Judicial Decision Making in Child Sexual Abuse Cases

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This book is dedicated to the memory of two people who contributed in immeasurable ways to my personal and professional development and to the overall quality of my life: my mother, Aileen Durack Wright, and my long-time teacher, mentor, and friend, John M. Gandy.

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Introduction

This book is about child sexual abuse. It is a book for anyone interested in how courts work to resolve serious social problems. It is for those people who struggle to understand what happens in the courts and to make some sense of the process. It is also for those people who work with offenders so that they can see how the experiences of the sentencing process may have influenced the offenders' willingness to accept responsibility for their behaviour toward their victims.

In 1988, Canada passed a law designed, at least in part, to answer the public outcry about the number of cases of sexual abuse of children that were regularly appearing in the media. They reported on sensational trials, which included alleged satanic rituals and cannibalism and described allegations of the pervasive institutional sexual abuse of boys at the Mount Cashel orphanage in Newfoundland. The remedy for all of this suffering, arrived at by Canadians through our federally elected officials, was a legal one, consistent with the tone of the decade. The 1980s saw the passage of the *Constitution Act* and the *Canadian Charter of Rights and Freedoms*. Passage of both these statutes gave rise to a number of other new laws, including amendments to the *Criminal Code of Canada* that redefined sexual assault within a legal framework. The word *rape* was replaced with a continuum of sexual assault categories. This was done supposedly to reflect the range of sexually intrusive behaviours that could be considered offensive. Women's groups had fought for recognition of the harms done to women and children and largely supported legislative changes to recognize these harms through the mechanism of criminal law.

C. Smart and other feminists have questioned the utility of a "resort to law" as a means of achieving social change. The law is only one component of a social structure that must be examined in any attempt to encourage change. An exclusive focus on law as a solution ignores the

multi-faceted reality of life in a complex society. However, deconstruction of the implementation of the law gives us insight into how some of our social systems perceive the offence, the offender, and the victim.

This book is the result of two separate studies in which I examined how the courts have dealt with cases brought before them and what effects the "resort to law" has had. In the first study, I examined child sexual abuse sentencing cases heard by the Court of Appeal of Ontario between May 1990 and June 1993. Analysis of the data in this study demonstrated that, although laws may change, interpretation of them is dependent on the social construction of child sexual abuse in the minds of the judges. Bill C-15 was passed in 1988, as noted above, to change how cases of child sexual abuse were tried. Its passage was a result of advocacy by women's groups and others concerned with the lives of children. These advocates wanted at least to convey the message that child sexual abuse is taken seriously by this society and that incidents of it will not be tolerated. The new law was designed to make it easier to prosecute child sexual abuse cases as well as to improve the victims' experiences of the process. I wanted to determine whether these goals had been met, and attempted to answer several questions.

- Which variables (e.g., relationship, duration of abuse, type of abuse, etc.) can predict the outcome of the appeal of the sentence? Which factors influence judicial decisions?
- Can the variability that seems to be present in all sentencing research be accounted for in cases involving child sexual abuse?
- Which issues are important to justices in these cases?
- How do they construct them?
- Is this construction indicative of a patriarchal world view that supports the belief that male reality is more important than other realities?

In this first study, I scrutinized the extent to which law is gendered from the point of view of how the Court of Appeal of Ontario made sentencing decisions. As well, I considered the degree to which patriarchal bias in interpretation of the law is supported by the medical and allied professions. Smart (1989, 34) has asked, "How does gender work in law and how does law work to produce gender?" I highlighted how gender themes weave their way throughout these cases, and I illustrated how judges and justices still retain notions of the privacy of the family in their consideration of the offender to a greater extent than the facts of the offence and the harm done to the victim. The study is an examination of the degree to which patriarchal norms influence interpretation

of these laws in court. The results reinforce the recognition articulated by Dobash and Dobash (1992) that, without cultural change, legal change is window dressing.

In the second study, I examined similar cases in the period 1998-99. Using the same method, I analyzed all of the cases of sentencing after convictions for child sexual abuse. What stood out as the most noticeable difference between the earlier three years studied and that year was the change in the percentage of Crown appeals. In 1990-93, the appeals were almost equally divided between Crown appeals and offender appeals. In 1998-99, the Crown appeals were reduced to 4 percent, while 96 percent were offender appeals. Other changes were noticeable as well: for example, the number of appeals related to dangerous offender designations increased. However, much of the same patriarchal bias appeared in the use of mitigating and aggravating factors, as was evident in the first study. Also present was the relative invisibility of the victims in spite of an increased number of victim impact statements presented to the court. In this book, I analyze these findings in light of the expectations raised when the legislation was passed, and I raise questions about the utility of a legal method to resolve the social problem of child sexual abuse.

In Chapter 1, I provide background for passage of the 1988 amendments to the *Criminal Code* through a description of some of the news accounts of child sexual abuse in the 1980s. I go on to describe the results of the Badgley Commission and its influence on the law. I then consider the voices of critics of the law. In an analysis of the legal construction of child sexual abuse, I then review feminist writers' views about the failure of the law to represent the interests of women and children. I also explore the power of the medical profession as a maintainer of the patriarchal view of male-female and adult-child relationships, and I consider feminist challenges to the "common sense" and patriarchal constructions of the "typical" child molester. I then outline and discuss sentencing issues in cases of child sexual abuse in general practice, as well as critiques of the implementation of these laws. Finally, I raise questions stemming from the review of the literature for exploration in subsequent chapters.

In Chapter 2, I describe how and why I carried out the research. I chose sentencing decisions because of the richness of information about the offence, the victim, and the offender that comes out during that phase of the judicial process. Many cases of alleged abuse result in guilty pleas, in which case very little information is available in the trial transcript. Detailed information is available only through the sentencing

hearing. This chapter contains accounts of attempts to study sentencing patterns in child sexual abuse and details the process by which I arrived at the methodology of the present studies. It explains how the first study began as an attempt to determine which factors in cases of child sexual abuse were important to judges in making sentencing decisions. It quickly became obvious to me that a study of trial judges' sentencing practices was not possible. What also became obvious when examining the cases available through the Court of Appeal of Ontario was that the variability in sentencing in child sexual abuse cases is considerable, that is, it is just as variable as sentencing has been found to be in general (Hogarth 1971).

I explain how the absence of any statistically significant predictors of a sentence led to an analysis of some of the processes of judicial reasoning and how they played themselves out in these cases. The relevance of the various actors in the courtroom drama is assessed in terms of their appearances in the cases studied. I discuss how the cases became the units of analysis so that I could consider influences on judicial decision making within the context in which decisions were made. Finally, I provide some descriptive demographic information, largely in chart form, to give the reader a glimpse of some of the background characteristics of the offenders, the victims, and the offences. There are also some details about the success and failure rates of these types of appeals and waiting times for appeals to be heard.

In Chapter 3, I reflect on expectations of the changes in the law and explore the ways in which courts have arrived at a characterization of the various types of sexual offences against children. I analyze the distinction that the courts make between penetration and non-penetration offences, how they arrived at this distinction, and what the implications of ignoring other significant factors surrounding the abuse, such as its frequency and duration, might be. Although the sexual assault laws passed in 1983 and 1988 do not contain any reference to "rape" or any emphasis on intercourse as a more serious harm, the Court of Appeal has articulated intercourse as a benchmark by which to establish sentence severity. This chapter contains an analysis of the continuing emphasis on penetration and the minimization of other forms of abuse as part of a patriarchal interpretation of child sexual assault.

In Chapter 4, I examine popular perceptions of men who sexually abuse children. These perceptions are based on stereotypical assumptions that portray these men as visibly deviant or demonic. Media portrayals present them as being "different." What happens when a "normal"-looking man comes before the court having been convicted of the sexual

abuse of a child? How is his behaviour explained given that he looks like the rest of us? Judges and justices appear to have difficulty with this scenario and sometimes lose their focus on what the offender did in their attempts to understand who the offender is. I analyze the use of mitigating and aggravating circumstances and illustrate how the law is focused on the offender rather than on the offence or on the victim. I examine the tension between these two types of factors, and I illustrate cases that demonstrate how aggravating circumstances are downplayed and mitigating circumstances are emphasized, resulting in an unbalanced view of the offender. Finally, I outline the circumstances under which a balance is least likely to be achieved.

In Chapter 5, I illustrate that the victim is often overlooked or, in sentencing, mentioned as a sidebar, not as an integral part of the consideration. The victim's invisibility conjures up the image of a small child lost to the sight of the judge in front of an imposing bench. Her harm is seriously considered only in cases that involve penetration. She is most visible when she is being discounted as having been complicit with the behaviour and when her role as victim is being challenged. Victim invisibility goes beyond smallness in stature. Victim stature appears to be small because of how it is constructed relative to the stature of the male defendant.

In Chapter 6, I explore how judicial decision makers have depended on "experts" to help them understand the offenders and, by extension, the offences. Particularly interesting and concerning is how little attention is paid to the victim's input unless it is presented through the voice of a "medical expert." I examine the "production of medical definition" as it applies to this work. What influence do the medical/psychiatric and psychological reports have on the sentencing process? What is the construction of the offender in these reports? What role do other reports play?

Finally, in Chapter 7, I wrap up the findings of the previous chapters and raise outstanding issues. The chapter consists of a discussion on the implications of legal solutions to the social problems of children. I raise questions about which remedies are available to victims now that the appeal process has been constricted by the Supreme Court and scarce Crown resources, and I examine possible changes to the system that may be more realistically beneficial for children who have experienced sexual abuse.

Judicial Decision Making in Child Sexual Abuse Cases

1
Recent Events

On 1 June 2004, the news media reported the results of the sentencing hearing in the case of Judge Donald Ramsay in Prince George, British Columbia, *R. v. Ramsay* (2004). In his reasons for sentencing, Mr. Justice Patrick Dohm summarized the charges as follows:

> **Count 2 – The sexual assault of J.**
> The accused picked up J., an aboriginal/Metis woman, then 16 years old, off the street in Prince George. He took her in his truck about four miles out of town into the woods. There they agreed on $150 for sex. She took off her clothes, but when she reached for a condom he became enraged. He slammed her head on the dashboard, causing her forehead to bleed. After some struggle, she made it out of the truck.
>
> However, he caught up with her and pinned her to the ground. He slapped her across the face and proceeded to penetrate her with his penis as she cried. He got up, threw her clothes out of the truck and left. No money changed hands. She made her way back to the highway and hitchhiked back to town. Over a year later, J. struggled with the fact that the accused presided over a case conference concerning the custody of her son.
>
> **Count 3 – Obtaining for money the sexual services of H., a person under 18 years of age**
> The accused picked up H., then 12 years old, off the street in Prince George. He paid her $80 for oral sex and intercourse. Approximately three months later H., now 13 years old, appeared before the accused charged with various offences. The accused became aware of H.'s age and tumultuous past during the course of those proceedings.
>
> A month or more later the accused again picked up H. off the street and made references to her court appearance. They agreed on sex for

money. The accused paid H. a premium, $150, to simulate aggressive sex. The two got involved in a physical confrontation with respect to the transaction. Ultimately H. pushed the accused away and escaped out of the vehicle. He told her no one would believe her if she reported what had happened.

Count 7 – Obtaining for money the sexual services of A., a person under 18 years

The accused first picked up A., an aboriginal woman, when she was 14 years old. She was picked up off the streets and taken about four miles outside Prince George and down an isolated road. She provided oral sex to the accused in exchange for $80. This scenario was repeated four to six times while A. was from 14 to 17 years old. None of these encounters involved violence.

During the course of these encounters A. appeared before the accused several times. In court, the accused was made aware of A.'s background, including her fragile mental state, low self-esteem, limited education and her past with abusive adults.

Count 8 – Breach of trust

On either the second or the third of the encounters with A., the accused told A. that he would "let her off sentences" if she did not tell anyone of the encounters, thus creating an expectation that he would deal with her leniently in return for her silence. A. appeared before the accused in court eight times.

Count 9 – Obtaining for money the sexual services of C., a person under 18

At age 15, C., an aboriginal woman, appeared before the accused where, by her consent, she was made a ward of the state. The accused was made aware of her date of birth. Several months later the accused picked up C. off a street in Prince George and drove her to the same area as he drove A. She agreed to provide oral sex to the accused for $60.

She was performing oral sex and just near the end of the situation the accused wanted his money back. They struggled in the vehicle. He was attempting to overpower her with his hand in her pocket where the money was. He had her by the hair. She got away, naked. Before he sped away with her clothes still in the vehicle, he threatened to have her killed if she told anyone of the incident. She was not physically injured in the exchange. She later hitchhiked back to town. (*R. v. Ramsay* 2004)

Mr. Justice Dohm went on to say:

> The accused's conduct was utterly reprehensible. He freely engaged in sexual activity, including violence, with young women who were highly vulnerable because of youth, disadvantaged backgrounds and addiction. He sat in judgment on them for the very behaviour in which he himself was instrumental in causing them to engage, when he had full knowledge of their personal circumstances. For the administration of justice and for these young women a greater tragedy is difficult to imagine.
>
> It is difficult to imagine a more astounding example of the split personality phenomenon. No one can question that the accused has already paid a price for his crimes. He has lost his position as a previously respected judge and foreclosed himself from ever being part of the legal community again. He has brought shame on his former colleagues, on the judiciary generally, his family and on himself. I fully expect that his time in custody will be an exceptionally heavy burden; and on his release the burden will be with him still.
>
> But the principles of denunciation and retribution demand no less. His callousness towards those young women, his violence towards two of them, his conduct in discarding two like one might discard a pair of old shoes, and the resulting psychological aftermath, these are but a few of the appalling features of his crimes that emerge from the detailed statement of circumstances.
>
> These circumstances alone would justify a global sentence at the highest end of the range suggested by counsel. But in this terrible case there is the additional aggravating feature of the accused's position. From the circumstances agreed to by counsel it is apparent that the accused used his office both to solicit satisfaction of his perverted lusts and to shield himself from their consequences. In our society judges are the trustees of the administration of justice. One can hardly imagine a more infamous breach of trust. (*R. v. Ramsay* 2004)

The trial judge listed the factors that he considered favourable to the convicted judge:

- his guilty plea
- the Crown attorney's argument that Ramsay's early resignation from the bench should be seen as mitigating
- the offender's age

- character references indicating that the offender had had a "fine reputation" as a lawyer and a member of the community
- the offender's apology.

Mr. Justice Dohm also relied on expert input at sentencing: he cited a psychiatric report commissioned by the defence, which indicated that Mr. Ramsay was remorseful, unlikely to reoffend, and open to receiving treatment.

In discussing the seven-year sentence that he imposed, Mr. Justice Dohm said that "the Crown and defence have not only agreed on the facts, but also on an appropriate range of sentence, that being from three to five years imprisonment. But the court is not bound by the agreed sentencing range. Only where the range is, in the view of the court, reasonable and appropriate, and in keeping with the facts as presented, will a court be guided by it" (*R. v. Ramsay* 2004).

Because Judge Ramsay entered a guilty plea to the counts listed above, several other charges – including sexual touching of a person under fourteen years, invitation to sexual touching of a person under fourteen years, sexual assault, sexual assault with a weapon, threats or causing bodily harm, and procuring sexual exploitation of a person under the age of eighteen years – were dropped.

This is one of the few cases of child sexual abuse that has received detailed attention in the media. Because public discussion about these cases is relatively rare, the average person reading about this case would have little ability to put it into context. One person who could do so is retired BC provincial court judge Wallace Craig (2004), who said, "as a sitting judge and serial predator who victimized the most defenceless and vulnerable of women, Ramsay should receive a maximum sentence." Justice Craig was reacting to a *Vancouver Sun* editorial commending the sentencing judge, Chief Justice Patrick Dohm. In an op-ed column, Justice Craig pointed out that, in its lavish praise of him, the editorial

- failed to assess whether the "severity" of the sentence was even remotely on all fours with the "egregious" circumstances of the crimes and
- ignored the fact that a seven-year sentence may not be the de facto maximum for sexual assault causing bodily harm.

And he pointed out that "there is no doubt that *Regina v. Ramsay* is a benchmark precedent."

In further critiquing the sentence, Justice Craig went on to say, "but consider this: Ramsay's crime spree lasted at least 10 years and all the while he was one of Her Majesty's judges. His sentence was one half the maximum of 14 years." Justice Craig's concern, under other circumstances, might be one expressed by the Crown in an appeal; however, given that the Crown entered into a plea agreement with the defence and that the sentence was higher than that sought by the Crown, and given that the current Canadian legal climate does not encourage appeals by the Crown, it was being expressed in the media by a retired judge with no hope of any legal recourse. The potential legal precedent cannot be challenged.

This was a case that made it into the media; most cases of child sexual abuse do not. This case was atypical in that the offender was a judge; in many other ways, though, it was typical of what happens in courtrooms when sentencing decisions are made. What follows in this book is an account of many similar cases and an attempt to make sense of the sentencing processes in them.

The Legal Construction of Child Sexual Abuse

In 1983, the laws dealing with sexual assault were changed (Part V, *Criminal Code of Canada*), due largely to a persistent demand from women's groups that the old laws did not reflect the realities of sexual abuse. The aim of this legislation was to increase the number of reports made by victims of sexual assault, to increase the confidence of victims of sexual assault that their situations would be taken seriously and that they would not be further victimized by the process, to improve the processing of complaints of sexual assault by the police, and to increase the proportion of charges that could result in conviction (Ruebsaat 1985; Gunn and Linden 1993; Hudson and Roberts 1993). Some of the ways in which the law was supposed to improve confidence in the system were related to the recognition that women could be sexually assaulted by their intimate partners, specifically spouses, and that the corroboration requirements in cases of sexual assault were unrealistic and characterized women as being unreliable and likely to make false complaints out of anger. These requirements suppressed reporting of these offences. As well, there was significant recognition given to the fact that sexual assaults, particularly of children, are frequently so traumatizing that the victims cannot always be expected to be able to immediately report them (Gunn and Linden 1993, 152-53).

Research into the effectiveness of the criminal justice system in using these laws to meet their intended goals is sparse, but does exist. In general,

the early research results indicated that there was an increase in reporting, with a particular increase in reports of child sexual assaults. The reports of assaults involved strangers less frequently than prior to enactment of the legislation and more frequently involved family members and acquaintances. In spite of the increase in reporting, "the conviction rate has probably not been affected by the legislation" (Gunn and Linden 1993, 153). Furthermore, "the rape reform legislation introduced in Canada in 1983 was successful in achieving one of the goals that inspired it. Ironically, its success was in attracting more victims into the system rather than in changing the way that the system responds to complaints of criminal sexual aggression" (Roberts and Gebotys 1993, 168). Gunn and Linden (1993, 154) conclude that passage of Bill C-127 was an acknowledgment of women's rights, but consistent affirmation of these rights cannot be guaranteed solely by legislation; Bill C-127 provides the framework that both allows and validates social change and is the first step toward meaningful change.

More recent research (Kong et al. 2003) indicates that the increase in reporting peaked in 1993 and has been declining steadily since that time. There are a number of possible explanations for this decline. Kong et al. connect it to a generally declining crime rate and to a reduced number of children in the overall population of the country. Others, such as Trocmé et al. (2002, 2), suggest caution in the interpretation of the decline: the number of substantiated investigations of sexual abuse decreased by 44 percent, from 3,400 in 1993 to 1,900 in 1998. This is consistent with decreases reported across the United States. Such a dramatic decrease requires careful analysis. While it could indicate that sexual abuse prevention programs and criminal charging policies may have acted to effectively deter sexual abusers, it is also possible that the same policies are causing victims and their parents to be less willing to report sexual abuse. This decrease may be the result of declining public attention to the issue after the enormous amount of attention that it received in the late 1980s. As well, child welfare workers have consistently reported problems with understaffing as reasons why the number of substantiated investigations has dropped. They also report reluctance by Crown attorneys who are also understaffed and insufficiently resourced to proceed with charges. Roberts (1996, 414) also reports that sexual assault allegations as a category of crime are twice as likely to be labelled unfounded: "We can observe that sexual assault victims who report to the police are more likely than victims of other crimes to have their complaints dismissed by the police as lacking sufficient foundation ... It is unlikely that having one complaint declared unfounded by

the police, a victim will return to the criminal justice system." Research conducted and reported by Du Mont and Myhr (2000) supports the conclusions of Roberts.

Early Days

Immediately preceding and following passage of Bill C-127, many media reports presented compelling stories about the victimization of children. There were stories describing methods of "street-proofing" children to keep them safe. There were stories about new methods used by social workers and police to ensure an increase in the prosecution and conviction of those men engaged in the sexual use of children, and stories claiming that reports of child sexual abuse had doubled in the previous six months: "in every case, the child knew the perpetrator and the abuse had been going on for more than two years before authorities heard about it" (Hickl-Szabo 1984). In February 1981, a federal task force was struck, headed by Robin Badgley, a professor at the University of Toronto medical school, and comprised primarily of a number of medical and legal participants but also a journalist and a director of a daycare centre. The task force reported in August 1984 and recommended several changes to the *Criminal Code of Canada* that included the creation of new offences that would criminalize, among other things, sexual touching. Media comments after the release of the report emphasized the extent of the social problem of child sexual abuse and recommended passage of a new law to implement the report's recommendations. At the time, an editorial in the *Globe and Mail* commented:

> Sexual abuse of children is incredibly widespread in Canada and – like an iceberg – only a tiny part of it is above surface and recognized by the authorities or the public. This was the finding in the recent two-volume report on three years of research by the federally appointed Committee on Sexual Offenses against Children and Youth. The committee, which had been asked to determine the adequacy of laws and their enforcement in protecting children against sexual abuse, reported baldly, "On the basis of our findings, about some 10,000 cases of sexual offenses against children and youths, our principal conclusions are that these crimes occur extensively, and that the protection afforded these young victims by the law and public services is inadequate." (*Globe and Mail* 1984)

In assessing the committee's recommendations, the editorial went on to state:

> Many of these legal changes would be sound, but some are frightening. It would be sound to end the one-year limit on prosecution of sexual abuse. It would be frightening to permit conviction on the uncorroborated evidence of a single witness. It would be terrifying to have the laws of evidence changed to declare that "*every* child is competent to testify in court and the child's evidence is admissible," and that, "there be no statutory requirement for the *corroboration* of an 'unsworn' child's evidence." Any parent, teacher, or child psychologist knows that most young children pass through stages where they are unable to differentiate between reality and fantasy. (ibid.)

It is obvious in reviewing media reports of the time that most of them emphasized that the abuse was reprehensible but they had concerns, as evident in the editorial above, about how that abuse should be defined and prosecuted and possibly punished. Finally, some years after the report was tabled, Bill C-15 was passed in January 1988 and dealt specifically with sexual offences committed against children. The goals of the legislation were to

- provide better protection to child sexual abuse victims/witnesses;
- enhance successful prosecution of child sexual abuse cases;
- improve the experience of the child victim/witness; and
- bring sentencing in line with the severity of the offence. (Hornick and Bolitho, 1992, xiv)[1]

This book is a study of the last two goals. How are children and convicted offenders treated under this legislation? To answer this question, it is necessary first to look at the history of the legal management of child-adult sexual contact in Canada and to some extent in the British justice system.

History of Child Sexual Abuse and the Criminal Law

Child sexual abuse may have received a great deal of attention in the 1970s and 1980s, but sexual contact between adults and children was not a new phenomenon. There is a consensus in the literature that sexual activity between children and adults has existed historically and cross-culturally with varying degrees of acceptance. Its existence was not considered problematic; what was monitored were the boundaries within

1 Section V of the *Criminal Code of Canada* outlines in detail what constitutes a sexual offence against a child.

which adult-child sexual contact took place. In Roman civil and criminal law, the concept of *patriae potestas* or "power of the father" gave the male head of the household total power and control over the family (DeYoung 1982, 101-2; Foucault 1968, 135). Sexual assaults on the adult females or on the male or female children in the family were not considered offences against those assaulted as much as they were regarded as vandalism against the male's (father's) property. As such, the remedies involved paying damages to the injured party, the husband or the father (DeMause 1975).

Christian law represented a concern for the age at which sexual intercourse between adults and children took place. Canon law defined sex with a child less than ten years of age as invalid rather than illegal: it did not exist even though it actually happened (Rush 1980, 34). When civil law was separated from church law in England, the crime of statutory rape was created, in effect recognizing that sexual activity did take place between adults and children under the age of ten. If a man had sex with a female under the age of twelve, he could be convicted of a misdemeanour offence (Rush 1980, 34-35).

Historical studies of the sexual use of children are sparse and tend to concentrate on sexual activity with boys (Jones 1982). Quinsey (1986, 144) points out that the lack of commentary on adult sexual activities with young girls appears to reflect its "acceptance and ubiquity." Foucault describes a major change in social attitudes toward sexuality in the nineteenth century. This change was from a social framework in which sexual behaviour was expressed openly, and in which adult sexuality was open to the view of children, to a framework in which sexual behaviour was moved into a more private sphere, the home, and hidden from children. "On the subject of sex, silence became the rule" (Foucault 1968, 3). Parents were supposed to shield their children from the knowledge of sex and were expected to police them to guard against masturbation and other evidence of budding sexuality (Haller and Haller 1974; DeMause 1975; DeYoung 1982).

Changes in the Western view of childhood moved the controls over children into a more public sphere. Until the end of the nineteenth century, the concept of childhood was not well developed (Houston 1974; Platt 1977; Sutherland 1976; Rooke and Schell 1982). Because of this absence of status, children were dealt with as if they were the property of their parents and could be treated in any fashion, usually short of murder, that their parents deemed to be appropriate. The child-saving movement was aimed specifically at poor children because, as Rothman (1971) contends, the real concern in these efforts was not for

the well-being of the child but for that of society in that these were really attempts to prevent the moral contamination of delinquency. Even after the child-saving movement, poor children were often treated as objects or as property, because poverty was considered to be an indication of abnormality (Rooke and Schell 1982). Therefore, the state or well-meaning people who were not poor could take charge of a child's life, usually by removing the child from his or her parents' home and placing him or her in an institution or foster home as a means of rescuing the child (Houston 1974). The rhetoric of the times compared institutions to family arrangements and found the institutional form of parenting preferable to that of the poor family.

In April 1893, legislation introduced in Ontario by J.M. Gibson, the *Children's Protection Act*, also known as the "Children's Charter" or the "Gibson Act," "reduced parents' right of property in their children and affirmed that from infancy, children possessed the rights of citizenship" (Sutherland 1976, 111). Sutherland has termed this time period one of "social optimism" (130). Yet, while the *Children's Protection Act* represented a turning point in the definition of children in Canadian society, many other factors mitigated against children's equal treatment vis-à-vis adults. Most of these factors related to acceptance of the primacy of the parent's role as well as to the secrecy surrounding and the taboo concerning discussion of sexual behaviour. The reduced right of property could be seen to be more applicable in poor families because of the closer scrutiny to which they were subjected. Their relative absence of power increased their "visibility."

In addition to this historical notion of children as property, we need to recognize that the concept or ideal of childhood that we hold today in Western societies is very different from the concept of childhood that existed in the late 1800s when the first federal legislation dealing with child sexual abuse in Canada was passed. Chunn (2002, 120) outlines some of this legislative history: "Although incest had been a penal offence in some provinces prior to Confederation, a federal statute had existed only since 1890, when the Canadian Parliament enacted a uniform criminal law ... Under the new law, incest involving grandparents, parents, and siblings was classified as a crime against morality carrying a maximum sentence of fourteen years of imprisonment. Two years later the 1890 law was incorporated virtually unchanged in Canada's first Criminal Code." Chunn goes on to contend that the prohibition against incest was part of a series of legislative and social attempts designed to strengthen heterosexual marriage. It also introduced some public oversight of what had been considered the private realm of the family,

under the father's jurisdiction. Chunn considers the new scrutiny of the family to be part of the development of a budding welfare state. As many others have observed above, state oversight was often restricted to those members of the community who were most visible and, according to the beliefs of the times, most in need of scrutiny: the poor.

Smart (1999, 392) similarly analyzes the history of criminal justice interest in adult-child sexual contact when she describes the development of British laws and the construction of that society's definition of childhood:

> Sociologically speaking, it would seem that we can now easily accept the idea that the extension of schooling in this century changed childhood. However, the idea that extending the age of consent for girls from 13 to 16 years old in 1865 also changed the nature of childhood is less easily grasped. We tend to think that it was self-evident that a 13-year-old could not consent and was too immature for sex. In fact, this was not self-evident at all. Rather we ought to understand the extent to which the Criminal Law (Amendment) Act 1885 was part of a new construction of modern childhood. It created and extended a particular, historically and culturally specific, type of childhood to the age of 16 in much the same way as the Education Acts did subsequently.

When Smart challenges the incapacity of a thirteen-year-old to consent as "self-evident," she discusses the confusion that has existed for many years about men's motives for sexual contact with children, children's responsibility for such contact, and the possible harms that may result from that contact: "Their frame of reference was more attentive to the idea of inappropriate sexual contact – whether consensual or not – which they saw as morally harmful and exploitative. (This differs from the contemporary perspective which understands adult/child sexual contact to be psychologically damaging rather than morally corrupting)" (1999, 399). Smart examines the conflicting views of the child in her discussion of the "abused child as leper" versus the child as a "true" victim. She contends that to some extent this depended on the age of the child. She also contends that definitions of childhood victimization and adult offending were being created primarily by the legal and medical professions.

Medicine and the Privacy of Abuse

The medical profession has been identified as an agent of social control through which the mantle of privacy veils issues of violence in the

relationships between men, women, and children and keeps them out of public scrutiny. The management of social problems by the medical profession ensures their "confidentiality" and to some extent their obfuscation. The average person is not expected to know what the physician, psychiatrist, or psychologist knows about someone. Nor is that person expected to understand the process by which that knowledge is achieved or to have insight into the dynamics of that person's functioning. Foucault (1968, 64) describes this view of medicine as the "confessional science" and outlines the medical profession's control over sexuality: "Through the various discourses, legal sanctions against minor perversions were multiplied; sexual irregularity was annexed to mental illness; from childhood to old age, a norm of sexual development was defined and all the possible deviations were carefully described; pedagogical controls and medical treatments were organized around the least fantasies, moralists but especially doctors, brandished the whole emphatic vocabulary of abomination" (36).

Gusfield (1992, viii), in an analysis of the medical profession's view of homosexuality, comments that "the medical metaphor is not as neutral and as amoral as it seemed in its inception." Gusfield advocates an analysis that highlights the way in which medicine conveys a particular moral message rather than simply reflects a natural order.

Smart (1989, 17) examines the interaction between law and medicine in the maintenance of patriarchal standards in male-female and male-child relationships and the power of law to "disqualify other knowledges and discourses." She examines how law as a profession turns to medicine as a profession for support of a phallogocentric construction of reality, and as a result extends its power: "We can see a form of cooperation rather than conflict and a process by which law extends its influence into more and more 'personal' or 'private' areas of life ... Hence law retains its 'old' power, namely the ability to extend rights, whilst exercising new contrivances of power in the form of surveillance and modes of discipline." Conrad and Schneider (1992, 278) support Smart's concern: "Our view of the medicalization thesis is that it is essentially about culture, focusing on the creation and use of categories and how this process constitutes, shores up, or challenges existing notions of reality." Medicine has exerted social control in the domestic sphere of life in terms of the regulation of sexuality and has defined what "appropriate" heterosexual relationships are. By defining what is "normal" in our society, it has contributed to the maintenance of power imbalances between men and women and between adults and children.

Medicalization of the Child Molester

With the dominance of the medical profession over the regulation of sex, as noted by Foucault, it is not surprising that some of the most widely accepted answers to questions about sexuality have been in the realm of biology. From Lombroso's (1911) early theorizing about the biological basis for criminal and aggressive behaviour, biological explanations have had a good deal of appeal. Biological explanations of men's aggression have been frequently cited to explain their dominance as well as their deviance. While some researchers have argued against this causal link, a great deal of effort has gone into attempting to prove one. The psychiatric community has been particularly active, if largely unsuccessful, in this regard, but much of the focus on treatment still revolves around the use of pharmacological agents: "The development of the selective serotonin reuptake inhibitors and other pharmacotherapies has moved the field more toward a bio-psycho-social model of etiology and treatment, and focused more attention on co-morbid psychiatric disorders in the treatment of sexual offenders" (Miner and Coleman 2001, 5).

Hucker and Bain (1990) report many problems in the study of a connection between sexual offending and levels of testosterone. These researchers indicate that the many studies that make claims to a link between hormone levels and aggression, sexual or otherwise, have not proven to be replicable and are plagued by small numbers of subjects and conflicting results. Studies investigating possible chromosomal abnormalities as an explanation for sexual offending have not demonstrated any correlation. Langevin (1990), on the other hand, indicates some confidence in studies that show a connection between temporal lobe impairment and sexually anomalous behaviours. He claims that, when recently developed imaging technology is used, there is some reason to believe that sexual sadists and pedophiles show different brain pathology in the temporal lobes. Langevin (1993, 70) is careful to point out, however, that the majority of men who sexually offend against children are not pedophiles but "conventional heterosexuals who offend for other, psychological reasons." He concludes that this is most obvious in intrafamilial abuse situations, but in cases of stranger offences he suggests that, although many offenders can be considered to meet the diagnostic criteria for pedophilia, a large number cannot: "Therefore, a child may be molested for reasons other than sexual preference" (1993, 74). It is clear that, in spite of the widely held belief that male sexual aggression against women and children is biologically based,

prominent researchers who have been most actively looking for a biological explanation for the majority of sexual abuses have been unable to find it.

Other attempts have been made to explain sexual victimization of women and children from the point of view of personality theories or other similar psychological constructs. Erickson et al. (1987, 566), commenting on their review of this literature at the time, noted that it "perpetuated over simple and stereotypic descriptions of the psychological characteristics of sex offenders. Such stereotypic descriptions can usually be identified by liberal use of the article 'the' as in the rapist, the child molester, and so forth." Quinsey (1986; see also Becker and Quinsey 1993), a leading researcher in this field, also questions the utility of the search for causation in the personality of the offender. Over the course of several years, many researchers have attempted to develop a typology of men who commit sexual offences against women and children. These attempts themselves are a good indication of the way in which the professionals concerned viewed the problem. That is, they have seen the problem as centred on the personality or the pathology of the individual offender. Knight and Prentky (1990) have attempted unsuccessfully to develop a viable typology of men who commit crimes of sexual assault.

A relatively recent development in the literature on sex offenders in general is the contention that sex offending is a compulsive behaviour indicative of an addiction similar to alcohol abuse, drug abuse, and gambling. Carnes (2002, 2004) is the primary proponent of this approach. He believes that sex offenders find the behaviour pleasurable and exciting and develop a pathological dependence on it as well as a behavioural structure to support the addiction. Blanchard (1985a and b) contends that offenders become progressively more preoccupied with the activity and that their behaviour escalates in frequency and seriousness because of the addiction. There is no evidence, however, for the existence of this dynamic. Some researchers see this "addiction" as a form of obsessive compulsive disorder.

The focus in recent years has turned to what are termed "cognitive distortions" in sex offenders. This turn began, at least in part, when Yochelson and Samenow (1976) claimed that criminals think differently from non-criminals and that these thinking patterns are the primary source of their criminality. Those who have published in this area[2]

2 See, for example, Segal and Marshall (1985); Segal and Stermac (1990); Stermac, Segal, and Gillis (1990); Hanson, Gizzarelli, and Scott (1994); and Ward et al. (1997).

believe that how child molesters think about children, and their behaviour toward them are significant considerations in understanding child sexual abuse. Child molesters tend to believe that children are not harmed by sexual contact with adults, that children benefit from sex with adults, and that children can consent to sex with adults and are frequently sexually provocative. However, researchers in this area cannot say whether these beliefs produce the behaviour or whether the stated beliefs are a result of dissonance. That is, does the offender report the beliefs after he has committed the offence in order to rationalize behaviour that is otherwise difficult to justify? Are his reasons for choosing children related to them being easy targets, or does he really believe that they can consent to and benefit from sexual contact with adults? Harris, Rice, and Quinsey (1998, 96-97) indicate that, in terms of cognitive-behavioural treatment strategies, "just as was the case with pharmacological treatments, the data so far are consistent with the conclusion that agreeing to and persisting with treatment over the long term serves as a filter for detecting those offenders who are relatively less likely to reoffend, but the nature of the treatment (so long as it is not exclusively humanistic or psychodynamic) has little or no detectable specific effect on outcome ... The question of the effectiveness of cognitive-behavioral treatment of sex offenders will go without a scientific answer for many years to come." Other researchers explain cognitive distortions as something people do rather than have: "An important assumption of this approach was that cognitive distortions were a 'property' of the person expressing the belief and were also causally implicated in the commission of that person's offence. This individualistic approach in turn enabled or legitimized interventions based upon the assumption that the individual is susceptible to cognitive change programmes or should be subject to a management regime" (Auburn and Lea 2003, 282). These authors conclude that offenders use these distortions to manage their culpability for their offences.

Much of the literature on men who sexually abuse children infers that their criminal activity is quite different from that of other people. Some researchers are now disputing this inference, which obviously challenges the medicalization or pathologization of sex offenders (Simon 2000; Soothill et al. 2000; Smallbone and Wortley 2004). These researchers challenge the perception that sex offenders are a homogeneous group and that they are essentially distinct from other offenders:

> Although the circumstances or contexts in which sexual offending occurs may be different from those in which nonsexual offending occurs,

> criminological perspectives generally assume the same fundamental mechanisms to be responsible for both. Gottfredson and Hirschi's (1990) general theory of crime goes so far as to suggest that a single common mechanism – essentially a failure to exercise restraint over self-serving impulses – can account not only for most criminal behaviour but also for a broad range of irresponsible and risk-taking behaviour. From this perspective, paraphilias, sexual offending and nonsexual offending would be expected not only to co-occur but also to share a common etiology. (Smallbone and Wortley 2004, 176)

Sentencing Issues in Child Sexual Abuse

According to the Canadian Sentencing Commission (1987, 151), "the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law through the imposition of just sanctions." Until the 1996 amendments to the *Criminal Code,* there was no "legislative statement of the aims of sentencing in Canadian law" (Manson, Healy, and Trotter 2000, 111) beyond maximum possible sentence length. Prior to that time, there were generally accepted "traditional" sentencing goals, utilitarian and retributive. Utilitarian goals are met by a focus on deterrence (general and specific), incapacitation, and rehabilitation. These goals emphasize the prevention of future crime committed either by the offender sentenced or by others in the public. Retributive goals focus on the concepts of retribution and just desserts and on denunciation. The emphasis is on the offence and on the need to censure and condemn the behaviour of the offender involved in it (Griffiths and Verdun-Jones 1994, 407; Manson, Healy, and Trotter 2000, 1).

Rehabilitation

There has been considerable criticism of the present correctional system as a useful agent of change. In the view of prominent Canadian researchers in discussing the rehabilitation of sex offenders,

> the best option in these circumstances of relative ignorance is to adopt treatments that (a) fit with what is known about the treatment of offenders in general, (b) have a convincing theoretical rationale in that they are motivated by what we know about the characteristics of sex offenders, (c) have been demonstrated to produce proximal changes in theoretically relevant measures, (d) are feasible in terms of acceptability to offenders and clinicians, cost and ethical standards, (e) are described in sufficient detail that program integrity can be measured, and (f) can be integrated into existing institutional regimens and supervisory

> procedures. The last point is of special importance because, to the extent that treatment fails to reduce recidivism, supervision (including denial of community access) has to take its place. (Harris, Rice, and Quinsey 1998, 97)

Brown (1991) and others make it clear that women's groups are disappointed with the track record of the traditional correctional system, particularly the institutional component of it. The success or failure of imprisonment to effect change in offenders has been the subject of considerable debate for some time. While the debate continues, few writers and researchers examine the culture of the correctional institution. That cultural environment is predicated on a form of macho masculinity in which sexism (Hansen 1993) and racism (Gittens and Cole 1994) are tolerated and even encouraged. Pro-social notions of co-operation and relationship are not valued or promoted in most institutional settings.

Denunciation

Ruby (1999) describes denunciation as an attempt by the court to express the abhorrence that society feels about a crime. According to Ruby, a sentence given under such a premise would be "inevitably harsh" (5). The Law Reform Commission of Canada (1974) described the attempt behind the concept of denunciation as educative. The sentence is supposed to reflect the societal value that holds the crime in question to be unacceptable behaviour. The Canadian Sentencing Commission (1987, 142-43) seemed to agree with the concept of an educative function but identified the same problem as exists, in its view, with deterrence: if the public never hears of the sentence or of the rationale for it, then there is no possible educational value. The commission also made the point that the public perception of seriousness of offences is more likely shaped by its perception of the harm done by the crime than by the sentence. A call for more appropriate sentences would then have to be accompanied by an explanation of the rationale for these sentences in terms of the harm done to the victims.

Deterrence

Deterrence as an aim of sentencing is usually divided into general and specific deterrence. In general deterrence, the public, or at least that part of it that might be tempted to commit a similar crime, is supposed to be deterred from committing crime by seeing what has happened to someone else who did. The Canadian Sentencing Commission (1987, 137) has observed that this form of deterrence may be undermined by a

media tendency to report more cases of lenient dispositions. Specific deterrence is aimed at the offender himself being sentenced. The sentence is supposed to give that individual the message that his criminal behaviour has resulted in a personal cost that should encourage him to avoid similar behaviour in the future. Many theorists of and researchers in the effectiveness of deterrence have emphasized that deterrence is effective in preventing crime only if the potential offender perceives that there is a reasonable certainty of getting caught (Freidland 1990; Gibbons 1992). Since many people who commit crime are not caught, and since most are not caught for every criminal offence, the certainty principle necessary for deterrence to be effective has been seriously doubted, particularly for sexual offenders, who are believed to offend many times before they are reported or arrested.

Legislative Guidance

There have been many calls for sentencing guidelines in Canada. For example, Doob and Brodeur (1996, 376) argue that Canadians are not so concerned about lenient sentencing as they are confused by the process of sentencing. They frame the problem as one of disparity or variability in sentencing and conclude that without guidelines sentences "will, over time, no longer be seen as legitimate" (379). These authors see the problem as part of a more general lack of accountability and challenge the vagueness and difficulty of setting in motion what are perceived to be existing accountability mechanisms for judges' decisions, including appeals to higher courts. They argue that the current issue of disparity and the resulting discontent with sentences stem from the fact that we lack a sufficiently clear set of principles from which to formulate policy and practice.

Manson, Healy, and Trotter (2000) outline the history of the sentencing principles developed in the 1996 amendments to the *Criminal Code*. They question which principle, if any, has priority over the others: "What does this statement achieve?" (112). They go further to point out that, notwithstanding the principles in section 718, trial judges are "the principle [sic] instruments of sentencing" (122). In their presentation of *R. v. C.A.M.* (1996), they illustrate how primacy has been reinforced by the Supreme Court (122-23). For example, Mr. Justice Lamer stated that,

> As Iacobucci J. explained in Shropshire, at para. 46, ... [a] sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique

> qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community ... The discretion of a sentencing judge should thus not be interfered with lightly. (Cited in ibid.: 269)

Manson, Healy, and Trotter (2000) question what would constitute an error in principle or a demonstrably unfit sentence. While the 1996 amendments created the expectation that sentencing processes might become clearer for everyone as a result of the statement of principles, using Doob and Brodeur's (1996) reasoning, it could be argued that the Supreme Court has narrowed the accountability of judges even further.

Feminist Concerns about Child Sexual Abuse

Some feminists do not share Mr. Justice Lamer's confidence in trial judges and have difficulty with the discretion that judges have in arriving at sentencing decisions. They dispute his claim above that judges' experience and position in the community situate them to make good decisions. Many women's groups who advocated for the changes in the law that came first with the proclamation of Bill C-127 and then Bill C-15 have expressed disappointment with the results of sentencing decisions since their enactment. Early on, after the change in the legislation, the works of Marshall (1985), Brown (1991), and METRAC (1992) focused on the gender bias that appeared in the processing of cases of child sexual abuse and was frequently most noticeable in the sentencing. Marshall (1985, 219) articulated these sentiments: "In cases where an assaulter has been found guilty, clear evidence that a crime took place is no guarantee that the judge understood either the nature of the crime or its impact on the victim."

The Manitoba Association of Women and the Law, in reviewing what it perceived to be stereotypical assumptions made by judges, found "judicial comment on sentencing that is overly sympathetic to the accused; minimizes or trivializes the offence; disguises or downplays the severity of the offence; [and] is overly concerned with the accused's background and the effect of the charge/sentence on the accused" (Brown 1991, xiii). Some feminists argued that, given the broader scope for the exercise of judicial discretion with respect to sentencing contained in the 1983 amendments, "there was a danger that many of the objectionable

features of the offences would reemerge at the sentencing level. Examples of this might include: (1) an undue emphasis on the absence of penetration" (Ruebsaat 1985, 93). One of the primary features of Bill C-127 was removal of the emphasis on rape as the only real form of sexual assault. Critics of the legislation (Nadin-Davis 1983; Ruebsaat 1985) observed that, although rape was no longer specified as a charge, the underlying male view of the damage associated with sexual assault that it implied might be retained in the application of the new law. In fact, the presence or absence of penetration has become the benchmark in determining the sentence. According to the Manitoba Association of Women and the Law, "the crime of sexual assault does not require vaginal penetration, as did the former crime of rape. However, the system continues to downgrade the seriousness of the assault if there has been no vaginal penetration" (Brown 1991, vi). This minimization is reflected in a 1994 decision made in Montreal by Madame Judge Raymonde Verreault, in which she cited the absence of vaginal penetration as a mitigating factor in handing down a twenty-three-month sentence to a man convicted of having repeatedly sodomized his stepdaughter: "The accused spared his victim. They did not have normal and complete sexual relations ... vaginal relations to be precise, so she retained her virginity, which seems to be a very important value in her religion" (Reuters 1994, A2). Doob and Brodeur (1996, 382) refer to this case as an example in their discussion on judicial accountability. They indicate that the prosecution immediately appealed the judge's sentence, but "this judge was subsequently promoted to be the administrative head of one level of court in the province." They go on to describe the public outcry following the decision and the judge's subsequent voluntary leave from the court.

Some viewed the sentencing of men who molest children as seriously problematic: "Sentences for the sexual assault of children as for the sexual assault of women are often so low that they do not convey that sense of outrage felt by the general population. It would be unrealistic to suggest that harsh sentences alone will solve the problems of child sexual abuse. However, harsh sentences would serve to convey more clearly the message that the sexual assault of children is not tolerated in Canadian society" (Brown 1991, 52-53).

More recently, Canadian feminists such as Comack (1999), Chunn and Lacombe (2000), and Comack and Balfour (2004) have continued the critique of the criminal justice response to the social problem of child sexual abuse and other legislation dealing with sexual violence: "Critical legal theorists have argued that this business of criminalizing

is much more complicated than it might first appear. Far from being an impartial and objective enterprise, law deals in ideology and discourse – through the meanings and assumptions embedded in the language that it uses, through its ways of making sense of the world and through its corresponding practices" (Comack and Balfour 2004, 9).

Feminist scholars have written extensively about the role that the law has played in remedying or allowing the abuse of women and children. Naffine (1990, 7) describes law as "deemed to be essentially an expression of masculinity, not only in its content but also in its modus operandi." She quotes Polan (1982) and MacKinnon (1983, 1987) as questioning the basic structure of the legal system, its hierarchical organization, its adversarial style, and its claim to and valuing of rationality and objectivity. Naffine goes further to conclude that "indeed law is unable to muster the degree of rationality, internal coherence and consistency which both approaches necessarily imply. And yet law remains an important site of feminist struggle because of the many ways it constrains and controls the lives of women" (1990, 12-13). Naffine suggests that only some men benefit from the male construction of law. This view is consistent with work done by Messerschmidt (1997) and Connell (1995) as well as the more recent writing of Carmody (2003). Notwithstanding the variability in the construction of masculinity as it applies to law, there is still strong evidence of what Connell refers to as the "patriarchal dividend."

Smart (1989, 161) argues against the ready acceptance of the "resort to law" that further empowers law and disempowers women and children. That is, she expresses concern about locating a struggle for social change within the structure of the law because of what she perceives to be its essential maleness, which immediately serves to put women and children in a "one down" position or makes them dependent on the law for change.

Comack and Balfour (2004, 118) see sexual assault trials as politically charged. They refer to their research with defence lawyers: "While lawyers see the amendments as politically motivated and thus contrary to the principles of fundamental justice, their comments suggest that, for some of them, the strategies adopted in sexual assault cases are based on a purposeful defiance of the legislative reforms."

Dobash and Dobash (1992, 172-73) point out that "changing practices involves altering not just laws and policies but also the structures, perceptions and cultural practices that are deeply embedded in the system of justice." In some jurisdictions since implementation of the child sexual assault legislation, there has been a backlash against the increase

in cases of child sexual abuse coming before the courts (Olafson, Corwin, and Summit 1993). This reaction appears to have taken the form of pathologizing the child victims as a means of discrediting them (Eberle and Eberle 1986) or pathologizing their mothers, claiming that the mothers plant the ideas in the children's minds in the heat of custody disputes (Gardner 1987). Some have also claimed that charges are the result of overly zealous investigators who take advantage of children's suggestibility. Some of the latest in this series of attempts to pathologize those who have been abused is the construction of "false memory syndrome" and "parental alienation syndrome" (Whitfield 2001). Additionally, extensive media coverage of the sexual abuse of male children in cases such as Mount Cashel, the training schools run by Christian Brothers in Ontario, the Catholic Church in Canada and the United States, and other institutional settings serves to focus attention on male offenders who are not the "norm." The convicted men are clerics who have taken vows of celibacy, and their victims are male children who are, for the most part, poor. This is reminiscent of the work of Platt (1977), Sutherland (1976), and others on the focus of the child-saving movement. The focus in these cases perpetuates the belief that men who abuse children are not ordinary men and that the victims are not the "norm" but the "poor" in a "public" institution.

The emphasis on the male victim is consistent with the work of Quinsey (1986), cited earlier. The focus on what can be put into the category of "homosexual" abuse feeds the perception, held by some, of homosexuality as aberrant, and obscures the reality that the largest amount of child sexual abuse cases are heterosexual with male offenders and female child victims in familial or close relationships (Finkelhor et al. 1990; MacMillan et al. 1997; Kong et al. 2003).

Conclusion

It is obvious from this brief overview of child sexual abuse, the law, and various researchers' opinions that a number of questions need to be addressed. I ask two central questions in this book: how does the criminal justice system view and respond to victims of child sexual abuse, and what influences that view? In answering these questions, other questions need to be addressed. What is the relative importance of the victim, the offender, and the offence? Is judicial comment overly sympathetic to the accused? Are judges overly concerned with the accused's background and the effect of the sentence/charge on him? Do they downplay or trivialize the severity of the offence? Is sexual assault considered

a violent act in and of itself, or is violence viewed as an additional factor? What consideration is there of the victim in the sentencing process? To what degree is the "patriarchal dividend" evident in this consideration? What kinds of mitigating and aggravating circumstances are accepted in sentencing? What role does psychiatry play in delineating these variables? What is the language of the court? I will address these questions in subsequent chapters.

While recognizing that the "resort to law" is problematic, Smart (1989, 88) reinforces the significance of a careful examination of the practices of law: "Law remains a site of struggle. While it is the case that law does not hold the key to unlock patriarchy, it provides the forum for articulating alternative visions and accounts."

In 1993, Madame Justice Bertha Wilson contended that the reality of the justice system is predicated on a reality that supports traditional masculine understandings of the world, that most police officers, lawyers, Crown attorneys, and judges are male, and that those who are not are forced to live within a system of male beliefs and behaviours. Judges have been referred to as the "last elite priestly cult."[3] Their position in the system is pivotal to bringing about change.

The following chapters attempt to deconstruct the discourse of justices of the Court of Appeal of Ontario in their decisions about cases involving child sexual abuse. The patterns uncovered illustrate that, in these cases at least, efforts to change thinking by changing laws have had very uneven results.

3 Comment made by Parker Bars-Dunham on *Morningside,* CBC Radio, 23 September 1993, in reference to the issue of bans on publication of testimony.