

The Myth of Rapists and Other Normal Men: The Impact of Psychiatric Considerations on the Sentencing of Sexual Assault Offenders

Ronit Dinovitzer*

*Department of Sociology
University of Toronto*

Abstract — *Canadian sentencing commissions have recommended that mental illness be considered as a mitigating factor in sentencing. With respect to sexual assault, some feminist literature asserts that over-reliance on psychiatric factors not only absolves the offender, but also serves to reinforce the myth that “normal” men do not rape women and children. In this study, data were collected on 97 Canada-wide sexual assault sentencing decisions from 15 August 1992 through 15 August 1993. This research does not find support for the hypothesis that sexual offenders are typically characterized as suffering from a mental disorder. Furthermore, using multiple regression, an interaction between judicial perception of the severity of the crime and judicial mention of psychiatric factors is found. The data show that psychiatric factors interact with perceptions of force, actually leading to harsher sentences. The impact of this variable turns out to be the opposite of what the literature would expect one to find: judicial perceptions of mental disorder act as aggravating factors in the sentencing of sexual assault offenders when a judge also believes that force has been used in the commission of the offence. The results of this research are then interpreted within the context of labelling theory.*

Résumé — *Certaines commissions canadiennes sur la détermination de la peine ont proposé que la maladie mentale soit traitée comme un facteur atténuant dans l'imposition de la peine. Les arguments émis par certaines littératures*

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féministes affirment que, en ce qui a trait à l'agression sexuelle, le recours excessif aux facteurs psychiatriques a non seulement pour effet d'exonérer le délinquant sexuel, mais également de conforter le mythe selon lequel l'homme «normal» ne viole pas les femmes et les enfants. Les données de la présente étude ont été tirées de 97 décisions de causes d'agression sexuelle rendues entre le 15 août 1992 et le 15 août 1993. Les résultats de la recherche ne semblent pas corroborer l'hypothèse selon laquelle le portrait-type du délinquant sexuel est celui d'un homme souffrant d'un désordre mental. Qui plus est, grâce à la régression multiple, on constate que la mention d'un facteur psychiatrique dans un jugement produit un effet interactif avec l'appréciation du tribunal de la gravité du crime. Les données démontrent que les facteurs psychiatriques agissent interactivement avec la perception judiciaire de la brutalité du délinquant, la peine imposée étant alors plus lourde. Cette variable démontre que, contrairement à ce que suggère la doctrine, le trouble mental constitue un facteur aggravant dans l'imposition de la peine lorsque le juge constate aussi que le délinquant a utilisé la force dans la commission de l'infraction. Les résultats de cette recherche sont interprétés en regard de la théorie de l'étiquetage.

In the daily processing of crimes, members of the criminal justice system rely upon descriptive categories and concepts to organize their daily activities and facilitate the legal process. David Sudnow explains that, in the course of routinely interacting with offenders, judges, police and lawyers gain knowledge “of the typical manner in which offenses of given classes are committed, [and] the social characteristics of the persons who regularly commit them.”¹ This process of typification and classification constructs a perception of the typical, or “normal crime,” through which members of the criminal justice system classify offenders as “normal” rapists or thieves based on the knowledge of a few characteristics of the crime committed; in sum, typical crimes are “those occurrences whose typical features, e.g., the ways they usually occur and the characteristics of persons who commit them (as well as the typical victims and typical scenes), are known ...”² Focussing upon the disposition of criminal cases by guilty plea in a metropolitan California community, Sudnow found that public defenders tended to rely upon their perception of the “normal” crime to facilitate the disposition of cases. Specific details regarding the offender and the offence were unnecessary; rather, an assumption about the typical crime and criminal prevailed. This practice is likely true for judges as well;³ when

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1. D. Sudnow, “Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office” (1965) 12 Social Probs. 255 at 259.
 2. *Ibid.* at 260.
 3. *Ibid.* at 255.

presented with an offender, judges presumably rely upon similar methods of classification and typification to efficiently (re)construct both the background of the offender and the nature of the offence. This concept of “normal crime” is linked to a broader labelling perspective, at the heart of which lies the proposition that official criminal labels cannot be taken at face value and that legal processing is neither automatic nor inevitable.⁴

This study focusses on sexual assault, and aims to unpack the label of the “typical rapist.” Using the concept of “normal crime,” we can see how judges use a descriptive category of the typical features of the rapist to simplify the processing of offenders through the criminal justice system. Of the varying features and characteristics of the “typical” rapist, the one of concern to this study is the belief that “rapists” suffer from a mental disorder.⁵ Early analyses suggested that rapists were mentally disordered, psychotic, or in some way abnormal; this view of the rapist has been called the “psychiatric model.”⁶ Criticizing this perspective, many feminist theorists claim that rapists are characterized in this manner to resist the implication that *all men*⁷ are capable of rape. They further argue that the perception of rapists as mentally disordered is simply a form of denial; it is a way to excuse the behaviour of men who rape women.⁸ It is thus a negation that rape is the product of a society which devalues women.⁹

Moreover, some authors assert that the ongoing judicial use of such concepts has serious implications for the legal processing of sexual offenders. They argue that this reliance on psychiatric considerations diverts the responsibility for the crime from the offender to the disorder, and consequently fails to address the true causes of sexual assault in our society. As Meg Ellis explains, “[a] ‘condition’ or ‘illness’ implies the offender was not acting

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4. G. LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault* (Belmont: Wadsworth, 1989) at 20 [hereinafter *Rape and Criminal Justice*].
 5. The typification of rapists as mentally disordered is not, however, the only such typification. This study found that judges attribute characteristics to different types of rapists. Offenders convicted of sexually assaulting a son or daughter, for instance, are assumed by some judges to have no prior record for sexual offences.
 6. See L. Clark & D. Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977); M. Torrey, “When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecution” (1991) 24 U.C. Davis L. Rev. 1013; D. Scully, *Understanding Sexual Violence* (London: Harper Collins Academic, 1991); J. Allison & L. Wrightsman, *Rape: The Misunderstood Crime* (Newbury Park, Ca: Sage, 1993).
 7. Since all offenders in this sample are male, sexual offenders are referred to as male throughout this paper.
 8. See Clark & Lewis, *supra* note 6 at 133–45; Allison & Wrightsman, *supra* note 6 at 22–27. See generally *Rape and Criminal Justice*, *supra* note 4.
 9. See generally C. A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989).

completely out of choice, that he is not completely to blame for his actions.”¹⁰ Evidence of this diversion of responsibility was found by Marni Allison who reported that judges use mental disorder and sexual deviancy as a way to minimize an offender’s culpability. She explains that:

[T]he reliance upon these factors as explanation fails to address sexual aggression as a social phenomenon. It implies that sexual violence is the product of sick/deviant “individuals” rather than the product of a society which treats women as second class citizens and which exploits, commodifies, and objectifies female (and child) sexuality.¹¹

Finally, judicial reliance upon psychiatric factors to typify the rapist may also be factually misleading. Check and Malamuth surveyed the psychiatric research, concluding that there are “very few differences between rapists and non-rapists which would justify any conclusion that rapists are grossly abnormal.”¹² In a study of convicted rapists and other felons, Diana Scully concluded that the “data do not support the widespread belief that most men rape because they are ‘sick,’ nor do they reveal that rapists, as a group, are more likely than other felons to be mentally ill.”¹³ Despite such conclusions, feminists posit that the belief of the “normal” rapist as mentally disordered may still be thriving in the courts.¹⁴

In Canada, judicial reliance on psychiatric factors has been endorsed by sentencing commissions. While not endorsing the belief that the typical sexual offender suffers from a mental disorder, Canadian sentencing commissions have legitimized reliance on mental disorder as a mitigating factor in sentencing.¹⁵

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10. M. Ellis, *An Analysis of B.C. Sexual Offence Sentences: M.E.T.R.A.C. Sentencing Study* (Toronto: Metro Toronto Action Committee on Public Violence Against Women and Children, 1989) [unpublished] at 19.
 11. M. D. Allison, “Judicious Judgements? Examining the Impact of Sexual Assault Legislation on Judicial Definitions of Sexual Violence” in L. Samuelson & B. Schissel, eds., *Criminal Justice: Sentencing Issues and Reform* (Toronto: Garamond, 1991) at 293.
 12. J. Check & N. Malamuth, “An Empirical Assessment of Some Feminist Hypotheses About Rape” (1985) 8 *Int’l J. W. Stud.* 414 at 415.
 13. Scully, *supra* note 6 at 76.
 14. See C. Toews, *Issues in Sexual Assault Sentencing in Nova Scotia* (Halifax: Nova Scotia Advisory Council on the Status of Women, 1991); Torrey, *supra* note 6; Ellis, *supra* note 10.
 15. Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach (Summary)* (Ottawa: Supply and Services Canada, 1987) at 28 [hereinafter *Sentencing Reform*]; Standing Committee on Justice and the Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections, *Taking Responsibility* (Ottawa: Supply and Services Canada, 1988) (Chair: David Daubney) at 67.

Present judicial practice appears to adopt this perspective. One study claims that “diminished responsibility” seems to act as a mitigating factor in the sentencing of sexual assault offenders;¹⁶ similarly, Ellis’ sentencing study classified mental health problems as a mitigating factor in actual sentencing practice in British Columbia.¹⁷

And yet, there is also some evidence that judicial reliance on mental disorder is endemic, suggesting that judges too often divert responsibility for sexual assault from the offender to a mental disorder. Meg Ellis, in a study of sentencing patterns in British Columbia, found that this notion of the rapist as “abnormal”¹⁸ forms part of judicial typifications of such offenders, noting a “widespread assumption that many, if not most, of those who commit sexual offenses are suffering from a mental condition, whether or not it is classified as ‘illness,’ while those who commit bank robberies are not.”¹⁹

Review of Literature: *The Effects of Psychiatric Considerations on Sentence*

Few studies have dealt with mitigating and aggravating factors in the sentencing of sexual assault offenders, and even fewer have dealt with the issue of psychiatric considerations in the sentencing process.

In 1991, a qualitative study was sponsored by the Nova Scotia Advisory Council on the Status of Women.²⁰ This study, covering the approximate period of 1988 to 1991, gathered evidence on the profiles of both victims and accused, with the aim of identifying factors which mitigated and aggravated sentences. To this end, this study accepted the statements made by judges rendering decisions at face value; no empirical attempt was made to assess the variables’ *actual* (quantitative) effects on sentence length. Using this methodology, the author found that judges are echoing the recommendations of Canadian sentencing commissions; the case law expresses that “diminished responsibility” functions as a mitigating factor in the sentencing of sexual assault offenders.²¹

16. Toews, *supra* note 14 at 31.

17. Ellis, *supra* note 10 at 5.

18. Similarly, Carol Bohmer found that “sex offenders are, more than any other class of offenders, considered abnormal and in need of medical treatment.” C. E. R. Bohmer, *Judicial Use of Psychiatric Reports in the Sentencing of Sex Offenders* (Ph.D. Dissertation, University of Pennsylvania, 1975) at 98.

19. Ellis, *supra* note 10 at 19.

20. Toews, *supra* note 14. Approximately 200 sexual assault cases were examined through data provided by the Halifax Police Department, the Department of the Attorney General, the *Nova Scotia Law News*, the *Nova Scotia Reports*, and newspaper coverage of sexual assaults in the province.

21. *Ibid.* at 31.

Another 1991 study was based on a content analysis of 109 Saskatchewan Court of Appeal sentencing cases.²² Focussing on judges' remarks at sentencing, the author found that judges tended to emphasize the offender's alcohol and drug abuse, and the accused's lack of control over his sexual drive, thus minimizing the offender's culpability.²³ However, the methodology employed did not allow for an assessment of the variables' actual impact on sentence.

Meg Ellis' sentencing study was based upon data from the British Columbia database of sentencing decisions, operated under the supervision of Dr. John Hogarth, which includes decisions from 1984 to 1986.²⁴ As noted above, Ellis claimed that there was a widespread assumption by the judges that sexual assault offenders were mentally ill.²⁵ Again, however, the actual impact of that factor on sentence length was not studied.

In contrast, Carol Bohmer examined the use of presentence reports in sentencing,²⁶ analysing data regarding all offenders convicted of a sex offence in Philadelphia between 1966 to 1970.²⁷ In addition, interviews were conducted with judges to ascertain their subjective assessments of "how and why they used psychiatric presentence reports in sentencing sex offenders."²⁸ Not specifically studying the effect of a psychiatric assessment on sentence length, Bohmer did find that "[j]udges were more likely to order reports in cases where the sentence they gave was more serious."²⁹ While Bohmer's methodology does not test the

22. Allison, *supra* note 11. The author focussed on nine themes: violence, coercion, physical impact of the offence on the victim, psychological impact of the offence on the victim, breach of trust, the significance of penetration, the accused's criminal history, the role of alcohol or drug abuse, and the accused's control over his sexual drive. In the present study, the categories of "control over sexual drive" and "alcohol or drug abuse" are understood as akin to mental disorder.

23. *Ibid.* at 287.

24. Ellis, *supra* note 10. Ellis analyzed a total of 107 cases and gathered information on the following variables: charge, plea, act, age of offender, offender's occupation, offender's background, prior offences, psychiatric treatment of offender prior to offence, psychiatric treatment of offender prior to sentencing, and judicial comments (which included the use of alcohol, circumstances which caused the offence, offender's demeanour following the offence, remorse, psychiatric treatment, and deterrence).

25. *Ibid.* at 19.

26. Bohmer, *supra* note 18 at 45.

27. Bohmer collected data from court records, psychiatric reports, police complaints, and police records. *Ibid.* at 50.

28. *Ibid.* at 45.

29. *Ibid.* at 103. This conclusion was based upon a correlation between the variables in question. This finding is complemented by a related conclusion that "[a]s the seriousness of the offence increased ... the proportion of reports increases," *ibid.* at 103. In contrast, other studies which have assessed judicial perceptions based upon presentence reports have shown that the *less* serious the offence, the *more* likely

direct effect of psychiatric considerations on sentence, this correlation points to the potential importance of psychiatric considerations in this context.

Finally, a study conducted by Anthony Walsh explores the direct effect of a psychiatric referral on the sentencing of sex offenders.³⁰ The data were based upon the files of sex offenders in a metropolitan Ohio county between 1978 and 1983. Out of a sample of 431 case files, 246 were referred for psychiatric evaluation; every one of these referred cases was then labelled with a psychiatric diagnosis.³¹ While originally labelled as “sex offenders,” those referred for evaluation (and subsequently diagnosed with a psychiatric label) were “twice labelled,” compounding the influence of the labelling process. Walsh determines that judges render “more punitive sentences to offenders so referred than to those not so referred,”³² and offers two explanations. First, the compounding of labels reinforces judges’ “negative image” of the sex offender; second, a psychiatric label informs the judge that the criminal behaviour may well be characteristic to the offender, and not an isolated act.³³ Thus, contrary to the findings of Ellis,³⁴ Toews³⁵ and Allison³⁶ who found psychiatric considerations to mitigate sentence length based upon qualitative assumptions, Walsh, using a quantitative methodology, found that psychiatric labelling aggravates sentence length.

Yet, Bohmer and Walsh must both undertake an extra step in order to determine the impact of psychiatric considerations on sentence; in other words, they must first determine the extent to which presentence reports influence judges in sentencing. Some studies have shown that the *recommendations* of such reports do not greatly influence the final sentence, and merely reinforce judges’ initial decisions regarding sentence.³⁷ In contrast, some data evidence

judges are to refer offenders to the diagnostic centre: A. Dershowitz, “The Role of Psychiatry in the Sentencing Process” (1978) 1 Int’l J. L. & Psy. 63 at 69, citing C. Smith, “Presentence Diagnostic Study in North Carolina” (1976) 8 North Carolina Central L. J. 17; “Comment ‘The Kansas Reception and Diagnostic Center’” (1971) 19 Kansas L. Rev. 821 [hereinafter *Comment*].

30. A. Walsh, “Twice Labelled: The Effect of Psychiatric Labeling on the Sentencing of Sex Offenders” (1990) 37 Social Probs. 375.

31. *Ibid.* at 378. Walsh lists the following psychiatric labels as examples: pedophile, poor psychosexual development, polymorphous perverse, sexual psychopath, inadequate personality, etc.

32. *Ibid.* at 386.

33. *Ibid.*

34. Ellis, *supra* note 10.

35. Toews, *supra* note 14.

36. Allison, *supra* note 11.

37. Bohmer, *supra* note 18 at 70. Walsh specifically finds that “psychiatric recommendations had no large independent effect on sentencing”: Walsh, *supra* note 30 at 384. Other studies have suspected this may be so. See Smith, *supra* note

that judges do rely on psychiatric recommendations;³⁸ similarly, studies have found a strong direct effect of probation officers' recommendations on judges' final dispositions,³⁹ and of psychiatrists' recommendations on probation officers.⁴⁰ Somewhat extricating himself from this quagmire, Walsh posits that judges may be influenced by the psychiatric labels of such reports, even if the sentencing recommendations tend not to have a significant effect on the final disposition.⁴¹ In conclusion, evidence that presentence reports have a *causal* impact on judicial decision-making, and do not simply serve to confirm judges' initial decisions, is equivocal. In a 1981 review, I. G. Campbell concluded that:

[T]he use of psychiatric pre-sentence reports is not numerically great, but that their influence appears to be quite significant, in so far [sic] as concurrence rates can signify this influence. Caution must be exercised, of course, in drawing a causal conclusion from observed concurrence, but whether pre-sentence reports are confirmatory or constructive, they do appear to be influential.⁴²

The present study, by examining judicial comments at sentencing, bypasses these difficulties, directly studying the effects of judicial beliefs on sentence length.

In sum, the evidence concerning judicial perceptions of the sex offender is unsatisfying. Qualitative studies claim a mitigating effect for psychiatric consideration, while the one quantitative study finds it to be aggravating. This divergence may be due to the differing methodologies. This contradiction will be explored in the present research as both quantitative and qualitative approaches are employed. The remainder of the studies reviewed simply investigate the influence of presentence reports on sentencing judges. In light of these shortcomings, I have based my analysis on specific judicial considerations of psychiatric factors in sentencing. By specifically focussing upon judicial attitudes and comments, a more coherent picture of judicial perceptions of

29 at 31 and *Comment, supra* note 29 at 841, as cited in Dershowitz, *supra* note 29 at 69.

38. See Dershowitz, *ibid.* at 68. Dershowitz explains that this may be due to a more significant discrepancy between the studies. As I have noted, one study has found that judges are more likely to order psychiatric reports for more serious offences, while other studies found the inverse. See *supra* note 29. For a thorough review, see I. G. Campbell, "The Influence of Psychiatric Pre-Sentence Reports" (1981) 4 *Int'l J. L. & Psy.* 89.
39. See J. Hagan, "The Social and Legal Construction of Criminal Justice: A Study of the Pre-Sentencing Process" (1975) 22 *Social Probs.* 620. See also Walsh, *supra* note 30 at 384.
40. See Walsh, *ibid.* at 382-84.
41. *Ibid.* at 384.
42. Campbell, *supra* note 38 at 105.

sexual assault offenders may be formed.⁴³ In the following section, the details of the data are discussed.

Data and Sampling

This study of sentencing decisions reviews the case law for a specified period of time, and codes these cases for the variables in question. The data collection was confined to the text of the sentencing trial or appeal alone. As a consequence, not all of the facts heard previously are included; only those facts which the judge, at sentencing, stated were relevant are analysed. Thus, even though not all the facts of the case may be cited, those that are discussed are presumably those which the judge considered to be of importance to the imposition of sentence.

The data were obtained from the *Canadian Sentencing Digest* which is a digest of judicial sentencing decisions.⁴⁴ The *Digest* reports precedents on quantum of sentence, and documents each case's docket number. The *Digest* includes 98% of cases reported for quantum of sentence, and a large number of unreported decisions. The reported cases which have been omitted from the *Digest* fall into two categories: those cases in which an acquittal was subsequently entered on appeal, and cases where the facts given are so inadequate, or details of the charge so vague, as to render inclusion useless or classification impossible.⁴⁵ When authority on an issue is sparse, the *Digest* includes a large number of unreported decisions, not published in hard-copy court reporters, including decisions which were given orally, jury trial decisions, and those cases which the editors of the court reporters chose not to include.⁴⁶ Finally, with the information provided in the *Digest*, the full text of the decision was retrieved.

Despite the fact that the *Digest* does include a number of unreported decisions, relying on such a collection presents some difficulties, as outlined in a Canadian Justice Department report:

43. This study examines the impact of judicial beliefs on sentence length. This methodology was informed by the work of John Hogarth in his landmark study: J. Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971). While not employing an identical methodology, I share the perspective that judges' ability to remain objective is influenced by their own attitudes and beliefs.

44. R. P. Nadin-Davis, ed., *Canadian Sentencing Digest* (Toronto: Carswell, 1982) [hereinafter *Digest*].

45. *Ibid.* at iii.

46. Research Section, Justice Canada, *A Review of the Sexual Assault Case Law 1985-1988, Sexual Assault Legislation in Canada: An Evaluation* (Report No.6) (Ottawa: Justice Canada, 1992).

There are serious limitations in drawing conclusions about the effects of the sexual assault legislation based on a survey of reported cases as this one. The sample of reported cases is not scientific. Not all cases are published; those that are have passed through an editorial filter and the reason why editors choose to publish certain cases are not known ... Finally, since most reported cases in the area of sexual assault deal with convictions, important information about acquittals is missing. For these reasons, a review of judicial decisions is from the outset, doomed to be somewhat incomplete.⁴⁷

Nevertheless, the same report stressed the usefulness of such a study. "However, together with the law itself, reported cases are the major source of insight into how judges have interpreted the new law and how lawyers can be expected to build their legal arguments."⁴⁸ Despite these shortcomings, and because no nationwide sentencing database exists,⁴⁹ the *Digest* offers the most accessible and comprehensive source of sentencing information.

In choosing a sample, the basic goal was to cover a recent year's worth of cases not marred by a change in legislation. On 15 August 1992, Bill C-49,⁵⁰ which amends certain provisions of the *Sexual Assault Law*, came into force. This bill was passed partly in response to the Supreme Court of Canada's decision to strike down s. 276 of the *Criminal Code*⁵¹ which imposed limitations on the questioning of a complainant's sexual history in a sexual assault trial.⁵² In essence, Bill C-49 was enacted to deal with controversial issues surrounding the law of sexual assault, specifically the issues of consent, breach of trust and the questioning of a complainant's sexual history.⁵³ While not dealing with sentencing directly, this bill introduced significant changes into sexual assault law which may possibly have impacted sentencing patterns. Consequently, the sample collected for this study includes all cases cited in the *Digest* between 15 August 1992 and 15 August 1993.

While a sexual assault offender may be charged with sexual assault with a weapon or sexual assault causing bodily harm (s. 272) or aggravated sexual

47. *Ibid.* at vii.

48. *Ibid.* at vii.

49. In November 1993, Statistics Canada released a report which is the result of a new sentencing database, named the "Adult Criminal Court Survey": Statistics Canada, *Sentencing in Adult Criminal Provincial Courts: A Study of Six Canadian Jurisdictions* by J. Turner (Ottawa: Canadian Centre for Justice Statistics, 1993). This is a computerized database initiated in 1991, which covers Prince Edward Island, Nova Scotia, Québec, Yukon, Ontario and Alberta.

50. *An Act to Amend the Criminal Code (Sexual Assault)*, 3d Sess., 34th Parl., 1992, proclaimed in force 15 August 1992 [hereinafter Bill C-49].

51. R.S.C. 1985, c. C-46, s. 276 [hereinafter *Criminal Code*].

52. *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

53. R. Cornaviera, "Reform of the Law Related to Sexual Assault" (1993) 2 Crown's Newsletter 1.

assault (s. 273), the vast majority of offenders (94%) are charged with sexual assault (s. 271).⁵⁴ Therefore, only sentences rendered for sexual assault (s. 271) were recorded. Furthermore, in some instances, an offender may have been charged with multiple offences. In these cases, the sentence for the sexual assault (s. 271) was isolated from the other sentences handed down. Thus, in some instances, an offender may have received an overall sentence of five years, while the isolated sentence specifically for the sexual assault was two years.

Moreover, only cases in which the charge was sexual assault, rape and/or indecent assault were included since the legislation surrounding sexual assault has undergone many changes over the years. "Sexual assault" was, prior to 1983, rape and/or indecent assault. Thus, for cases in which the offender was being charged with an offence that occurred prior to 1983, the crimes of rape and indecent assault were used. While there exist other sexual offences, such as incest and gross indecency, only the offences of sexual assault, rape and indecent assault were included in the analysis in order to provide for a clear and coherent discussion of the relevant issues.

Forty-five trial level and 57 appeal cases were collected, for a total of 102 cases. In some instances, a single case dealt with the sentencing of two separate offenders. In this situation, each sentence handed down for each offender was treated as a separate case. Furthermore, five cases from the sample were removed since the charge was either not sexual assault (s. 271) or the exact sentence for the sexual assault was not specified when there were multiple counts. The final sample yielded 97 cases of sexual assault, rape, or indecent assault for analysis.

Testing the Hypotheses

Independent and Dependent Variables

There are two major hypotheses that will be tested in this study. The first is whether judges perceive the "normal" sexual offender to suffer from a mental disorder, as posited by many feminist researchers. If such a categorization is found, I will examine whether judicial perceptions of the "normal" offender as mentally disordered diverts the responsibility for the crime from the offender to the illness. As discussed above, such a shift in responsibility would potentially act as a mitigating factor at sentencing. To test these hypotheses, information was collected on whether judges mentioned the presence or absence of mental

54. *Criminal Code*, *supra* note 51, ss. 271-273; Research Section, Department of Justice Canada, *Sentencing Patterns in Cases of Sexual Assault, Sexual Assault Legislation in Canada: An Evaluation* (Report No.3) by J. V. Roberts (Ottawa: Justice Canada, 1990) [hereinafter *Sentencing Patterns*].

disorder when speaking to sentence. This information was defined as judicial mention of mental disorders (*whether diagnosed by a psychiatrist or not*), drug and alcohol abuse, references to the offender being “sick,” and recommendations by the judge that the offender receive psychiatric counselling or therapy. This is an important point; since this study focusses on *judicial perceptions* of the offender, it does not differentiate cases in which a judge relied upon an expert’s psychiatric assessment and those in which the judge proffered his/her own “diagnosis.”⁵⁵

To maximize the number of cases, dummy variables were used.⁵⁶ The dummy variable “yes psychiatry” was coded 1 for those cases in which the judge specifically mentioned that mental disorder was a factor in the sentencing decision, and zero for all other cases. The dummy variable “no psychiatry” was coded 1 for cases when the judge articulated that mental disorder was specifically *not* a factor in the sentencing decision, and zero otherwise. In this sample, there were 27 cases (28%) in which a mental disorder was specified by judges; in 19 cases (19%) judges mentioned that psychiatric factors were specifically not a consideration in sentencing. A third dummy variable, “no mention,” was created for those cases in which no mention of mental disorder was made.

The sentencing process is, however, one which involves many factors and considerations. It is suggested that the variables of greatest importance to the sentencing of sex offenders are those that point to the severity of the act and the criminal history of the offender. Thus, the variables included in this analysis are evidence of the offender’s prior offences, the number of counts with which the offender was charged, judicial assessment of the force used by the offender, and the offender’s plea. The dependent variable is sentence length. *Table 1* presents a description of the variables used in this study.

It should be noted that the measure of force in this study is based upon those instances in which a judge mentioned force or violence being used in the sexual assault. The dummy variable “yes force” was coded 1 for instances when the judge specifically mentioned that the accused used force, coercion or threats to gain the complainant’s submission, and zero for all other cases. Furthermore, the dummy variable “no force” was assigned the value 1 when the judge articulated that threats, force, or coercion were *not* a factor in the case, and zero otherwise. As the coding relies upon judicial definitions of force, the variable encompasses either verbal, psychological or physical force. While a measure of judicial perceptions of force that is able to differentiate between physical and psychological harm would be ideal, basing the measure on judicial definitions

55. See also Walsh, *supra* note 30 at 38.

56. In each case, dummy variables were created for each category of the variable, including a dummy variable for the cases in which the judge made no mention of psychiatric factors.

precludes such a formulation. Overall, judges mentioned force in 48% of cases, and specified “no” force in 6% of cases.

Table 1
Variable and Descriptive Statistics

Variables	Values	Average	Std. Dev.
Number of Counts	None=0 2 through 4=1 5 and higher=2	.742	.721
No Force (Dummy)	No Force Noted=1	.062	.242
Yes Force (Dummy)	Force Noted=1	.474	.502
Guilty Plea (Dummy)	Guilty Plea=1	.454	.500
Not Guilty Plea (Dummy)	Not Guilty Plea=1	.227	.421
No Psychiatric Evidence Noted (Dummy)	No Psychiatric Evidence Noted=1	.196	.399
Psychiatric Evidence Noted (Dummy)	Psychiatric Evidence Noted=1	.278	.451
No Mention of Psychiatric Evidence (Dummy)	No Mention of Psychiatric Evidence=1	.527	.502
No Prior Offence (Dummy)	No Priors=1	.268	.445
Prior Offence (Dummy)	No Priors=1	.268	.445
Sentence Length ^a	Coded in Months (0=suspended sentence of absolute or conditional discharge)	36.130	32.170
N=97			
So that the regression equation would not be skewed, outliers were removed from the sample. This meant that two cases, in which indeterminate sentences were given, and which were coded as equivalent to life sentences (275 months), were removed from the analysis.			

Methods and Results

An ordinary least squares equation was used in order to assess the impact of the specified variables on sentence length. *Table 2* presents the data from this procedure. The strongest determinants of sentence length in this study are judicial perceptions of force ($b=13.806$, $p<0.05$, $\beta=0.218$) and the number of counts with which the offender was charged ($b=12.038$, $p<0.05$, $\beta=0.267$), both of which increase sentence length. Furthermore, the data show that if an offender pleads not guilty, this will increase his sentence ($b=18.773$, $p<0.05$, $\beta=0.255$). Judicial perceptions of offenders as mentally disordered did not have a significant effect on sentence length.⁵⁷ In sum, while the results of this equation do not support the hypothesis that perceptions of the offender as mentally disordered mitigate sentence length, the findings that perceptions of force, number of counts and a guilty plea do impact sentence length are in accord with prior research.⁵⁸

57. Please note that since this variable was coded into three dummy variables, one dummy was omitted from the equation. Thus, only the categories "yes psychiatry" and "no psychiatry" were included in the regression equation; the third category "no mention" was chosen as the reference group, and was excluded from the regression.

58. Research that has found priors to act as an aggravating factor includes: J. Dixon, "The Organizational Context of Criminal Sentencing" (1995) 100 *Am. J. Sociology* 1157; University of Manitoba Research Ltd., *Report on the Impact of the 1983 Sexual Assault Legislation in Winnipeg, Manitoba* (Ottawa: Justice Canada, 1988) [hereinafter *University of Manitoba*]; G. LaFree, "Variables Affecting Guilty Pleas and Convictions in Rape Cases: Toward a Social Theory of Rape Processing" (1980) 58 *Social Forces* 833 [hereinafter "Variables Affecting Guilty Pleas"]; *Rape and Criminal Justice*, *supra* note 4; J. R. Posynick & P. Benyk, *Sexual Assault and Sentencing: A Survey of Cases before the Courts of the Northwest Territories During the Period January 1, 1988 through December 31, 1989* (Yellowknife: Department of Justice, Northwest Territories & Arctic Public Legal Education and Information Society, 1991); Toews, *supra* note 14; Canadian Sentencing Commission, *An Empirical Study of the Use of Mitigating and Aggravating Factors in Sentence Appeals in Alberta and Quebec from 1980 to 1985* by S. H. Benzvy-Miller (Ottawa: Justice Canada, 1988); Ellis, *supra* note 10. A plea of guilty is found to be a mitigating factor by Dixon, *ibid.*, Posynick & Benyk, *ibid.*, and Benzvy-Miller, *ibid.* Evidence from police, prosecutorial and court studies have found force to be a good predictor of guilt. See B. F. Reskin & C. Visher, "The Impact of Evidence and Extralegal Factors in Jurors' Decisions" (1986) 20 *L. & Society Rev.* 423; S. Feldman-Summers & G. C. Palmer, "Rape as Viewed by Judges, Prosecutors and Police Officers" (1980) 7 *Crim. Justice & Behavior* 19. Others have found that force has no effect on convictions: G. LaFree, B. Reskin & C. Visher, "Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials" (1985) 32 *Social Probs.* 389; M. Baril, M. J. Bettez & L. Viau, *Les Agressions sexuelles avant et après la réforme de 1983: Une évaluation des*

Table 2
OLS Regression Model of the Effect of Variables on Sentence Length

Variables	b	S.E.	β
Number of Counts	12.038	4.876	.267*
No Force	-16.216	13.386	-.128
Yes Force	13.806	6.762	.218*
Plea (Not Guilty)	18.773	8.915	.255*
Plea (Guilty)	1.686	7.827	.027
No Psychiatric	-8.454	8.673	-.109
Yes Psychiatric	5.651	8.218	.079
No Priors	-3.819	8.003	-.055
Yes Priors	4.939	7.921	.074
Constant	15.449		
R ²	.228		

*p < .05 **p < .01

I further hypothesized that judicial perceptions of mental disorder will affect sentence length depending on whether the judge perceived force to have been used in the commission of the offence. While the offence of sexual assault is inherently a crime of violence that involves force,⁵⁹ this study focusses on

pratiques dans le district judiciaire de Montréal (Montréal: Université de Montréal, Centre International de Criminologie Comparée, Montréal, 1989); *University of Manitoba, ibid.*

59. In 1982, the law of rape and indecent assault was repealed and was replaced with a three-tiered system of sexual assault offences brought in under *An Act to Amend the Criminal Code in Relation to Sexual Offences and other Offences Against the Person*, S.C. 1980-81-82-83, c.125. These amendments also made an important change in the organization of the provisions; while the offences of rape and indecent assault were located in Part IV of the *Criminal Code*, "Sexual Offences, Public Morals and Disorderly Conduct," the offences of sexual assault were placed in Part VI: "Offences Against the Person and Reputation." This move reflected a response to pressure from women's groups to define sexual assault as an act of violence rather than as a purely sexual act. See generally, L. Snider, "Legal Reform and Social Control: The Dangers of Abolishing Rape" (1985) 13 *Int'l J. Sociology* L. 337; D. Stuart & R. Delisle, *Learning Canadian Criminal Law*, 3d ed. (Toronto: Carswell, 1990); J. V. Roberts & R. Mohr, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994).

judicial perceptions, and thus the definition of force is based on judicial mention of that factor. I anticipated that when a judge notes that the offender used force in the commission of the offence, perceptions that the offender also suffers from a mental disorder will increase sentence length. This hypothesis was confirmed, as can be seen by the interaction effect presented in *Table 3* ($b=31.102$, $p<0.05$, $\beta =.0375$). Judicial perceptions of offenders as mentally disordered have an interesting effect on sentence length; the data from this study show that when a judge perceives a sexual offender to be mentally disordered, and when a judge mentions that the offender used force in the commission of the offence, sentence lengths are longer. Perceptions of mental disorder, then, further contextualize the effect of force on sentence lengths.

Table 3
OLS Regression Model of the Effect of Variables on Sentence Length
with Interaction Terms

Variables	b	S.E.	β
Number of Counts	12.829	4.790	.285**
No Force	-13.269	13.183	-.104
Yes Force	6.536	7.463	.103
Plea (Not Guilty)	19.154	8.733	.260*
Plea (Guilty)	-.110	7.712	-.002
No Psychiatric	-8.389	8.493	-.108
Yes Psychiatric	-12.871	11.903	-.180
No Priors	-2.438	7.865	-.035
Yes Priors	5.089	7.757	.076
Force by Psychiatry	31.102	14.726	.375*
Constant	17.820		
R ²	.269		

* $p < .05$ ** $p < .01$

Discussion

As a consequence of the routine processing of sexual assault cases, judges gain knowledge of the typical manner in which these offences are committed. The judge “learns to speak knowledgeably of ...[rapists]...and to attribute to them personal biographies, modes of usual criminal activity, criminal histories,

psychological characteristics, and social background.”⁶⁰ One of the characteristics that has become associated with this view of the “normal,” or typical, rapist is the perception that he is likely psychotic or mentally disordered. In fact, there is evidence that, despite feminist critiques, this characterization of sexual offenders is still held by the judiciary.⁶¹ However, the data from this study question whether the characterization of the “normal” rapist encompasses an assumption of mental disorder; judges made such a classification in only 27 (28%) of the 97 cases. Consequently, we must reassess this feminist critique of the judiciary; it may be that judges have now rejected the highly criticized “psychiatric model.” In other words, this study does not support the hypothesis that the judiciary characterizes the “normal” sexual offender as suffering from a mental disorder.

Nonetheless, the data from this study place a new twist on this issue. While there was no direct effect of judicial perceptions of mental disorder on sentence length, sentences were aggravated by the interaction between judicial mentions of force and judicial perceptions of mental disorder. Force alone, however, does not exert a significant effect on sentence length. Rather, it seems that the unique combination of psychiatric considerations and perceptions of force leads judges to consider these offenders to be beyond the realm of the “normal” sexual offender. While this study shows that the “normal” sexual offender is not necessarily characterized as mentally disordered, those offenders who are so labelled and who are perceived to have used force in the commission of the offence receive harsher sentences.

This effect can be explained by labelling theory. In a similar study involving the effect of psychiatric labels on sentencing, Anthony Walsh found that judges “are consistently and powerfully influenced by these labels.”⁶² In the present study, it is the label of *dangerous sex offender* that leads to longer sentences; this sex offender uses force in the commission of the offence and is also considered to suffer from a mental disorder. Labelling theory would explain that this offender is twice labelled; the negative labels are even more stigmatizing, leading to longer sentences.⁶³ Once an offender is labelled as both “violent” and as “mentally disordered” his offence is no longer perceived as a “normal” crime, and he will receive a harsher penalty. In essence, what the data

60. Sudnow, *supra* note 1 at 259.

61. *Rape and Criminal Justice*, *supra* note 4; Ellis, *supra* note 10; Allison, *supra* note 11; Bohmer, *supra* note 18.

62. Walsh, *supra* note 30 at 386.

63. For an interesting discussion of the effects of labelling on psychiatric patients, see Walsh, *ibid.*; B. Link, “Understanding Labelling Effects in the Area of Mental Disorders: An Assessment of the Effects of Expectations of Rejection” (1987) 52 *Am. Sociological Rev.* 96; B. Link *et. al.*, “A Modified Labeling Theory Approach to Mental Disorders: An Empirical Assessment” (1989) 54 *Am. Sociological Rev.* 400.

show is that aggravating factors do not only work as additive effects; indeed, it is the multiplicative effects of violence and mental disorder that work to aggravate sentence lengths.

By punishing these offenders more severely than those they consider “normal,” judges may simply be acting in the shadow of established Canadian law. The *Criminal Code* contains provisions for offenders to be deemed “dangerous offenders.”⁶⁴ The dangerous offender provisions relate to those cases in which the prosecution may apply to have an as yet unsentenced offender declared a “dangerous offender,” after which the court may impose “a sentence of detention in a penitentiary for an indeterminate period.”⁶⁵

There are two types of offender for whom the Crown may seek to invoke the dangerous offender provisions: dangerous *violent* offenders and dangerous *sexual* offenders. In the case of dangerous *violent* offenders, the offender had to have been convicted of a serious personal injury offence, and he must “constitute a threat to the life, safety, physical or mental well-being of other persons.”⁶⁶ The second category, the “dangerous *sexual* offender,” will be deemed “dangerous” if he, by his conduct in any sexual matter involved in the offence for which he has been convicted, has shown “a failure to control his sexual impulses.”⁶⁷ In addition, the offender must have shown “a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses.”⁶⁸ The focus on this latter category is, therefore, on the sexual and psychological nature of the crime and criminal, while the former label emphasizes the violence of the offender and the consequent threat of danger he poses to the public.⁶⁹

64. *Criminal Code*, *supra* note 51, s. 753.

65. C. Ruby, *Sentencing*, 4th ed. (Toronto: Butterworths, 1994) at 118. If an indeterminate sentence is imposed, there is an automatic review by the National Parole Board after three years, and then every two years after that.

66. *Ibid.*

67. *Ibid.* at 119.

68. *Ibid.*

69. It is interesting to note that an as yet unproclaimed section (s. 672.65) of the *Criminal Code* allows for an application to be made, following a verdict of “not criminally responsible on account of mental disorder,” that an accused be found a “dangerous mentally disordered accused.” If such a finding is made, the court may increase the “cap” for the offence to a maximum of life. Yet, since this section is not in force, and since it deals with accused found not criminally responsible, this paper focusses instead on the influence of the dangerous offender provisions at s. 753. In the United States, certain states have specific legislation dealing with “sexual psychopaths.” These statutes have been described as defining sexual psychopaths as “repetitive, habitual, or compulsive” sex offenders “possessing a mental condition or defect which falls short of insanity. *Such persons are considered socially maladjusted or mentally disabled, but not legally insane or mentally ill so as to render them irresponsible for the criminal acts.*” See J. Bulkley,

The offenders in the present study may be best categorized by analogy to “dangerous sexual offenders.” In this study, the variable force could not be confined to physical force or violence alone, since the coding rested upon judicial definitions which are not limited to physical force. Thus, those cases in which force was combined with psychiatric considerations involved a range of scenarios, ranging from severe physical harm, to cases in which the harm was defined by psychological and emotional trauma.⁷⁰ Since the label “violent dangerous offender” is largely based on the physical violence committed by the offender, the label “dangerous sexual offender” is the more likely influence on judicial perceptions of the offenders in this sample.

The dangerous offender provisions offer a framework from within which judges can categorize offenders. As explained earlier, typifying offenders is a common practice among members of the criminal justice system.⁷¹ The offender who commits a sexual assault with the use of force, and who is deemed to suffer from mental disorder, is no longer the “normal” rapist; he is now likened to the “dangerous” offender, and, consequently, sentence lengths are longer. It must be noted that in the cases in this sample, the Crown has *not* made an application under the dangerous offender provisions; rather, the label of the “dangerous” offender is one which serves as an *inspiration* to the judiciary in categorizing those offenders who cannot be classified as “normal” sexual offenders. As noted earlier, the use of labels and the process of typification enables the judiciary to efficiently process offenders; offenders who do not conform to the label of the “normal” offender are consequently (re)categorized into the appropriate type, in this case, the “dangerous sexual offender.”

Qualitative Observations

This study also incorporates a qualitative element, which provides a richer understanding of judicial perspectives on sexual assault offenders, and contextualizes the interaction effect found in the data.

While the quantitative data show that judicial perceptions of mental disorder, when interacting with perceptions of force, aggravate sentence lengths, the qualitative observations tell a different story. In essence, some judges specifically assert that mental disorder is a mitigating factor, when, according to the data, perceptions of mental disorder, in conjunction with perceptions of

ed., *Child Sexual Abuse and the Law* (Washington, D.C.: American Bar Association, 1981) at 92, cited in N. J. Pallone, *Rehabilitating Criminal Sexual Psychopaths* (New Jersey: Transaction, 1990) at 2 [emphasis Pallone’s].

70. An appendix, available upon request from the author, summarizes cases which illustrate the range of comments made in those cases where the offenders were both considered to have used force and to have been mentally disordered.

71. See Sudnow, *supra* note 1; *Rape and Criminal Justice*, *supra* note 4.

force, truly acts as an aggravating factor. The following cases illustrate the invocation of mental disorder as a mitigating factor.⁷²

In *R. v. Cryderman*,⁷³ the offender was sentenced to ten years incarceration for sexually assaulting a mother and her daughter.⁷⁴ The act involved extreme violence and degradation: “[T]he accused terrorized, sexually assaulted and brutalized these women over a period of five-and-one-half hours. His actions were degrading, dehumanizing, and just plain dirty.”⁷⁵ With respect to psychiatric considerations, the Court stated that, “I regard his illness as a mitigating factor ... He is an ill man who needs continued treatment.”⁷⁶

In *R. v. F.G.B.*,⁷⁷ the accused was convicted of indecent assault and sexual assault, and was sentenced to 14 months incarceration. On appeal, the accused argued that he had been in therapy for several years, and that his emotional state was fragile; his psychiatrist submitted that “incarceration over an extended period of time could result in harm to the accused.”⁷⁸ Justice Helper, speaking for the Manitoba Court of Appeal, agreed and substituted the 14-month sentence with a prison term of nine months.⁷⁹

Finally, in *R. v. R.S.R.*,⁸⁰ the accused was appealing his sentence for the sexual assault of his wife. The Crown introduced a psychiatric report into evidence which stated that the accused was suffering from “a Bipolar Affective Disorder—Manic Type, with alcohol abuse.”⁸¹ The Crown and the defence agreed that this disorder should be taken into consideration as a mitigating factor; the judge agreed, taking the accused’s condition into account as the “primary mitigating factor.”⁸²

These, and similar cases in the sample, evidence that judges are at least paying lip-service to the recommendations of sentencing commissions, stating that mental disorder should mitigate sentence. In fact, however, such

72. While looking for examples in which the judge expressed that psychiatric factors aggravate sentence length, I was surprised that there were no cases in which the judge explicitly states this view. This supports the finding of dissonance between the judicial mention of psychiatry as mitigating, when, in cases involving judicial perceptions of force, it is truly aggravating sentences.

73. *R. v. Cryderman* (1992), 134 A.R. 141 (Q.B.) (*sub nom. R. v. J.L.C.* [hereinafter *Cryderman*]).

74. This case was then appealed by the defendant and the Crown. The Court did not grant leave to appeal to the Crown, and dismissed the appeal brought by the accused: *R. v. Cryderman* (1993), 135 A.R. 377 (C.A.).

75. *Cryderman*, *supra* note 73 at 143.

76. *Ibid.* at 145.

77. (1993), 83 Man. R. (2d) 312 (C.A.) [hereinafter *F.G.B.*].

78. *Ibid.* at 313.

79. The original three-year probation order was confirmed.

80. (1993), 118 N.S.R. (2d) 95 (S.C.A.D.) [hereinafter *R.S.R.*].

81. *Ibid.* at 97.

82. *Ibid.* at 98.

considerations (in combination with perceptions of force) are aggravating sentence length. This discord between quantitative and qualitative findings is not confined to this study. Carol Bohmer, who compared interviews with judges and data gathered from sentencing cases, commented that there is a "clear disparity among some of the judges between what they said they did in the interview and what the objective data indicated about their behavior."⁸³ What may account for this tension is that, while many factors enter into consideration at sentencing, trial courts may be trying to prevent successful appeals by "properly" taking mental disorder into account as a mitigating factor.

This evidence of dissonance between judicial statements and judicial actions raises important policy implications. What judges specifically state carries its own weight; the legal profession depends on case law to establish a range of appropriate sentences. Judges refer to case law in order to determine patterns in sentencing, while lawyers use case law to assist them in speaking to sentence. However, if judicial comments on the impact of mental illness are misleading, as this study suggests, inconsistency and confusion will result regarding the effect of aggravating and mitigating factors. Specifically, the case law may claim that psychiatric evidence is to be taken in mitigation of sentence, when, as we have seen, it may under certain circumstances aggravate sentence length.

One may question whether the practice of sentencing such offenders more harshly is desirable. Since much of the public's concern regarding sex offenders revolves around the issue of leniency in sentencing, one may posit that the findings of this study are actually reassuring.⁸⁴ However, it is unclear whether sentencing offenders, whom judges perceive as suffering from mental disorders, to longer periods of incarceration is appropriate. Walker, for example, finds disquieting the substantial numbers of the prison population who, according to the prison medical staff, should be in psychiatric hospitals.⁸⁵ Unfortunately, this hypothesis could not be tested in this study due to insufficient data on judicial penal philosophy.

83. Bohmer, *supra* note 18 at 94.

84. *Sentencing Patterns*, *supra* note 54 at 30.

85. N. Walker, *Sentencing: Theory, Law and Practice* (London: Butterworths, 1985). Furthermore, Hogarth posits that opinion on this matter is correlated with one's sentencing philosophy. He found that those magistrates who believed in the reformation of offenders were more likely to view the offender as mentally ill. Conversely, a belief in general deterrence, retribution, and incapacitation was negatively correlated with the proportion of offenders believed to be mentally ill. Hogarth states: "Magistrates appear to interpret selectively the causes of crime and the amount of pathology exhibited by offenders in ways which maximize concordance with their personal objectives in sentencing." See Hogarth, *supra* note 43 at 85.

In order to achieve greater consistency in sentencing offenders, the judiciary must have at its disposal all relevant sources of information, a proposal noted by Hogarth in 1971. Concentrating on the efficiency of having access to increased information, Hogarth noted that:

[P]roviding an information retrieval system ... appears to be a feasible ... [undertaking] ... which would probably reap immediate benefits in terms of effectiveness and efficiency, and in the long run it should prove to be more economical than the present time-consuming and highly inefficient way of obtaining information relevant to the sentencing task.⁸⁶

Furthermore, a report of the Canadian Sentencing Commission indicated that 41% of surveyed judges believed that they would definitely find it helpful in sentencing to have better information about current sentencing practices and 38% agreed that it would probably be helpful to have such information.⁸⁷ Similarly, 39% of judges responded that a computer system providing basic sentencing information (provided by judges) about individual cases would be very helpful, and 31% agreed that this would be somewhat helpful. Given the great disparity in sentencing patterns across Canada, better sources of information are not only desirable, but may promote consistency in judicial decisions. As stated by the 1987 Canadian Sentencing Commission, there are “[o]ver 1,000 judges, with varying sentencing philosophies, regularly imposing sentences in criminal matters across the country with few opportunities for communication among them.”⁸⁸

The data from this study have offered a new insight into the sentencing of sex offenders. The findings indicate that when force is believed to have been used in the commission of the offence, judicial perceptions of mental disorder will aggravate sentence length. The concept of “normal” crime, in conjunction with labelling theory, offers a useful perspective in understanding this interaction effect.

Conclusion

This study has explored the definition of the “normal” sexual offender with a specific focus on the issue of judicial perceptions of mental disorder. One of the major findings was that the “normal” offender is not necessarily considered to be mentally disordered; this is in contrast to much feminist research which suggests that sexual offenders are assumed to suffer from a mental disorder because

86. Hogarth, *ibid.* at 392.

87. Research Reports of the Canadian Sentencing Commission, *Views of Sentencing: A Survey of Judges in Canada* by J. P. Brodeur *et al.* (Ottawa: Justice Canada, 1988).

88. *Sentencing Reform*, *supra* note 15 at 71.

“separating “rapists” from “normal” people allows us to continue living in what we believe to be a secure environment.”⁸⁹ More specifically, the data show that the effects of judicial perceptions of mental disorder are mediated by judicial perceptions of force, leading to an increase in sentence length; offenders who are perceived to use force and who are perceived to suffer from mental disorder are treated more severely. It is posited that this interaction effect can be explained by labelling theory, as this specific group of offenders may be categorized as “dangerous sexual offenders.” In sum, while this study set out to test the hypothesis that sexual offenders are labelled as suffering from a mental disorder and that this label would have a mitigating effect on sentence, the data show that these offenders are not typically characterized as mentally disordered, and that, in fact, perceptions of mental disorder act as an aggravating factor when perceptions of force are also present.

Finally, a discord between the qualitative and quantitative findings emerged, with the qualitative data suggesting that judges say they use mental disorder as a mitigating factor and the quantitative findings indicating an aggravating effect of perceptions of mental disorder when judicial perceptions of force are also present. It is suggested that this disjuncture between the qualitative and quantitative findings indicates that judges, among others, need better access to information on current sentencing practices, so that they can attain a higher level of consistency and reliability in sentencing.

89. Allison & Wrightsman, *supra* note 6 at 22.