, that for nearly a quarter of victims, although their case went to court and was sentenced, their story was retold in a way that did not validate their experience. While this phenomenon is well documented in the literature on adult offenders, it is of concern that a young man's potential moral and physical violation of a victim is reduced to a minor legal infringement. Judges must certainly sentence strictly according to the facts that have been proved, but they could use their judicial address to emphasise to the adolescents that what they believe are appropriate ways of relating to girls and women may, in fact, constitute sexual violence.

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Young Offenders Act 1993 (South Australia)

Criminal Law (Sentencing) Act 1988 (South Australia)

Dangerous Prisoners (Sexual Offender) Act 2003 (Queensland)

Juvenile Justice Act 1992 (Queensland)

APPENDIX B

CODING CATEGORIES

The remarks were coded following five broad categories: 1) sentencing and justifications, 2) offence and victim; 3) causes of offending and responsibility; 4) the young person; and 5) moral communication and admonishment.

Sentencing and justifications

A series of themes were coded to capture what factors judges took into account when sentencing, and which justifications they provided for the sentence. At the suggestion of one of the Youth Court judges, some of the matters relating to sentencing listed in s.10 of the *Criminal Law (Sentencing) Act 1988* were used. To these, and drawing from the theoretical and empirical literature on sentencing (e.g., Ashworth 1994; Daly 1994; Easteal 1993; Mackenzie 2005; Warner 1997), variables indicating aggravating (e.g., use of weapon, offender's criminal history) and mitigating (e.g., offender's reaction to the offence) factors were also coded.

The aims that judges said they wished to achieve through their sentences were coded according to the following purposes of punishment: deterrence (specific and general), rehabilitation, retribution, protection of the public, and reparation (e.g., Ashworth 1994; Daly 1994; Hudson 2003; von Hirsch 1985, 1993).

Offence and victim

I had initially planned to examine the ways in which judges described the offences, along the lines of Coates and colleagues' (1994, 2004) and McMartin's (2005)

studies. This was not possible because, since most of the cases were finalised through a guilty plea, the facts of the offences were generally not described in the remarks. Nevertheless, for the purpose of the study, the Police Apprehension Report (AP) provided details on how the case started, and permitted to compare the facts that were initially reported with those that were eventually proved. Themes relating to the harm caused to the victim and the victim's suffering were coded, as well as any minimisation of the harm. Other themes included how the victim's consent was characterised, whether the description from the remarks matched what the victim had said in the AP, and whether the victim was seen to be partially responsible for the offence.

Causal attributions and responsibility

The coding of causal attributions used similar themes to Coates' (1997) study. New themes relating to youthfulness were included. All the causal attributions were recorded; they were then ranked according to which one emerged as the most important in the judges' discourse. Signs that the offender's responsibility was minimised were recorded, as well as any themes relating to responsibility, for example, whether the judges emphasised responsibility for the offence or for future behaviour.

Young person

A range of variables recorded what was said about the young persons, their living conditions, their background, and how they had reacted to the offence. Any comments relating to whether the offender had changed since the offence were also

coded, as well as judges' comment about potential future offending. These comments were grouped into two categories according to whether the things that were said about the youth were positive or negative.

Moral communication

This category focused on whether judges showed reprobation for the offence and in which ways – e.g., comments such as "what you did was wrong…" and why it was wrong, and how they addressed the seriousness of the offence and its consequences. I also coded whether judges provided a normative framework on gender relations. Other normative themes emerged from the remarks, but which had not been noted in the literature, for example, the need to protect children from abuse. Finally, the ways in which judges communicated with the youths was coded following Weijers' (2002) theory of court communication.

APPENDIX C: CODING SCHEDULE

REMARK CASE NO: **PSEUDONYM:**

BACKGROUND

Date of Finalisation: ..... **Jurisdiction**:.....

Judge: ..... **Judge's gender** M F

Sexual charges proved on sentencing remarks .....

Most serious sexual charge proved: Major indictable Minor Indictable Summary

Any non sexual offences Y N which ones.....

If non sexual offences, which offences do remarks focus on .....

Most serious sexual charge at AP: ..... Was it proved: Y N
Most serious sexual charge at first hearing: ..... Was it proved: Y N
Most serious sexual charge proved through.....Guilty plea Trial

Has there been an overall reduction of the charges Y N

PENALTIES FROM SENTENCING REMARKS:
.....
.....

STRUCTURE OF REMARKS

Documents available:.....

No pages (excluding title page): **No. paragraphs:** **No. words:**

Paragraphs and what topic they address:
1. .....4.....7.....
2. .....5.....8.....
3. .....6.....9.....

Does judge address defendant directly, using 'you': Y N

Does judge ask questions to the defendant: Y N

Does defendant speak: Y N **Is it in response to judge's question**: Y N

Does judge has a dialogue with defendant (that is having a real exchange) Y N
What sorts of questions does judge ask defendant .....

Does judge address other people
Prosecutor Y N What about:.....
Defence counsel Y N What about:.....
YP's parents Y N What about:.....
FACS rep Y N What about:.....
Victim Y N What about:.....
Other Y N What about:.....

Do they contain justification for
Conviction/no conviction Sentence as a whole Specific penalties
Y N Y N Y N

Comments on the structure of remarks
.....

DESCRIPTION OF THE FACTS OF THE OFFENCE

Is the offence described at all Y N How long is description:
In legal terms (eg this is a rape) Y N
In terms of behaviour and actions Y N
Comments .....
.....

If a description is provided, what does it cover
.....
.....

How is the encounter described mutual coercive

Is the victim's consent (or lack of) mentioned Y N

Is victim described as consenting to sexual encounter Y N

If offence is USI, **does anything said suggest the victim is deemed to have consented because of the legal charge, but this may not be the case** .....
.....

Does description of victim's consent in remarks match what is reported in AP Y N
Why.....
.....

VICTIM

Characters of the victim mentioned
Age/youthfulness Y N Gender Y N
Maturity Y N Vulnerability Y N
Other (eg V was drunk) .....

Is V blamed for the offence in any way or given some responsibility Y N
How.....
.....

Is the harm caused to the victim mentioned Y N In which terms
Physical Psychological Emotional Others
How.....
.....

Is the harm caused described in terms of
Harm to the individual victim Y N
Harm to society (breaking of norms/laws) Y N
How.....
.....

Is no harm mentioned because offence deemed consensual Y N

Is harm mentioned even though offence is deemed consensual: Y N

Is a Victim Impact Statement mentioned Y N
If yes, does it influence the sentence Y N
How.....
.....

Does judge mention how V is coping with harm caused Y N

When sentencing, does the judge mention
the legal charge Y N
the story told by the V Y N
How.....
.....

Is an apology/reparation to victim mentioned Y N

What is the place of the victim in the remarks
Not mentioned Mentioned in passing Important

Any judicial comments about the victim or the harm Y N
Which ones .....
.....

ATTRIBUTION OF RESPONSIBILITY

Does judge attribute causes to the offence Y N If yes, which ones

Alcohol/drug	Y	N	Family circumstances/bckgrd	Y	N			
Stress/pressure	Y	N	Emotions (eg anger)	Y	N	Loss of control	Y	N
Sexual drive	Y	N	Mental illness	Y	N	Mental impairment	Y	N
Psychological	Y	N	Victimisation	Y	N			
Character of YP	Y	N	Immorality	Y	N	Selfishness	Y	N
Immaturity	Y	N	Youthfulness	Y	N	Experimentation	Y	N

Other/comments: .....

Are they:
External something acting upon the offender (e.g.his depression made him to it) Y N
Internal based on YP's free choice and agency (e.g. he is a rapist) Y N
Violent: stems from a violent nature or the decision to be violent Y N
Non-violent: stems from a non-violent cause (being drunk) Y N

Is the responsibility of the YP for the offence minimised Y N
How:.....

Are excusing for the behaviour provided Y N
Which ones:.....

Is the offence described as "out of character" Y N

Is the offence described as a once off Y N

The YP

How is YP's character described, at the time of the offence (eg. immature)
.....

How is the YP's character described now, at the time of sentencing
.....

Is YP portrayed as likely to change Y N

Is YP portrayed as having changed since the offence Y N

Is YP given a chance to change Y N

Is YP portrayed as "misguided"	**At time of offence**	Y	N
	At time of sentencing	Y	N
Is YP portrayed as immature	**At time of offence**	Y	N
	At time of sentencing	Y	N
Is YP portrayed as dangerous to others	**At time of offence**	Y	N
	At time of sentencing	Y	N
Is YP portrayed as a sex offender	**At time of offence**	Y	N
	At time of sentencing	Y	N

Is YP portrayed as taking responsibility for the offence Y N

Is YP portrayed as remorseful/sorry Y N

Does judge think YP is likely to reoffend Y N

Is YP portrayed as a good person who has done a bad act Y N

Is YP portrayed as having good future prospects Y N

Is this YP portrayed as "a lost cause"? Y N

Positive things said about YP Y N
Which ones.....

Negative things said about YP Y N
Which ones.....

Is a pre-sentence report mentioned Y N

Mary Street Y N Social Background Y N
Psychological Y N Others Y N .....

Does judge take it into account Y N **Does judge agrees with it** Y N

Is YP referred to Mary St Y N **Is YP already attending Mary St** Y N

Is YP referred to other types of counselling Y N
Which ones.....

Reasons for referral to Mary St or others
.....

Comments about portrayal of YP character
.....
.....
.....
.....

ORIENTATION IN SENTENCING & JUSTIFICATIONS

At sentencing, does judge take into account (from S.10 *Sentencing Act*)
Circumstances of offence Y N How.....
Other offences Y N How.....
Course of conduct Y N How.....
V circumstances Y N How.....
V injuries Y N How.....
YP contrition Y N How.....
YP cooperation Y N How.....
YP characteristics Y N How.....
(character, age, mental condition, etc.)
Other factors:.....

What does judge say re-offence (type/seriousness) .....

What does judge say re-offender .....

Does judge mention YP must be made accountable Y N

Does judge say YP is already accountable (taking responsibility) Y N
.....

Is YP previous offending taken into account Y N
How.....

JUSTIFICATIONS FOR SENTENCE

Does judge refer to YOA or Sentencing Act to justify sentence Y N

Does judge mention or refer to

Retribution	Y	N	How.....
Special deterrence	Y	N	How.....
General deterrence	Y	N	How.....
Rehabilitation	Y	N	How.....
Protection public	Y	N	How.....
Protection victim	Y	N	How.....
Reparation	Y	N	How.....
Other	Y	N	How.....

Which goal is prominent
Why.....

Is a conviction recorded Y N **Is there a justification** Y N
Reasons given.....

Any mitigating factors mentioned Y N

YP good character	Y	N	Lack of criminal history	Y	N	Youthfulness	Y	N
YP at school	Y	N	YP at work	Y	N	Family support	Y	N
Guilty plea	Y	N	showed remorse	Y	N	In counselling	Y	N

Others.....

Any aggravating factors mentioned Y N

Criminal history	Y	N	age/vulnerability of V	Y	N	YP lied	Y	N
No remorse	Y	N	No plea	Y	N	Use of force	Y	N

Others.....

Comments re sentencing/justifications .....
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JUDICIAL STYLE AND TECHNIQUES DURING SENTENCING

Paragraph number in which sentence is delivered

Is there some deliberation before sentence is announced Y N

Is the severity of sentence mentioned before sentence is delivered Y N

If detention imposed and suspended, how judge announces suspension.....

Does judge comment on type of penalty imposed (this rather than another) Y N

Does judge comment on severity of sentence Y N
Presented as lenient severe

Is severity of sentence presented by comparing it to adult sentence Y N

Is there specific threats of further legal liabilities Y N

If YP re-offends as juvenile	Y	N
If YP re-offends as adult	Y	N
IF YP breach order	Y	N

Other .....

Comments on judicial style and approach.....

MORAL COMMUNICATION WITH YP

Does the judge encourage the YP to recognise the consequences of the offence Y N

Through pain YP caused to his family Y N

Through pain YP caused to the victim Y N

Through damage YP caused to him/herself and future Y N

Does the judge encourage the YP to reflect about the offending? Y N

Does judge appeal to the YP's self-identification (eg do you recognise yourself in that?) Y N

Does the judge ask questions to the YP re his behaviour? Y N

Does the judge induce shame or remorse? Y N

Comments .....

.....

Does the judge degrade the YP (ie he has nothing going for him?) Y N

Does the judge censure the offence (eg what you've done is wrong) Y N

Moral wrong.....

Harm caused .....

Seriousness of offence` .....

Breach of the law.....

Other.....

Amount of admonishment.....

NORMATIVE FRAMEWORK

Does the judge provide a moral/normative framework to YP Y N

How YP should behave in relationships Y N

In relation to women/girls Y N

In relation to young children Y N

In relation to others Y N

Other.....

Does judge challenge rape myths Y N

How.....

Does judge reinforce YP responsibility Y N

Does judge talk about responsibility for the future Y N

Comments.....

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General comments about this case.....

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