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Sentencing Sexual Assault:
A Study of Mitigation and Aggravation

Ronit Dinovitzer
Department of Sociology
McGill University
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Abstract

In an effort to establish a clearer understanding of the sentencing of sexual assault offenders, this study analyzes data generated from a content analysis of sexual assault cases, using feminist theory as a backdrop for the analysis. The sample consists of ninety-seven sexual assault cases from across Canada for the period of August 15, 1992 through August 15, 1993. Using a statistical analysis, the data were analyzed for evidence of whether certain factors aggravated or mitigated sentence length. The findings indicate that factors not affecting sentence length include breach of trust, sex of the judge, sex of the complainant, plea and show of remorse. Factors that work to mitigate sentence length include the youth or old age of an offender. Finally, variables that, when present, aggravate an offender's sentence length are prior offences, force, sexual intercourse and psychiatric considerations. These findings indicate that while there has been some response to feminist concerns regarding criminal justice processing of sexual assault, some of the myths that have been traditionally associated with its victims and offenders are still influencing the judiciary.

Résumé

Ce mémoire vise le crime d'agression sexuelle ainsi que les peines judiciaires qu'un accusé pourrait se voir imposé. Cette étude considère des données recueillies d'une analyse d'instances d'agression sexuelle. L'échantillon comprend quatre-vingt-dix-sept cas d'agression sexuelle au Canada, entre le 15 août 1992 et le 15 août 1993. Les donnés ont été examinées dans le but d'évaluer les critères qui pourraient influencer la sentence imposée. Les résultats indiquent que des critères tels que l'abus de confiance criminel, le sexe du juge, le sexe de la plaignante, le plaidoyer, et la démonstration de remords par l'inculpé n'affectent pas la durée de la sentence imposée. Parmi les critères qui réduisent la durée de la sentence est l'age de l'inculpé. Par contre, des condamnations antérieures, la violence, la pénétration vaginale et des considérations psychiatriques prolongent la sentence. Ces résultats indiquent que même si certaines inquiétudes de la recherche féministe sont maintenant pris en considération dans le milieu judiciaire, des mythes traditionnels concernant l'agression sexuelle sont toujours évidents.

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Chapter One

Introduction and Overview

Introduction

> The ultimate victim degradation I witnessed in court was not at the hands of either the defence or the prosecuting lawyer using informal techniques, but at the hands of the judge using the formal powers allotted to him, powers geared to maintaining dominant definitions of reality, powers to which the victim is as vulnerable as anyone else (McBarnet:1983,302).

The issue under consideration is judicial attitudes in sexual assault cases. The point of interest is to investigate the factors relevant to the decision of judges in the sentencing of a convicted sexual assault offender. This will allow one to assess whether judges are biased, whether the "myths" of women still resound in our modern-day courtrooms, and whether, as a result, justice is truly being served. In fact, a recent report on Gender Equality in the Canadian Justice System ascertains that there have been some widely publicized comments by judges which are reflective of gender-biased myths and stereotypes (*Gender Equality* 1992a,1992b,1992c). If these myths prove to be widespread, the implications are very serious for sexual assault sentencing patterns. As Patricia Marshall, former Executive Director of the Metro Action Committee on Public Violence Against Women and Children (METRAC), explains, sentencing research necessarily deals with only the "sure" cases; those that have remained throughout the filtering process of the Criminal Justice System. Thus, if judges are handing down sentences which are tainted by gender-biased, racist and classist myths and stereotypes, the supposed objectivity of judicial decisions must also be questioned. Patricia Marshall concludes her own research with the comment that, "judges' understanding of the experience of sexual assault, as evidenced by their comments

to sentencing, only infrequently coincides with the reality reported by sexual assault survivors" (Marshall:1988,216).

Marshall has measured judicial understanding of sexual assault against a benchmark of the experience of the sexual assault survivor. Judges, however, do not use a uniform benchmark from which to form their judgements. Consequently, as the findings from this study will indicate, judicial understanding of the crime remains complex, and, at times, contradictory. There are many questions and debates surrounding the basic issue of which factors are and should be considered in the sentencing of sexual assault offenders. As will be evidenced by this research, there is much tension between feminist authors and even the judiciary itself concerning this matter. Furthermore, the debate also extends to the interpretation of key issues surrounding sexual assault, such as the definitions of violence, harm and breach of trust.

While much research has been conducted on convictions/nonconvictions, this study will focus upon sentencing. As mentioned earlier, sentencing data necessarily deal with those cases which have survived the filtering process of the criminal justice system. Consequently, if bias is evident at the sentencing stage, it provides a basis for further study of the attitudes of judges during the trial process. Christine Boyle explains that, "after the exercise of police and prosecutorial discretion, sentencing decisions will reveal the most about the reality of the law on sexual assault" (Boyle:1984,171). Thus, this study will discuss the influence of various factors on the sentencing of sexual assault offenders. This data will allow for the assessment of key issues surrounding sexual assault sentencing, such as the impact of demographic factors (for example, the age and sex of complainant and offender) as well as matters including the role played by an offender's prior record or the relationship between the offender and the complainant. In sum, this study will be an exploration of the various factors used by the judiciary in the mitigation and aggravation of sexual assault sentencing.

General Overview

Over the years, there has been a transformation of the definition of sexual assault. Prior to 1983, a man could rape his wife without legal sanction, and women had to go to great lengths to legally prove that they were legitimate victims of sexual violence. Despite both legal and ideological changes, there are many issues that remain unresolved. Feminists have been trying to bring about reforms both with respect to the legislation and to the views of the members of the criminal justice system. While there is evidence that some progress has been made, both the literature and the findings from this study indicate that there remains inconsistent treatment and perspectives on sexual assault (Mohr:1994,159).

One of the motivations of this study was to determine whether factors such as women's moral character are still affecting judges. Much of the feminist literature on the topic of sexual assault has dealt with the issue of female victims of sexual assault being victimized a second time by the criminal justice system (Clark and Lewis 1977; Boyle 1984; Brown 1991). These theorists explain that members of the criminal justice system hold biased attitudes which foster certain myths of rape. One of the manifestations of these biases is the belief that in order for a sexual assault complainant to be regarded a legitimate victim, she must be morally chaste (c.f. Clark and Lewis 1977). Thus, this study sought to investigate whether judges were characterizing the complainant as not being a legitimate victim, and seeking to blame the complainant for the crime.

After reading close to one hundred cases, however, it was found that there was very little mention or reference to the complainant at all in the sentencing of sexual assault offenders. This outcome was not confined to this study alone; other authors report similar findings. For example, Ellis explained that, "[g]enerally, judges made few comments on the behaviour or actions of the victims" (Ellis:1988). The lack of discussion concerning the character of complainant may stem from the fact that this

sample was based upon sentencing decisions. At sentencing, the guilt of the offender is no longer an issue (Ellis:1989,9). Thus, while at trial the defence attorneys may want to question the credibility of the complainant in order to absolve the accused of his guilt, there is no need to attack her character at a sentencing trial.

An additional reason as to why, in this study, there was little mention of the complainant's character and role in the sexual assault may stem from the demographics of the sample; approximately 67% of all complainants in this sample were children. Due to this large percentage of child complainants, issues such as the character and the morality of the victim are no longer relevant. Instead, when dealing with children, issues of breach of trust and familial relationships become the focus.

Furthermore, reference to the complainant was also absent from discussions concerning the severity of the sexual assault. While there was, at times, discussion concerning the injury or harm suffered by the complainant, the bulk of the decisions centred on the character of the accused and legal precedents concerning sexual assault sentences. In the study conducted by Renate Mohr, it was also found that the injury or harm sustained by the complainant was not discussed. The author reports that while harm to the victim is integral to sentencing in cases of assault or robbery, "[s]exual assault is an exception. In well over one-half of the entire sample of appeal court judgements, aside from a brief description of the facts of the offence, no mention was made of harm to the victim" (Mohr:1994,171). As will be discussed in later chapters, this lack of discussion concerning harm to the complainant may be illustrative of inconsistent judicial treatment of the concepts of harm and violence.

Despite the large percentage of child complainants in this sample, feminist concerns regarding the understanding of the concept of violence and harm are still applicable. And thus, an absence of discussion concerning the harm and injury suffered by either child or adult victims of sexual assault raises concern. Together with the changing legal definition of sexual assault has come a growing understanding of the multifaceted nature

of the injuries sustained by both adult and child sexual assault victims. Feminists have argued for a broad definition of violence, one which includes emotional, verbal, psychological as well as physical injury. This definition, they argue, should include the concepts of submission and breach of trust. However, the debate continues as to whether violence should be confined to the notion of physical injury or whether it should encompass a wider range of harms. In this study, in addition to a theoretical exploration of the meaning given by the judicial to the notion of harm, the impact of this variable on sentence length will also be examined in order to assess whether judges are using the notion of violence as an aggravating factor in sentencing. As shall be explained, the data from this study show that there is an inconsistency within the judiciary concerning the scope of its interpretation of the concepts of violence, injury and harm.

In addition to discussing the debate surrounding the concept of violence and harm, this study will raise other issues which have been integral to both a legal and social understanding of sexual assault. One of the issues involves the concept of breach of trust. This discussion will deal with the definition of a trust relationship and whether or not the judiciary recognizes breach of trust as an aggravating factor in sentencing. Another issue which is integral to sexual assault is the concept of the mentally ill offender. Here, the discussion centres on the impact of mental illness on sentence length, in addition to a theoretical discussion of the concept. Furthermore, the issue will be raised as to whether mental illness is being used to excuse an offender from the responsibility for his crime. Some feminists claim that the judiciary invokes mental illness on the part of the offender in order to excuse him. This, they claim, stems from the belief that "normal" men do not rape women and children. However, in light of the findings from this study, this feminist assertion will be questioned.
While there are many issues that will be discussed, there seems to be a similar pattern occurring throughout. No matter what the issue may be, we will see a debate, uncertainty and divisions. Whether it is a discussion of violence or psychiatry, there will be no one definition that is agreed upon and, as of yet, no middle ground. Most

importantly, the findings will reveal a judiciary that is not providing consistent decisions on these issues. Similar divisions and inconsistencies were discovered by Renate Mohr, who concluded that:

> ...no law reform effort will ever achieve anything of any importance as long as there is so little shared understanding of the offence, of its impact, of the purpose of sentencing, and of the role of the law in the achieving the ultimate goal of a society without sexual assault. We can no longer afford to assume that even this ultimate goal is shared (Mohr:1994,159).

Furthermore, the statistical data from this study will also indicate there may be a distinction between the qualitative assumptions regarding judicial practices and the actual effects of certain factors on sentence length. This may indicate an inconsistent pattern between what judges say, and what they actually do. Unfortunately, until a clear and consistent response from the judiciary is presented on these matters, victims of sexual violence will be losing out to the process.

Before discussing the specific findings of this study, a review of the relevant literature will be presented. This review will canvass the major issues studied with respect to the sentencing of sexual assault offenders. The information gleaned from these studies has served to provide a basis for the factors analysed in this present study.

Review of Literature

A review of the literature has revealed ten Canadian studies explicitly concerned with sentencing and judicial attitudes in sexual assault cases. Of these ten studies, unfortunately only one analyses the direct effect of variables on sentence length (Manitoba 1988b). The remainder of the literature discusses the variables in an anecdotal manner, in which the effect of a variable is discussed by reviewing cases in which it appeared. In fact, as we will see, the effect of the variable is not demonstrated in much of the literature. However, some of the studies offer the frequency with which

each variable appeared, and, together with an interpretation of the context in which it was mentioned, conclude whether it was mitigating or aggravating. There are also many non Canadian studies dealing with sentencing practices and, more generally, judicial, juror and mock-juror attitudes towards convictions. These non Canadian studies will not, however, be discussed in this review. They will be discussed in the following chapters, where relevant, and will be presented in comparison to the data generated from this study.

A Canadian study was conducted by Patricia Marshall using the Metro Action Committee on Public Violence Against Women and Children (METRAC) sentencing database (Marshall 1988). Marshall discusses examples of judges' comments in the conviction and sentencing of sexual assault cases, with a focus on those cases in which the author felt that the judge's comments exemplified a lack of comprehension of the victim's experience. This study does not, however, report any information about its methodology (eg. the number of cases surveyed, or the years involved)[1] and employs an anecdotal approach. Some of the major variables that Marshall discusses with respect to judicial understanding of sexual assault are violence, injury, character of the offender and of the victim (employment status position in the community), evidence that the offender was under duress, absence of previous convictions and evidence of provocation by the victim. Marshall maintains that judges displayed a "seemingly high tolerance for violence in sexual assault" (220), and that sentencing "can often rest on a paradigm of what a "real" rape is" (221).

More recently, Marshall and Symons (1992) published a study on breach of trust in sexual assault. This research draws on METRAC's newly computerized sentencing database of over 550 sentencing decisions with the aim of uncovering the judicial use of the concept of breach of trust. The authors found that the percentage of cases in which

[1]However, the author does provide a table of 38 cases, which contains the case name, sentence, facts and a quote of the judge's comments.

they deemed a breach of trust relationship to exist has increased over the years, reaching a high of 57 percent in 1989. Furthermore, the proportion of cases in which breach of trust was not recognized by judges has remained consistently at about 42 to 44 percent (Marshall and Symons:1992,4). The authors also found that judges failed to mention breach of trust in numerous cases where METRAC found a relationship of trust and that judicial definitions of the concept were inconsistent (1992,11). As with many of the studies that were reviewed, however, the data is presented in an anecdotal fashion. Marshall and Symons were therefore not able to discuss the impact of the recognition or lack of recognition of breach of trust on sentence length.

Another Canadian study conducted on the topic of sentencing sexual assault cases was authored by Marni Allison (1991). In this study, the author evaluated the impact of the 1983 rape law reform by performing a content analysis of 109 "remarks at sentencing". Specifically, all cases of sexual offences in the province of Saskatchewan which were ppealed to the Saskatchewan Court of Appeal from 1975-1988 were analyzed for the presence or absence of reference to each of 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 (Allison:1991,285).

The author's findings include the identification of three trends: 1) judges tend to minimize the seriousness of the offences; 2) the offender's culpability is minimized; and 3) judges continue to focus on the "sexual" element of the offence rather than the violent and coercive element (Allison:1991,287). As with the above studies, Allison conducted a content analysis which did not include an investigation of the impact of any of these nine themes on the length of sentence handed down.

Teressa Nahanee studied all sentencing decisions reported for the period between 1984 and 1989 which involved Inuit people, as accused or as complainants (Nahanee 1994)[2]. She specifically searched for use of what she terms the 'cultural defence', which is when the judiciary has "suggested sexual exploitation of young females is an Inuit cultural practice and, therefore, acceptable" (Nahanee:1994,196). Nahanee adopted a more qualitative approach by bringing up specific cases depending upon the issue under discussion. Without testing for effect on sentence length, Nahanee's main conclusions were that judges are using the "cultural defence" as a mitigating factor in sentencing, and that, overall, sentences for the sexual assault of Inuit people are too lenient. This conclusion of a factor working in mitigation of sentence, must then be taken in the context of a qualitative impression, rather than as a statistical finding.

Renate Mohr gathered data on 196 cases from Canadian Courts of Appeal that were reported between 1983 and 1991 (Mohr 1994). Her aim was to uncover the impact of the 1983 legislative reform of the sexual assault laws. She collected data on a number of variables, which included plea, Crown/Defence initiated appeal, principles of sentencing, complainant/accused relationship, relationship of trust, harm to the victim and relevance of the victim's conduct. The analysis of these included both an in-depth theoretical discussion in addition to information on the frequency or impact of the variable in question. Consistent with the data used for this study, Mohr found that a majority of cases (53%) in her sample dealt with adult defendants and child victims. Among Mohr's findings was the fact that a relationship of trust almost always led to incarceration; however, as reported by Marshall and Symons (1992), in fewer than half of these cases was the specific factor breach of trust articulated by the court (Mohr:1994,177). Furthermore, she found that while a "stranger rape" was rarely named as an aggravating factor, the sentences in these cases were more severe (Mohr:1994,181)[3]. This finding of sentence lengths seeming longer although the factor

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[2]The number of cases in the sample was not reported.

[3]Although Mohr did not test for the effect of the variable on sentence length, she is reporting that those cases of "stranger rape" had longer sentences than other cases (Mohr:1994,181).

was not always specified as aggravating demonstrates that studies must assess the direct impact of variables on sentence length. By relying on anecdotal evidence, then, the true picture of which factors are aggravating and mitigating may be distorted.

While the above studies rely largely on qualitative/anecdotal methodology, the following reports adopt a slightly more quantitative approach. The only study that actually looks at the impact on sentence length is the study conducted by the University of Manitoba (1988b), noted earlier. The remaining studies assessed simply the frequency with which each factor was mentioned, and did not attempt to study the impact of the factors on sentence length.

The University of Manitoba study (Manitoba 1988b) was part of a larger Department of Justice endeavour, evaluating varying aspects of the 1983 Sexual Assault legislative reforms. The research was conducted by University of Manitoba Research Ltd. in Winnipeg, Manitoba from January 1987 to February 1988. This project was an inquiry into all aspects of the sexual assault legislation, and included data gathering from police files, sexual assault centre files, court monitoring, and interviews with judges, lawyers, police, prosecutors, workers from the sexual assault crisis centres and victims. In order to assess the impact of the 1983 Sexual Assault reform, researchers also compared police files from 1981-2 to files from 1984-5. While this document is one of six separate studies conducted in different regions for the Department of Justice[4], it is the only one which specifically discusses the factors affecting charging patterns, sentencing and convictions. This study considers

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[3]Although Mohr did not test for the effect of the variable on sentence length, she is reporting that those cases of "stranger rape" had longer sentences than other cases (Mohr:1994,181).

[4]The other studies are: Ekos Research Associated Inc., *Report on the Treatment of Sexual Assault Cases in Vancouver*, Department of Justice Canada, Ottawa: September, 1988a.; Ekos Research Associates Inc., *Report on the Impact of the 1983 Sexual Assault Legislation in Hamilton-Wentworth*, Department of Justice Canada, Ottawa: July, 1988b.; J. and J. Research Associates Ltd., *An Evaluation of the Sexual Assault Provisions of Bill C-127, Fredericton and St. John, New Brunswick*, Department of Justice Canada, Ottawa: November, 1988.; University of Manitoba Research Ltd., *Report on the Impact of the 1983 Sexual Assault Legislation in Lethbridge, Alberta*, Department of

factors affecting charging patterns, sentencing and convictions. This study considers the specific effect of variables such as prior offence, injury to the victim and use of a weapon in order to measure their effects on the length of sentence handed down. The specific findings of this study are discussed in Chapter 3 as they will be presented in comparison to the findings from this present study.

Another study which analyses the sentencing process in cases of sexual assault was sponsored by the Nova Scotia Advisory Council on the Status of Women (Toews 1991). 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. This study, covering the period of approximately 1988 to 1991, gathered evidence on the profiles of both the victims and accused, with the aim of discovering information on the factors which mitigated and aggravated sentences. For the purposes of her study, Toews defined aggravating and mitigating based upon judicial accounts, rather than by the variable's effect on sentence length. Thus, the author's findings are based upon assumptions and interpretations of the judges' statements that certain factors were aggravating or mitigating. This methodology led to the assertion that mitigating factors included the offender's age (either youthful or aged), lack of a criminal record and the perception of the offender as ill. Aggravating factors included young victims, a relationship of trust, and stranger-rape (Toews:1991,52). The impact of these factors on sentence length will be tested in the present study.

Sentencing issues in sexual assault cases were the focus of a study conducted in the Northwest Territories which considered cases that were before the courts during the

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Justice Canada, Ottawa: August, 1988a.; University of Manitoba Research Ltd., *Report on the Impact of the 1983 Sexual Assault Legislation in Winnipeg, Manitoba*, Department of Justice Canada, Ottawa: September, 1988b.; CS/RESORS Consulting Ltd., *The Impact of the Legislative Change on Survivors of Sexual Assault: A Survey of Front Line Agencies*, Department of Justice Canada, Ottawa: November, 1988.

period of January 1, 1988 and December 31, 1989 (Posynick and Benyk 1991). The authors of this study surveyed approximately 261 cases, and provide a wide array of statistics on sexual assault cases, ranging from offender/victim characteristics to the number of mitigating and aggravating factors used in each case. Similar to some of Toews' (1991) findings, these authors claim that typical mitigating factors included characteristics of the offender such as age, employment, education. Other mitigating factors included: guilty plea, remorse, disclosure, spontaneous act, first offence, and offender's use of alcohol (Posynick and Benyk:1991,5-6). Those considered to be typical aggravating factors included: premeditation, violence, degrading or dehumanizing behaviour, vulnerability of the complainant (young age, handicapped or incapacitated), breach of trust and effect on complainant (injury, lasting trauma) (Posynick and Benyk:1991,6). Unfortunately, the authors do not discuss the effect of these factors on sentencing length; instead, they state the frequency with which each variable appeared.

Shereen Benzvy-Miller authored a study on sentencing for the Canadian Sentencing Commission (CSC) as part of the CSC's effort to evaluate sentencing in Canada (Benzvy-Miller, 1988). This study examines case law from the Courts of Appeal of Alberta and Québec for the years between 1980 and 1985 and examines four offence categories: sex offences, violent crimes, drug-related offences and offences related to stealing or destruction of property. The author set out to quantify the frequency of appearance of a number of factors she said were spoken of in terms of aggravating and mitigating in order to determine "whether any inappropriate factors influence the court" (Benzvy-Miller:1988,1). A total of 36 factors were included in the study and, consistent with both the findings of Toews (1991) and Posynick and Benyk (1991), some of the most frequent included age of offender, seriousness of offence, criminal record and guilty plea. The author also included a section dedicated to sexual offences in which she explains that a plea of guilty is the mitigating factor most often mentioned in both Alberta and Québec. She also notes that in Québec, plea of guilty, no record, age and no violence are mentioned more often than in Alberta, while in Alberta, family background, rehabilitation of the offender, good record of employment and involvement

of drugs or alcohol are found to mitigate more often than in Quebec (Benzvy-Miller:1988,14). The limitation of this study is that while the author presents a list of mitigating and aggravating factors, her results are based on the frequency with which each factor was mentioned rather than an analysis of the impact of the factor on sentence length.

Another study on sentencing patterns in cases of sexual assault was conducted by Megan Ellis (Ellis 1989). She gathered her data from the British Columbia database of sentencing decisions which operates under the supervision of Dr. John Hogarth and which includes decisions for the period 1984 to 1986. The author analyzed a total of 107 cases and gathered information on the following background and mitigating and aggravating variables: charge, plea, act, age of offender, offender's occupation, offender's background, prior, psychiatric treatment of offender prior to offence, psychiatric treatment of offender prior to sentencing, judicial comments (which included the use of alcohol, circumstances which caused the offence, offender's demeanour following the offence, remorse, psychiatric treatment, and deterrence) (Ellis:1989,5). The author offered a brief analysis of each variable and discussed those cases in which the variable was present, without, however, discussing the impact on sentence length. For example, Ellis notes that a prior record seems to act as an aggravating factor, while as Posynick and Benyk (1991) found, remorse and a plea of guilty seem to be used as mitigating factors.

In addition, the Canadian Department of Justice, as part of its evaluative research on Sexual Assault legislation, commissioned a study on the sentencing patterns of sexual assault, yet it does not deal with judicial attitudes (Roberts 1990a). This study relies upon several different databases, and offers a thorough discussion of the issues in question. This report addresses three principal questions: what kind of sentences are imposed, how do these sentences compare with dispositions of other crimes of violence, and how much sentencing variation exists in Canada for sexual assault offences. No

findings could not be compared with the ones from the present study.

Furthermore, the Canadian Department of Justice commissioned a study in its efforts to assess the impacts of Bill C-15[5] (*An Act to Amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985, c.19 (3rd Supp.) [hereinafter Bill C-15] (Hornick and *Bolitho 1992). This research was conducted in several sites (Calgary, Edmonton and* three rural Alberta locations) and involved, among many data collection strategies, an assessment of the dispositions in child sexual assault cases. The authors do not attempt to measure the variables which may have influenced the sentence; instead they present the rates of incarceration and the length of incarceration (Hornick and Bolitho:1992,81). This data will be presented in Chapter 2 in the general discussion of sexual assault in Canada.

The remainder of literature on the topic of judicial attitudes toward sexual assault does not focus upon sentencing. For example, as part of the aforementioned Justice Department series, two studies were conducted, one of which analyzed the case law of 1983-1985 (Ruesbaat 1985), the other surveyed the case law of 1985-1988 (Research Section 1992). While these studies employ a rigorous methodology, they focus upon the purely legal factors and legal precedents in sexual assault decisions. And, while a legal examination does indicate whether change is occurring within the judiciary with respect to legal reforms, the method is limited in terms of a sociological analysis.

A Canadian study authored by Margo Nightingale deals with judicial attitudes but does not touch upon issues of sentencing. Nightingale reviews 69 sexual assault cases (no years given) which deal with Native offenders and/or victims (Nightingale 1991). The author's objective is to uncover judicial bias through an examination of judicial comments when rendering verdicts. The factors she discusses are intoxication, injury (what is considered serious by the judge, physical vs. psychological), sex-role bias and

[5]This Bill implemented changes to the laws concerning the sexual abuse of children.

(what is considered serious by the judge, physical vs. psychological), sex-role bias and class. The author found that judges will often blame alcohol as the "root cause" of the offence and that judges ofter fail to "recognize any injury or harm, or will minimize that harm which cannot be avoided" (Nightingale:1991,84).

The authors of the American studies which deal with judicial attitudes[6] have conducted a large number of their analyses through courtroom observation and post trial interviews, as have a number of Canadian studies[7]. Finally, there exists literature on the topic of juror attitudes, which utilizes mock jurors or which analyzes the decision-making processes of the police or prosecutors (eg. Bridges and McGrail 1989; Shotland and Goodstein 1983; Frohmann 1991; Bradmiller and Walters 1985) . This type of research explores a wide-range of hypotheses concerning extralegal variables, but they are not tested on judges. These studies, while not concerned with judicial attitudes towards sentencing, did serve to help me to operationalize my variables. When the impact of extralegal factors is discussed with respect to police, prosecutors, jurors or mock jurors, one can hypothesize whether these same factors would influence a judge's reasons for sentencing.

It should be noted that while most of the research focused upon juror or mock juror attitudes, the majority of sexual assault cases are tried in front of a judge. LaFree explains that in the United States only a small proportion of reported sexual assaults are

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[6]Reskin, Barbara F., and Christy Visher, "The Impact of Evidence and Extralegal Factors in Jurors' Decisions", *Law and Society Review*, Vol.20, No.3, 1986; LaFree, Gary; Barbara Reskin and Christy Visher, "Jurors' Responses to Victims' Behaviour and Legal Issues in Sexual Assault Trials, *Social Problems*, Vol.32, No.4, 1985.; and LaFree, Gary. "Variables Affecting Guilty Pleas and Convictions in Rape Cases:Toward a Social Theory of Rape Processing" *Social Forces*, Vol.58, No.3, 1980.

[7]Baril, Micheline; Marie-Josée Bettez and Louise Viau., *Les Agressions Sexuelles Avant et Après la Réforme de 1983: Une Évaluation des Pratiques dans le District Judiciaire de Montréal.* Université de Montréal, Centre international de criminologie comparée et Faculté de droit, Montréal: 1989.; Sahjpaul, Suresh and K. Edward Renner, "The New Sexual Assault Law: The Victim's Experience in Court". *American Journal of Community Psychology.* Vol.16, No.4, 1988.; Nuttall, Sandra. *Toronto Sexual Assault Research Study.* Solicitor General of Canada, 1989.

stresses this fact:

> ...there are rarely cases that go before juries....You'll see the majority of them are in front of judge alone....[juries] don't like sexual assaults....no one is comfortable with sex offenders....The kind of case a defendant will chose to bring before a jury are the things where they hope to sway the jury with...attitudes about the victim. She is a prostitute, she has previous convictions for drugs, she...whatever. Those kinds of things[8].

While there have been a wide range of methodologies and approaches in the studies concerning sexual assault, each shed light on the different factors that are relevant to the sentencing of a sexual offender. The major variables considered by these studies are violence, injury, plea, prior offence, remorse, age of offender, age of complainant, relationship between the victim and the accused and a relationship of trust. One of the major shortcomings of the reviewed studies is that they often rely too heavily on anecdotal evidence. In so doing, the authors of these studies are unable to form a conclusion as to the overall trends in the courts and the specific impact of a variable on sentence length. As is the case with many of the studies discussed above, comments are examined in an effort to determine what variables the judges are considering as aggravating and mitigating factors in sentencing. Yet, by looking to comments alone, the findings may be misleading. For example, as Mohr (1994) found in the case of stranger rape, a sexual assault by a stranger was rarely mentioned as an aggravating factor, yet it did seem to lead to harsher sentences. The current study, therefore, codes factors as indicated in the judges' comments and then analyses their impact on sentence length. This analysis will allow for a more complete assessment of which factors are, in reality, acting in aggravation or mitigation of sentence no matter what the judge may have articulated in his or her comments. Thus, this study aims to provide information on the overall effects of the specified variables in addition to a theoretical discussion of the concepts. In the following section, the methodology used to collect this

[8]Interview with a female crown prosecutor in April 1993, in Montreal, Québec.

data will be discussed.

Methodology

Sampling

In this study the analysis of sentencing decisions was conducted through a review of the case law, and the coding of the texts of judicial decisions for the variables in question. The data collection was confined to the text of the sentencing trial or appeal alone. This implies that not all of the facts heard previously will be included; only those which the judge, at sentencing, stated were relevant, are addressed. Thus, even though not all the facts of the case may be cited, those that are discussed were the ones the judge considered to be of importance to the sentence.

The data were obtained from the *Canadian Sentencing Digest* (Nadin-Davis 1992, hereinafter the *Digest*) which is a digest of judicial sentencing decisions. The *Digest* reports precedents on quantum of sentence, and documents each case's docket number. With the information provided in the *Digest*, the full text of the decision was located in Quicklaw or court reporters.

Carswell states that 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 (Nadin Davis:1992,iii). Carswell also states that the *Digest* includes a large number of unreported decisions. Decisions which are unreported are those which were not published in hard-copy court reporters. These cases may include decisions which were

given orally, jury trial decisions, and those cases which the editors of the court reporters chose not to include (Research Section 1992). The only unreported decisions included in the *Digest*, are those which address issues in which authority is sparse.

The shortcomings of this approach are clearly outlined in a Justice Department report:

> 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. Thus, it is important to recognize that this report does not consider all decisions on sexual assault charges that have been handed down, but only presents a selection of cases from a limited sample....Since jury trials are not reported in law reports (a jury is not required to give reasons for its verdict), the only way these will come to light in a case law review is if a conviction results and a subsequent sentencing hearing is reported; if the sentence is reported in a sentencing digest; or if a conviction is appealed and the appeal decision is reported....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 (Research Section:1992,vii).

Nevertheless, the same report stressed the usefulness of such a study as well:

> 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 (Research Section:1992,vii).

Despite the above-mentioned shortcomings, since there existed no nationwide sentencing database at the time this research was being conducted[9], 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 August 15, 1992 Bill C-49, *An Act to Amend the Criminal Code (Sexual Assault)*, 3d Sess., 34th Parl., 1992 (hereinafter Bill C-49), which amends certain provisions of the Sexual Assault law, came into force. Therefore, the sample includes all cases cited in the *Digest* between August 15, 1992 and August 15, 1993.

The cases listed in the *Digest* for the specified time period were then compiled. 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 these cases, 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 a sexual assault (s.271) or the exact sentence for the sexual assault was not specified when there were multiple counts. Finally, there were 97 cases of sexual assault (s.271) that were available for analysis.

Analysis

This research focuses upon the impact of both legal and "extralegal" variables on a judge's reasons for sentencing. However, the concept of legal versus extralegal factors is one which is not easily demarcated. As Martha Myers points out, "the

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[9]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 1993). This is a computerized database which was initiated in 1991, and which covers six jurisdictions: P.E.I, Nova Scotia, Quebec, Yukon, Ontario and Alberta. While this database does offer a good starting point for research on sentencing, the database is still limited in the amount of information it offers. For example, information on the relationship between the victim and the offender is not reported.

factors of legal relevance are not always easily distinguished from those of questionable relevance" (Myers:1991,163). Furthermore, Myers explains that reliance upon legally relevant factors may simply reinforce previous discrimination and bias. For example, an offender's prior record of incarceration, rather than of arrest or conviction, is often heavily relied upon as a legal factor by judges when sentencing. Yet this "legal factor" is in itself the product of a long series of discretionary judgements, which may have been tainted by sexism or racism (Myers:1991,164). Thus, in the present study a distinction between those variables which are "legal" and those which are "extralegal" was not created. Instead, data were gathered on all variables which were relevant at sentencing. Furthermore, since judges do not necessarily articulate all of the factors relevant at sentencing, the data collection was limited to those issues raised in the written judgements. Thus while the data is restricted to information that judges conveyed in written form, there may have been judicial considerations that were not accounted for in the analysis.

Before beginning the data collection, a subsample of the cases was read in order to become familiar with the types of data that could be collected. Based on this reading and the review of literature, a coding scheme was formulated. Using the computer software program Paradox for Windows[10], a computerized form was designed which would allow for a simple and uniform data entry scheme. The following details the variables for which information was collected, including the way in which they were coded.

Data were collected on the type of act perpetrated against the complainant. Based upon the information detailed in the text of the sentencing decision, information was collected on the following acts: vaginal intercourse, anal intercourse, digital penetration, fellatio and cunnilingus and other acts. Additional variables included the age of the offender at

[10]A relational database.

the time of sentencing as well as the age of the complainant at the time of the offence. Furthermore, it was noted whether the judge mentioned the presence or absence of a breach of a trust relationship. A breach of trust was coded for if the judge made any mention of a relationship of trust, a relationship of *loco parentis*, or specific mention of a breach of trust. In addition, a variable was created for whether there was any presence of a breach of trust *independent* of whether the judge mentioned the presence of a trust relationship. With respect to this latter variable, a breach of trust was considered to be present when there was a familial relationship between the complainant and the accused, where the complainant and accused were involved in a relationship (marital, common law or dating), and where the complainant was a child and the accused was in a position of trust. For example, if the accused was a principal, teacher, priest or babysitter, he was considered to be in a position of trust. Furthermore, a relationship of trust also included adult relationships such as husband/wife and doctor/patient. Another factor for which data were collected concerned whether the judge noted the presence of force. In this instance, a case was coded as "yes" in instances where the judge specifically mentioned that the accused used force, coercion or threats to gain the complainant's submission. Furthermore, cases were coded "no" when the judge specifically mentioned that threats, force or coercion were *not* a factor in the case. In addition, since the variable was based upon judicial mention of force, the variable included either verbal, psychological or physical force.

Other factors that were coded for include the level of court (trial or appellate). Furthermore, if the case was from an appellate court, data were collected on whether the appeal was granted or dismissed. In addition, information was collected on the number of accused and complainants, as well as the number of counts and the number of counts for different offences with which the offender was charged. Another factor concerns the psychiatric state of the accused. This variable was comprised of two categories: "Yes" (for cases in which psychiatric factors were specifically mentioned as a factor) and "No" (for cases in which the judge stated that psychiatric factors were specifically *not* considered to be factors). Psychiatric factors included the presence of a psychiatric

report, mention of psychiatric analysis of the accused prior to trial, specific mention of mental illness and comments regarding psychiatric treatment of the offender.

Other variables included the sex of the complainant and the accused as well as the sex of the judge[11]. Furthermore, the offender's plea of guilty or not guilty was coded for, in addition to evidence of an offender's prior record. Whether or not the offender showed remorse for the crime was another factor for which information was collected. In this case, remorse was evident through specific judicial mention of this factor. Another variable was the relationship between the complainant and the accused. In this instance, the information could only be obtained if the judge commented on the relationship between the complainant and the accused. Finally, the sentence handed down, in months, was coded as the dependent variable.

Dependent Variable

The dependent variable in this case was sentence length, as the interest of this study was investigating which factors lead to shorter or longer sentence lengths. As opposed to data on convictions/nonconvictions, sentencing data allow one to address a wide range of possible extremes. Thus, one can compare those cases in which a lenient sentence was handed down to a case in which the maximum penalty was imposed. Conversely, data on convictions allow one to address the simple dichotomy of guilty/not-guilty, and the data will therefore not be as rich. Moreover, in order to obtain a proper sample of cases on convictions of sexual assault, one must go through a costly and very time consuming process. Sentencing data, however, is much more accessible due to the Carswell *Digest* and is therefore more suitable for this type of preliminary study. Finally, the research on sentencing data are very

[11]Information on the sex of the judge was collected from Gardner, Paul ed. *Canada Legal Directory*. Toronto: Carswell, 1994. In the instances when information was missing from the directory, the specific court was called for the information.

sparse, and those reports which do address the issue recommend that further research be conducted in this area (Ekos 1988a; Roberts 1990a).

The variable "sentence" was coded in months. For those cases in which the accused received a suspended sentence or a conditional discharge, the sentence length was coded as zero months. Furthermore, if the sentence length was indeterminate, the case was coded as 275 months, which is equivalent to a life sentence. When statistical procedures were conducted, the variable "sentence" was dichotomized. This was done in order to create tables that were both clear and meaningful. The two categories into which the variable was collapsed were "No Time/Jail" and "Prison". The category "No Time" refers to cases in which the offender received a suspended sentence or a conditional discharge, and thus was not incarcerated. "Jail", refers to sentence lengths that are two years less a day or less, while "Prison" refers to sentences that are greater than two years[12].

While the crime of sexual assault also includes sexual assault with a weapon or causing bodily harm (s.272) and aggravated sexual assault (s.273), 95% of all cases the Canadian Criminal Justice System fall under the rubric of sexual assault (s.271) (Roberts:1990a,xv). Therefore, only the sentence lengths that were handed down for the offence of 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 for the sexual assault was two years.

Furthermore, only the cases in which the charge was sexual assault, rape and/or indecent assault were included. As will be explained in Chapter Two, the legislation surrounding

[12]A person sentenced to imprisonment for a term of two years or more must be sentenced to a penitentiary operated by the federal government. If an accused is sentenced to a term less than two years, he must be sentenced to a prison operated by the province (Salhany:1989,365).

the crime of sexual assault has undergone many changes over the years. Consequently, what we call today "sexual assault" was, prior to 1983, rape and 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 instead of the charge of sexual assault. Finally, while there exist other sexual offences, such as incest and gross indecency, only the offence of sexual assault was included in the analysis in order to provide for a clear and coherent discussion of the relevant issues.

Before turning to an in depth analysis of the data from this study, it is necessary to discuss the legal dimension of sexual assault. This discussion will serve to provide a context for the analysis of the data. Thus, Chapter Two will set out the legal and historical context of the sexual assault laws in Canada. Furthermore, since the dependent variable in this study is sentence length, the nature of sentencing, and, more specifically, sexual assault sentencing, will also be examined.

Chapter Two

Sexual Assault and Sentencing: The Legal Dimensions

In order to understand the current law on sexual assault, its origins and evolution should be discussed. Thus, in this chapter, a general overview of the legal and social history of the law on sexual assault will be presented. Our present day laws on sexual assault originate from a law which was designed "to regulate the orderly transfer of property" (Clark and Lewis:1977,115). When a woman was raped, the rapist was ordered to pay a sum of money to either the woman's father or husband; indeed it was these men, and not the woman, who were considered to have been wronged by the rape. The sum of money to be paid was determined by a woman's social "value" which was based upon her social status and by her desirability as a chaste woman (Clark and Lewis:1977,115; Stuart and Delisle:1990,442).

Since its inception, the law of sexual assault has undergone many changes and has been embodied by varying legal definitions. As of 1955, the principle offences of sexual aggression in the Canadian *Criminal Code* (R.S.C. 1985, c. C-46, hereinafter *Criminal Code*) were rape and attempted rape, indecent assault on a female and indecent assault on a male:

> *Rape.*
>
> **143.** A male person commits rape when he has sexual intercourse with a female person who is not his wife,
>
> (*a*) without her consent, or
>
> (*b*) with her consent if the consent
>
> (i) is extorted by threats or fear of bodily harm,
>
> (ii) is obtained by personating her husband, or
>
> (iii) is obtained by false and fraudulent representations as to the nature and quality of the act.
>
> *Indecent assault on a female—Consent by false representations.*

> **149.** (1) Every one who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years and to be whipped [13].
>
> (2) An accused who is charged with an offence under subsection(1) may be convicted if the evidence establishes that the accused did anything to the female person with her consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act.

Indecent assault on male.

> **156.** Every male person who assaults another person with intent to commit buggery or who indecently assaults another male person is guilty of an indictable offence and is liable to imprisonment for ten years and to be whipped.

There are several aspects of the 1955 rape law that are worth noting. The law clearly stated that a man could not be convicted of raping his wife; a notion referred to as the 'marital exemption'. In cases in which a woman was, de facto, raped by her husband, the husband could only be charged with indecent assault or even common assault. These options were, however, not the usual practice. Criminal charges were usually not laid at all (Dekeseredy and Hinch:1991,62).

In addition, the rape law stated that proof of sexual intercourse was a required element of the offence. Thus, when a woman was sexually attacked, but intercourse did not occur, there could be no recourse to prosecution. Another problematic aspect of the law was the gender biased language of the legal text. First, only men could be charged with rape. Second, with regards to indecent assault, if the complainant was male, the *Criminal Code* stated that only male perpetrators could be charged. If, however, the complainant was female, the *Criminal Code* acknowledged that both men and women could be charged with indecent assault.

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[13]Corporal punishment was abolished in 1972 (Salhany:1989,357). The words "and to be whipped" were removed from the legislation at that time.

Finally, for the offence of rape, there was no acknowledgement that someone in a position of trust could coerce someone to submit to sexual intercourse without the use of force or threats. Indeed, the rape law incorporated no understanding of the concepts of power and submission (Clark and Lewis:1977,162).

In response to growing pressure from women's groups, these sexual offences were repealed in 1982 and were replaced with a three-tired 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 (hereinafter *1982 amendments*) . The new sexual assault offences were implemented in response to growing social awareness that the "old" offences of rape and indecent assault were inadequate and did not reflect the reality of the crime (Gunn and Linden:1994,136). Feminists asserted that the law itself was flawed; specifically, issues of the marital exemption were raised, in addition to the corroboration requirement and the gendered nature of the crime[14] (Snider:1985, 338; Hinch:1990,236). To bolster their argument, women's groups pointed to the low reporting rates of sexual assault and to the low conviction rates for the crime (Clark and Lewis 1977).

The new sexual assault offences were comprised of a three-tiered system that included sexual assault (s.271), sexual assault with a weapon, threats to a third party or causing

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[14]The corroboration requirement stipulated that there must be corroborating evidence of a rape independent of the complainant's testimony. It was argued that a woman's uncorroborated testimony could not be trusted:

> Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men...(Wigmore:1970,736; cited in Stuart and Delisle:1990,444)

There were other aspects of the "old" rape law that were criticized as well: evidence of recent complaint (requiring that a woman must promptly report the crime at the first opportunity) and evidence of a woman's past sexual history. However, a full discussion of these issues can not be included in the scope of this paper. Indeed, such a discussion has had many papers dedicated to this topic alone (Snider 1985; Hinch 1985; Boyle 1984).

bodily harm (s.272), and aggravated sexual assault (s.273)[15]. In this study, only the offence of sexual assault (s.271) will be discussed, as 95% of all sexual assaults are classified under this offence (Roberts:1990a,xv). The offence of sexual assault (s.271) was created as a hybrid offence, which means that the Crown can proceed by way of summary conviction or indictment[16]. If the Crown chooses to proceed by summary conviction, the maximum penalty is six months' imprisonment or a $200 fine. The maximum penalty for a sexual assault proceeded by way of indictment is 10 years (*Criminal Code*, s.271(1)(a))[17].

This three-tiered structure of sexual assault parallels that of the offence of assault which is comprised of: assault (s.266) (a hybrid offence), assault with a weapon or causing bodily harm (s.267) and aggravated assault (s.268). The maximum penalties for these offences are, respectively, 5, 10 and 14 years imprisonment (*Criminal Code*, ss.266-268).

The new offences of sexual assault, according to the *Criminal Code*, are:

> 271. (1) **[Sexual Assault]** Everyone who commits a sexual assault is guilty of
> (*a*) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
> (*b*) an offence punishable on summary conviction.
> **272. [Sexual Assault with a weapon, threats to a third party or causing bodily harm]** Everyone who, in committing a sexual assault,

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[15]While this paper deals exclusively with the offence of sexual assault, there are other sexual offences in the *Criminal Code* such as sexual interference (s.151), invitation to sexual touching (s.152) and incest (s.155). This paper deals with the crime of sexual assault, to the exclusion of other sexual offences so that a clear and specific analysis of sexual assault could be presented. This will allow for a discussion of sexual assault without involving some of the issues that may be associated with the other sexual offences.

[16]All offences in the *Criminal Code* are classified as either indictable offences or punishable by way of summary conviction. Hybrid, or dual, offences are those in which the Crown can select whether to proceed by way of indictment or summary conviction (Salhany:1989,2).

[17] The offences of sexual assault with a weapon and aggravated sexual assault are not, however, hybrid offences. The Crown must proceed by way of indictment. The maximum penalty for sexual assault with a weapon is 14 years while that for aggravated sexual assault is life.

(*a*) carries, uses or threatens to use a weapon or an imitation thereof,
(*b*) threatens to cause bodily harm to a person other than the complainant,
(*c*) causes bodily harm to the complainant, or
(*d*) is a party to the offence with any other person,
is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

273. (1) **[Aggravated Sexual Assault]** Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

(2) **[Punishment]** Every one who commits an aggravated sexual assault is guilty of an indictable offence and liable to imprisonment for life.

Section 271(1) does not explicitly define the conduct that qualifies as a sexual assault. Instead, the *Criminal Code* treats sexual assault as a form of assault, defined at s.265(1) of the *Criminal Code*:

265. (1) **[Assault]** A person commits an assault when
(*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
(*b*) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
(*c*) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

265.(2) **[Application]** This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

S.265 does not speak either to the sexual nature or scope of the act in question. While the law of rape required that penetration be proven in order to convict someone of rape, the law of sexual assault encompasses a wide range of acts. Although the *Criminal Code*, in defining sexual assault, refers to the general assault provision at s.265(1), Canadian courts have held that the scope of what constitutes a sexual assault cannot be limited to the definition of assault provided at s.265(1) (*R.* v. *Chase*, [1987] 2 S.C.R. 293. [hereinafter *Chase*]). In *Chase*, Supreme Court of Canada overturned a

lower court's decision that a woman's breasts were secondary sexual characteristics and that the touching of a woman's breasts did not constitute a sexual assault (Stuart and Delisle:1990,483). Currently, the test for determining whether an incident is indeed a sexual assault is whether, according to the "reasonable observer," the act is "committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated" (Boyle:1994,137). Today, sexual assault includes acts ranging from touching of the buttocks or breasts to sexual and anal intercourse (Violence Against Women:1994,2).

The *1982 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' (Mohr and Roberts:1994,7). 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 (Snider:1985,340; Stuart and Delisle:1990,477). Two authors, Clark and Lewis, were among those who strove to have the definition of rape changed from a focus on rape as a sexual act to rape as an act of violence. They explain:

> In suggesting that the presence of physical coercion, rather than the absence of consent, should be the central feature of the offence of rape, we are saying that our rape laws should reflect the perspective of women--the victims of rape. For women, the presence of physical coercion defines the nature of the act. They experience rape as an *assault*, as an unprovoked attack on their physical person, and as a transgression of their assumed right to the exclusive ownership and control of their own bodies (Clark and Lewis:1977,166; emphasis in original).

The *1982 amendments* also effected other significant changes. They removed the marital exemption from the legislation, thus permitting charges to be laid against husbands who sexually assault their wives. Furthermore, the requirement for

corroboration was removed, as was the necessity of recent complaint[18] (Snider:1985,341; Hinch:1985,37).

Since the *1982 amendments*, there have been further reforms to the Canadian sexual assault laws. On August 15, 1992 Parliament passed Bill C-49, *An Act to Amend the Criminal Code (Sexual Assault)*, 3d Sess., 34th Parl., 1992 (hereinafter Bill C-49), which amends certain provisions of the sexual assault law. This Bill was passed partly in response to the Supreme Court of Canada's decision to strike down s.276 of the Criminal Code (*R.* v. *Seaboyer*, [1991] 2 S.C.R. 577), which imposed limitations on the questioning of a complainant's sexual history in a sexual assault trial. In essence, Bill C-49 was enacted to deal with controversial issues surrounding the law of sexual assault; specifically, with the issues of consent, breach of trust and the questioning of a complainant's sexual history (Cornaviera:1993,1).

Bill C-49 enacted a definition of consent:

> 273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
> (2) No consent is obtained, for the purposes of sections 271, 272, 273, where,
> (*a*) the agreement is expressed by the words or conduct of a person other than the complainant;
> (*b*) the complainant is incapable of consenting to the activity;
> (*c*) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
> (*d*) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
> (*e*) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
> ...
> 273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where,
>
> (*a*) the accused's belief arose from the accused's
> (i) self-induced intoxication, or

[18] Please see footnote number 2 for a fuller explanation of the concept of recent complaint.

(ii) recklessness or wilful blindness; or

(*b*) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

Bill C-49 also imposed limitation on the questioning of a complainant's past sexual history:

276. (1)....[E]vidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(*a*) is more likely to have consented to the sexual activity that forms the subject matter of the charge; or

(*b*) is less worthy of belief.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

(*a*) is of specific instances of sexual activity;

(*b*) is relevant to an issue at trial; and

(*c*) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court or justice shall take into account

(*a*) the interests of justice, including the right of an accused to make a full answer and defence;

(*b*) society's interest in encouraging the reporting of sexual assault offences;

(*c*) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(*d*) the need to remove from the fact-finding process any discriminatory belief or bias;

(*e*) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(*f*) the potential prejudice to the complainant's personal dignity and right of privacy;

(*g*) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(*h*) any other factor that the judge, provincial court judge or justice considers relevant.

An important change which was implemented by the passing of Bill C-49 was that for the first time, Canadian law included a definition of consent in the law of sexual assault.

Prior to Bill C-49, "an accused who believed that a woman means "yes" when she says "no" was not criminally liable" (Cornaviera:1993,19). Yet, one of the goals of this Bill was to have a woman's "no" understood as her meaning "no". Furthermore, Bill C-49 states that consent cannot be obtained if it is induced by abusing a position of power, trust or authority. This change reflects a response to the evolving notion of sexual assault. From a property crime to a crime against a woman's sexual integrity, the definition of sexual assault has slowly been changed in order to conform to the victim's reality of the crime.

A further change to the law of sexual assault is the controversial onus on the accused to show that "reasonable steps" were taken in order to ascertain that the complainant was consenting (Cornaviera:1993,16). This change was designed to deal with earlier case law which stated that, if an accused honestly, even if mistakenly, believed that the complainant was consenting, he could not be convicted of sexual assault. While there were some limitations on an accused's assertion that he honestly believed that the complainant was consenting[19], there was no requirement that this belief be reasonable. Bill C-49 now requires that an accused have taken "reasonable steps" in formulating an honest belief of consent, in the circumstances known to the accused at the time.

Until this point, the discussion has centred upon the legal definition of sexual assault. In the following section, the nature of sentencing will be discussed. Since the dependent variable in this study is sentence length, it is imperative that sentencing principles and issues specific to sentencing sexual assault be reviewed.

[19]For instance, if an accused was found to have been 'willfully blind' he could not assert that he honestly believed that the complainant was consenting.

THE NATURE OF SENTENCING

The Canadian sentencing scheme is based upon a highly individualized, case-by-case approach which relies primarily upon judicial discretion. Sentencing guidelines are very general, and basically speak to the general principles of sentencing rather than to the method by which a judge should determine a sentence. All offences in the *Criminal Code* are classified as either indictable offences or punishable by way of summary conviction. Hybrid, or dual, offences are those in which the Crown can select whether to proceed by way of indictment or summary conviction (Salhany:1989,2). The maximum sentences for indictable offences are life, fourteen years, ten years, five years and two years[20]. If no specific maximum penalty is assigned to an indictable offence, the maximum sentence is assigned at five years. Summary conviction offences are provided with a maximum of six months imprisonment (Salhany:1989,357).

The *Criminal Code* contains minimum sentences for very few of the 400 offences listed[21]. The main reason that Parliament has refrained from legislating minimum sentences is that they tend to "prevent the use of judicial discretion to tailor a sentence to the circumstance of the offence" (Linden:1987,58-9). It is argued that in order to impose a just sentence, each case must be considered independently, as the facts and circumstances will always vary (Salhany:1989,349).

In 1987, the Canadian Sentencing Commission (hereinafter "the Commission") was established in recognition that there exist serious structural problems with current sentencing practices, including unrealistically high maximum penalties. The Commissioners also explained that there exists no method for anyone "to know in a systematic, up-to-date, and accessible manner, on a continuing basis, what kinds of

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[20]Each offence in the *Criminal Code* carries a maximum penalty. For example, life sentences are the maximum for the offences of Murder, Robbery and Manslaughter.

[21]See, generally, Ruby 1994.

sentences are being handed down" (CSC:1987,60). Furthermore, one of the main concerns of the Commission was the evidence of unwarranted disparity in sentences (CSC:1987,71). The Commission stated that 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" (CSC:1987,71). Mr. Justice Archambault, the chair of the Commission, explains that one of the major shortcomings of our sentencing structure is its lack of consistent guidance. He states that Parliament has not established policy and principles to govern the determination of sentences, and "[i]t is time that Parliament assume its responsibility" (Archambault:1991,103).

While there are no legislative guidelines available to the judiciary on matters of sentence, there do exist some basic principles that have been formulated through case law. The fundamental principle of sentencing in Canada is "to preserve the authority of and to promote respect for the law through the imposition of just sanctions" (CSC:1987,xxv). When sentencing an accused, a judge usually takes into consideration the relevant principles of sentencing which include general and specific deterrence, denunciation, and rehabilitation. General deterrence refers to the inhibiting effect of sanctions on the criminal activity of persons other than the accused, while specific deterrence aims to discourage the particular offender from reoffending (CSC:1987,135). Denunciation is defined as an expression of condemnation of the crime of the offender, while rehabilitation is the aim to rehabilitate the specific accused with a view to reintegrating the offender into society[22].

[22]There has been much debate as to whether the principle of retribution should be considered in sentencing. Some of this concern stems from the possibilty of equating retribution with vengeance. Norris JA, in *R. v. Hinch and Salanski* clarifies the distinction: "I am of the opinion, with respect, that in those cases where the term "retribution" is used it is loosely equated with the word "punishment", for I cannot believe that "vengeance", a common meaning of the term "retribution", was ever intended." (Stuart and Delisle:1990,803).

With the aim of providing some cohesion to the practice of sentencing, the Commission included a proposal for informal guidelines to be provided to judges. Furthermore, among its 91 recommendations, the Commission also included a list of aggravating and mitigating factors which would aid judges to determine the sentence within the legislated range of maximum penalties and also serve as a basis for departing from the informal guidelines. They are as follows:

Aggravating Factors

1. Presence of actual or threatened violence or the actual use or possession of a weapon, or imitation thereof.
2. Existence of previous convictions.
3. Manifestations of excessive cruelty towards victim.
4. Vulnerability of the victim due, for example, to age or infirmity.
5. Evidence that a victim's access to the judicial process was impeded.
6. Existence of multiple victims or multiple incidents.
7. Existence of substantial economic loss.
8. Evidence of breach of trust (eg. embezzlement by bank officer).
9. Evidence of planned or organized criminal activity.

Mitigating Factors

1. Absence of previous convictions.
2. Evidence of physical or mental impairment of offender.
3. The offender was young or elderly.
4. Evidence that the offender was under duress.
5. Evidence of provocation by the victim.
6. Evidence that restitution or compensation was made by offender.
7. Evidence that the offender played a relatively minor role in the offence (CSC:1987,27-8).

This list has remained, however, simply a recommendation.

In addition to the 1987 Sentencing Commission report, the Daubney Commission presented its report, *Taking Responsibility*, in 1988 (Daubney 1988). This commission

was formed in part as a response to public unease regarding the effectiveness of the criminal justice system as well as to address a wide-range of sentencing, conditional release and related aspects of the correctional system. Finally, the Justice Department and the Solicitor General of Canada presented a discussion paper entitled *Directions for Reform* (Solicitor General 1990) which contained proposals aimed at reforming and overhauling the present criminal justice system. A direct result of this and other reports has been the tabling of Bill C-90 (*An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, 3d Sess., 34th Parl., 1992, hereinafter Bill C-90) which after two readings and Legislative Council, has died on the order paper. This Bill addressed, among other things, that:

> No statement of purpose and principles of sentencing currently exists in the *Criminal Code*, or elsewhere in the legislation. While jurisprudence sets out principles, these can, however, vary from province to province, and do not lend themselves to a national interpretation....At present, there are no clear guidelines in the law to indicate how sentencing should be approached--when information should be made available to the court, what powers the court should have to obtain that information, or how that information should be assessed in determining the appropriate sentence. The case law may be referred to but it offers limited guidance and may differ significantly from province to province (Communiqué: June 23,1992).

Even if Bill C-90 had become law, sentencing would remain a practice which would be highly discretionary in order to preserve judicial discretion. Bill C-90, it should be noted, did not include a list specifying aggravating and mitigating factors; its focus was to legislate the general guidelines and principles of sentencing which had been developed in the courts in an effort to provide a framework for decision-making[23].

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[23]The Bill stated:

> **718.** The fundamental purpose of sentencing is to contribute to the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (*a*) to denounce unlawful conduct;
>
> (*b*) to deter the offender and other persons from committing offences;

SENTENCING SEXUAL ASSAULT

In this section, the specific issue of sentencing sexual assault cases will be presented. The charge and sentencing ranges for sexual assaults are summarized as follows:

Table 2.1 Sexual Assault Charge and Sentencing Ranges

Criminal Code Section	Charge	Summary Conviction Maximum 6 months incarceration	Indictable	Maximum Sentence for Indictable
s.271	Sexual Assault	Yes	Yes	10 years
s.272	Sexual Assault (with weapon; with threats to another person; causing bodily harm)	No	Yes	14 years
s.273	Aggravated Sexual Assault	No	Yes	Life

Table 2.1 sets out the maximum penalties available for each sexual assault offence. There is, however, no minimum penalty for these offences. Consequently, as with most offences, judges have a large amount of latitude when sentencing sexual offenders. In the process of determining a sentence, judges do look, however, to case-law precedents to benefit from a general sense of the current trends in sentencing.

(*c*) to separate offenders from society;
(*d*) to provide reparations for harm done to victims or the community;
(*e*) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community; and
(*f*) to assist in rehabilitating offenders.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(*a*) a sentence may be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or offender;

...

One of the precedents referred to by certain judges when sentencing sexual assault cases is *R.* v. *Sandercock* ((1985), 48 C.R. (3d) 154. [hereinafter *Sandercock*]), a case decided in the Alberta Court of Appeal in 1985. In *Sandercock*, the Crown had appealed a sentence of 3 years. The Court of Appeal agreed, raising the sentence to 4 1/2 years. In this case, the presiding Appellate Court judge, Mr. Justice Kerans, stated that sentencing courts are to utilize a "starting point" approach to sentencing, in which courts compare the facts in each case to a benchmark case. This benchmark case would have a standard sentence attached to it, and judges would then add or subtract an appropriate quantum depending upon the mitigating and aggravating circumstances in each case.

Mr. Justice Kerans set the benchmark case as a "major sexual assault" which was described as a situation in which:

> a person, by violence or threat of violence, forces an adult victim to submit to sexual activity of a sort or intensity such that a reasonable person would know beforehand that the victim likely would suffer lasting emotional or psychological injury, whether or not physical injury occurs....This category...includes...many cases of attempted rape, fellatio, cunnilingus and buggery (*R.* v. *Sandercock* (1985), 48 C.R. (3d) 154 at 159).

Mr. Justice Kerans set the base sentence for a major sexual assault at three years, assuming the offender is "mature", with "good character" and has no criminal record (*R.* v. *Sandercock* (1985), 48 C.R. (3d) 154 at 160).

The "starting-point" approach to sentencing sexual assault has not, however, been accepted by all courts. In *R.* v. *Gentles* (1992), 17 W.C.B. (2d) 38 (Ont.Gen.Div.), a recent case from the Ontario Court of Justice (General Division), the court defers to the judgement of Mr. Justice Brooke in *R.* v. *Glassford* (1988), 27 O.A.C. 194 at 198:

> As in the past the Court declines to follow and apply the judgment in R. v. Sandercock. A review of the cases cited reveals that primarily each case must be decided on its own facts.

Furthermore, in *R.* v. *Dupuis*, [1993] R.J.Q. 2024 (C.A.), also rejects the *Sandercock* logic. Mr. Justice Fish, writing for the majority, states that, "Quoi qu'il en soit, il me paraît maintenant établi que la Cour se refuse par principe à imposer un starting point, pas plus en matière d'agression sexuelle". It seems then, that those courts who reject the *Sandercock* starting-point approach do so in an effort to resist a restrictive framework in sentencing.

In sum, the case law indicates that the sentencing practices surrounding sexual assault are dealt with in a case-by-case fashion. While certain trends may be identified, sentences are the result of an individualized, highly discretionary process.

In the following section, data concerning sexual assault and sentencing trends will be presented. The statistical data, in addition to the previous discussion concerning the legal aspects of sentencing and sexual assault, will serve to provide a solid background to the presentation of the findings from this study.

PREVALENCE OF SEXUAL ASSAULT IN CANADA

This section will briefly outline the characteristics and prevalence of sexual assault in Canada. Furthermore, the discussion will be expanded to include data from the sample of cases to be analyzed in this study.

Reporting Rates

There exist a number of studies that have attempted to document the prevalence of sexual assault in Canada (Gunn and Minch 1988; UCR; Violence Against Women 1993). Some have gathered data from police records while others have been victimization studies or self-report studies in which respondents are asked to report whether they have been the victims of a crime. One of the major obstacles to this endeavour has been the fact that sexual

assault is an under-reported crime, occurring more often than it is reported to the police (Gunn and Linden:1994,135; Gunn and Minch:1988,13).

Approximately 95% of all sexual assault cases dealt with by the Criminal Justice System fall under the rubric of Sexual Assault (s.271) (Roberts:1990a,xv). It is for this reason that this study will only focus upon Sexual Assault (s.271). According to the Uniform Crime Reporting (UCR) database[24], the national number of sexual assaults (s.271) reported to the police in 1992 was 38,337. Of those, approximately 15% were declared unfounded[25], which left the "actual" number of sexual assaults at 33,017 (UCR 1994). This translates into a rate of 120 incidents per 100,000 residents which represents a 164% increase over the number of sexual assaults reported to the police since 1983 (Roberts:1994,7). However, this increase does not necessarily reflect a rise in the rate of the crime; it may be a function of public-awareness and the mechanisms which are now in place to aid victims of sexual assault to come forward and report the crime (Roberts:1990b,25; Roberts and Gebotys:1992,162). For the sake of comparison, the "actual" reporting rate for assault (s.266) in 1992 was 175,736.

Table 2.2 Sexual Assault and Assault Reporting Rates

	Reported	Unfounded	% Unfounded	Actual Number	Rate per 100,000	Charges Laid (number and percentage)
Sexual	38,337	5,320	15%	33,017	120	16,260 (42%)
Assault	191,143	15,407	8%	175,736	641	83,465 (44%)

The rate of unfounding has been a focus of much criticism of the criminal justice system, as feminists have asserted that the unfounding rate for sexual assault is much

[24]A national database of police records.

[25]An unfounded case is one in which the investigating officer decided that a crime did not take place or was not attempted (Roberts and Gebotys:1994,157)

higher than that for other crimes (Clark and Lewis 1977). As can be seen from the above table, the percentage of cases declared as unfounded is, indeed, almost twice as high for sexual assault than for assault. However, proportionally, charges are laid as often for sexual assault and assault. Thus, it seems that feminist criticisms concerning the unfounding rate for sexual assault cases still holds true. However, the data that both sexual assault and assault have similar charging patterns may be an indication that progress is being made with respect to criminal justice processing of sexual assault cases.

Another method for determining the prevalence of sexual assault in Canada is through self-report surveys. Using this method, the Violence Against Women survey has found that 39% of all women reported having been sexually assaulted while fully one half of Canadian women have experienced at least one incident of physical or sexual violence since the age of sixteen (Violence Against Women:1993,2). Furthermore, this study states that only 6% of sexual assaults were reported to the police while over one quarter of wife assaults and other physical assaults were reported to the police (Violence Against Women:1993,7). Of those incidents that were reported to the police, over one-third resulted in a charge laid against the perpetrator (Violence Against Women:1993,7).

Child Sexual Assault

One of the often over-looked aspects of sexual assault is the sexual assault of young complainants. In fact, recent data show that there has been an increase in the number of juveniles reporting sexual assaults (Roberts and Gebotys:1992,164). Unfortunately, national data on sexual assault do not report the age of the complainant, thus we must rely upon other sources, such as local studies[26], for this information.

[26]The term 'local studies' in this paper refers to studies in which the sample was based on a single city or region.

A Department of Justice research evaluation which was conducted in several Canadian cities shows the following reporting rates of child sexual assault per 100,000 residents in 1990: Hamilton: 73, Calgary 90; Edmonton 114 , Saskatoon 155 (Hornick and Bolitho:1992,33). Table 2.3, below, indicates the reporting rates, unfounding rates and conviction and charging information for child sexual assault in these four cities.

Table 2.3 Child Sexual Assault Reporting Rates

	Calgary	Edmonton	Hamilton	Saskatoon
Rate per 100,00	90	114	73	155
Unfounding Rate	8.3%	7.2%	22.1%	4.7%
Charge Laid	43.8%	24.8%	30.8%	45.9%
Convictions	73.8%	59.1%	83.0%	80.1%

Furthermore, a Montreal study shows that almost half of all sexual assault complainants were under 18 while in Winnipeg 66% of complainants were under the age of 17 (Roberts and Gebotys: 1992,164). A revised UCR survey[27] reports that in 1992 over half of the victims of sexual assault were either children or teenagers (Roberts:1994, 7). A similar trend was found in the data used for this study, with 67% of complainants aged 16 and younger. These figures indicate that a large proportion of all sexual assaults involve children as the complainants. Since the sexual assault of children often involves very different dynamics than adult sexual assault, age must not be overlooked as a factor in this crime.

[27]The revised UCR data are not yet nationwide--it provides information from 51 selected police departments across the country (Roberts:1994, 18).

Convictions and Sentencing

Data on convictions and sentencing have not been regularly recorded on a national basis in Canada (Statistics Canada 1993; Clark and Hepworth 1994). A recent Statistics Canada report is one of the first steps aimed at providing consistent and comprehensive data on sentencing in Canada (Statistics Canada 1993, hereinafter Sentencing Study). This study presents conviction and sentencing data for six provincial jurisdictions during 1991 and 1992: PEI, Nova Scotia, Québec, Ontario, Alberta and the Yukon. According to this report, there were 1,582 convictions of sexual assault in 1991 and 1992 in these six jurisdictions[28]. In addition, a recent overview of Canadian data shows that the conviction rate for sexual assault is 73% and that between 60% and 80% of those convicted of Sexual Assault (s.271) will be sentenced to a period of imprisonment (Roberts:1990a,xv)[29].

Of the 1,582 convictions of sexual assault, 54% received a sentence of prison, 22% a suspended sentence[30], 3% a conditional discharge[31] and 1% received an absolute

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[28]The Sentencing Study coded its conviction data as follows:
Data include all Criminal Code and other federal statute charges resulting in conviction in adult provincial/territorial courts. Absolute and conditional discharge sentences are included as sanctions, although they are "legally" not considered to be convictions (Statistics Canada:1993,Table A).

[29]There seems to be an inconsistency in the data. The UCR data indicate that there were 16,260 charges laid for sexual assault in 1992. However, the Sentencing Study reports that there were only 1,582 offenders who received sentences for sexual assault in six major jurisdictions over the period of 1991-1992. Yet, Roberts states that between 60 to 80 per cent of sexual assault offenders will be sentenced to a period of imprisonment. Thus, the data do not seem to fit together into a coherent picture. This is one of the reasons that many authors call for more consistent and coherent data gathering on this issue.

[30]"If an accused is convicted of an offence where a minimum punishment is not prescribed by law, the court has the power to suspend the passing of sentence where it is of the opinion that, having regard to the age and character of the accused, the nature of the offence and the circumstances surrounding its commission, he should be released on probation. In such instance, the court will direct that the accused be released upon the conditions set out in a probation order" (Salhany:1989,371).

discharge[32]. Furthermore, three-quarters (75%) received probation, 19% received a community service order or some type of peace bond or prohibition and 18% received a fine[33] (Statistics Canada:1993, Table 5).

In discussions of statistical data concerning sexual assault, authors often compare its rates of incarceration with those of other crimes in order to set a benchmark against which the effectiveness of the criminal justice system can be measured. As a result of these comparisons, feminist authors have argued that sexual assault is not dealt with as harshly as other crimes (Clark and Lewis 1977). Thus, in order to make such comparisons, data on assault have been provided. The comparative data for sexual assault and assault are presented in the Table 2.4, below. This table illustrates that sexual assault offenders are, actually, incarcerated more than twice as often as those convicted of assault. Furthermore, both sexual assault and assault offenders receive suspended sentences in almost one quarter of cases. Finally, three quarters of all sexual assault offenders received probation, compared to more than half of those convicted of assault.

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[31]An accused who has received a conditional discharge is deemed to not have been convicted of that offence, however the discharge may be "revoked if he is convicted of a subsequent offence" (Salhany:1989,385).

[32]"an accused who has been granted a discharge is deemed not to have been convicted of that offence" (Salhany:1989,384).

[33]Please note that an offender may receive more than one type of sentence at one time. Thus, an offender who receives a prison sentence may also receive probation and a fine.

Table 2.4 Sexual Assault and Assault Sentence Statistics

	No.	Prison	Suspended Sentence	Conditional Discharge	Absolute Discharge	Probation	Fine
Sexual Assault	1,582	54%	22%	3%	1%	75%	18%
Assault	30,469	21%	24%	12 %	4%	64%	37%

The Sentencing Study reports that the median sentence length for sexual assault is 120 days, and the average sentence length is 297 days. The sentence lengths for assault are notably shorter; the median is 30 days (Statistics Canada:1993, Table 8). As Table 2.5 illustrates, sexual assault offenders receive harsher penalties than those convicted of assault. Thus, with respect to sentence length, it does not seem that sexual assault offenders are being treated more leniently than assault offenders.

Table 2.5 Sexual Assault and Assault Sentence Lengths

	Median	**Mean**	**Mid-80 Percentile[34]**
Sexual Assault	120	297	30-730
Assault	30	51	1-90

As for the conviction rates for child sexual assault, the data from the Department of Justice study show very high rates: Calgary 73.8%; Edmonton 59.1%; Hamilton 83.0%; Saskatoon 80.1% (Hornick and Bolitho:1992,33). The authors posit that this rate is so high because there were high proportions of guilty pleas. They go on to explain that many cases in Calgary and Hamilton involved the withdrawal of charges, "which would tend to increase the conviction rate because withdrawn charges do not count against the conviction rate" (Hornick and Bolitho:1992,39). Furthermore, these conviction rates

[34]The mid-80 percentile "is the range of values, excluding the highest and lowest 10%. This provides an indication of the "typical" range of sentence lengths imposed for a particular offence, without extreme values being included (Statistics Canada, C-6).

include cases from both the Provincial Criminal Court and the Youth Court which had differing rates of conviction, with the Youth Court's rate higher than that of the Criminal Court (Hornick and Bolitho:1992,39).

Hornick and Bolitho also present data on incarceration rates and sentence lengths for child sexual assault cases. The incarceration rate in Calgary was 62% and in Edmonton it was 58%[35]. The rates of probation in both cities were over one-third. The average sentence length in Calgary was 9.9 months while in Edmonton it was 11.2 months (Hornick and Bolitho:1992,78). As will be explained in the following chapters, child sexual assault accounts for a large majority of the sample used for this study, thus much attention will be given to this subject.

GENERAL CHARACTERISTICS[36]

In this section the general characteristics of the crime of sexual assault will be outlined, based on sentencing data and other available sources. By providing information on the act, the sex and age of the offender and the complainant, in addition to the relationship between the two, a general picture of the crime of sexual assault in Canada will be presented.

Gender

Despite the fact that the legal text of sexual assault is gender-neutral, it is a crime that has remained gendered, with males over represented as the offenders and women as the overwhelming majority of complainants. According to the data from the Sentencing

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[35]Information on Hamilton and Saskatoon were not available for sentencing (Hornick and Bolitho:1992,78).

[36]While there exist many studies which describe the prevalence and characteristics of sexual assault for a given population, only those studies which have a wider scope and some cross-national perspective will be discussed.

Study, 97% of sentenced sexual assault offenders were male, while 1% was female[37] (Statistics Canada:1993,Table 2). According to the revised UCR survey, 84% of the sexual assault victims in 1992 were female while 98% of those charged were male (Roberts:1994, 7). The same pattern holds true for child victims of sexual assault: the percentage of female complainants ranged from a low of 72% to a high a 83% (Hornick and Bolitho:1992,29). Furthermore Hornick and Bolitho report that the accused was male in over 94% of the cases (Hornick and Bolitho:1992,30). The findings from the sample collected for the present study are consistent with the national data: 95% of all offenders were male, and none were female[38]. With respect to the sex of the victims, 93% of complainants in this sample were female, and the remainder were male[39].

Age of Offender

As explained above, a large proportion of sexual assault complainants are either children or teenagers. Offenders, however, tend to be older: "approximately two-thirds of accused persons charged with sexual assault were over 25 years of age" (Roberts:1994,7). In addition, the Sentencing Study reports that sentenced offenders aged 38 years or older were over-represented in sexual assaults[40]. In fact, 15% of all offenders were 53 years or older (Statistics Canada:1993,9).

In this study, the average age of the sentenced offender was 42 years old and as seen with the national data, older persons are over represented. In fact, 34% of the sample was aged 41 years or older, while only 20% were under 30 years old. The fact that the

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[37]An additional 1% was a corporation and the remaining 2% were unknown (Statistics Canada:1993,Table 2). The numbers do not add up to 100% because of rounding.

[38]The remaining 5% were missing cases.

[39]Due to the fact that the overwhelming majority of offenders in this study were male, offenders will be referred to through male pronouns. Since victims in this study were mostly female, they will be refer to through the use of female pronouns.

[40]Please note that this is the offender's age at the time of sentencing. However, the crime could have been committed years before.

age of the offender is so high may have a link with the predominance of child sexual abuse both in this sample and nationally. This will be discussed more fully in Chapter Three.

Relationship

One of the characteristics of sexual assault that has come to light in recent years is the predominance of 'acquaintance rape' over 'stranger rape' (Violence gainst Women:1993,2). The revised UCR data show that "[t]he most frequently occurring relationship category was "casual acquaintance" which accounted for 32% of sexual assault cases" (Roberts:1994,7) . Parents and family members accounted for almost one-third of all cases while only 20% were strangers (Roberts:1994,7). The Violence Against Women survey found similar results: close to one-half of all women experienced violence from men they know (including spouse, date, friend, family), while less than a quarter of women reported violence by a stranger (Violence Against Women:1993,2). The data regarding child sexual assault show similar patterns: the percentage of either father-figures or relatives as offenders ranged from a low of 30% in Saskatchewan to a high of 57% in Calgary (Hornick and Bolitho:1992,30).

The patterns of relationships between the complainants and the accused from this study largely mirror the national data. In this study, parents, stepparents and other family members accounted for 45% of the sample. Strangers made up only 6% of the sample, acquaintances close to ten percent and boyfriends or close friends accounted for 8% of the sample.

Injury and Force

Information on the type or nature of the act of sexual assault is not collected nationally. Thus, once again, local studies will be used as a basis for this data. A Department of Justice endeavour which commissioned studies in several cities across Canada, reports that physical force was reported in 63 percent of sexual assaults reported to police. This physical force consisted of grabbing or restraining (Roberts:1990a,37). Physical injuries

were present in 11% of cases reported to the police (Roberts:1990a,37). This study, however, did not report any data concerning psychological or emotional harm.

The Violence Against Women survey indicates that one-in-five incidents reported to the survey resulted in physical injury (Violence Against Women:1993,2). Victims of violence also describe a high level of emotional injury: nine-in-ten complainants report suffering from emotional trauma (Violence Against Women:1993,6). As for child sexual assault, physical violence has been reported in approximately ten percent of cases (Hornick and Bolitho:1992,31). The low percentage of physical abuse in child sexual assault is not surprising since the accused is often older than the child and need not resort to physical force in order to overpower the victim (Gunn and Linden:1994,85). In the sample used for this study, it was found that among sentenced cases, judges mentioned the use of force as a factor in 89% of cases for which data were available. Unfortunately, information on this variable was only available for 52 out of 97 cases.

Conclusion

Up to this point general information on sexual assault and sentencing has been presented. In the following chapters, the specific findings of this study will be discussed. Given that there is little information in terms of what factors are aggravating and mitigating in the determination of sentence, this research aims to address this matter. Thus, issues such as sex of judge, age of offender, violence, breach of trust and mental illness will be explored. A more in depth look at the role and importance of factors such as breach of trust, psychiatry, and violence will follow.

Chapter Three

Selected Findings: A Discussion of Some of the Data Collected

In this section, the various factors that were hypothesized as affecting the length of sentence handed down by the courts will be explored. These variables include the accused's prior record, age of the offender and complainant, sex of complainant, the number of counts that were laid against the offender, as well as the number of different counts with which he was charged. The effect of the offender's plea, whether or not he expressed remorse and the impact of a breach of a trust relationship will also be investigated. Finally, the findings generated from this sample will be compared to those from other research efforts. This will allow for the testing of the reliability of the findings from this study and for the formation of conclusions respecting the effects of certain variables on sentence length.

Sex of Judge[41]

Some authors have posited that the sex of the judge will impact upon the type of sentence handed down (LaFree, Reskin and Visher 1985; Langley et al. 1991; Nelligan 1988). In order to test this hypothesis, however, jurors and mock jurors rather than judges, have been the subject of the studies. LaFree, Reskin and Visher (1985) found that the sex of the juror did not affect juror perception of offender's guilt, and Nelligan (1988) found that the number of males and females on rape-case juries is unrelated to their propensity to convict or acquit. Contrary to these court findings, two student surveys have found that the sex of the juror was found to exert an influence upon the

[41]This study deals with sex of judges only, and not with jurors. This is because all of the cases in the sample were adjudicated by judge alone.

perceive the incident as rape, considered the event to be more violent, and were more punitive toward the perpetrator. Males were much more likely to blame the victim and to say that the victim desired sexual intercourse. The student survey conducted by Thornton, Ryckman and Robbins (1982) found similar conclusions, however a third student survey by Shotland and Goodstein (1983) found that sex of the juror was not a significant variable. It seems, then, that two-thirds of the student surveys found that the sex of the juror did impact on perceptions of the crime, while court studies showed that sex of juror is not a significant variable.

While the above studies dealt with the impact of the sex of a *juror*, in this study the effect of the sex of a judge on sentence length will be investigated. Judges, rather than jurors were the focus of this study because most cases of sexual assault are tried in front of a judge alone (LaFree:1989,153). In this sample, 64% of all single judges adjudicating cases were male and 7.3% were female. In Appellate courts there are three to five judges presiding in a given courtroom, thus reporting a single sex for these cases was not possible. Instead, the categories of "all male", "all female", "predominantly male" or "predominantly female" was used. Thus, in addition to the numbers reported above, there were 26 cases (27%) in which the sex of judge was predominantly male, while in 2% of cases judges were predominantly female. These numbers alone indicate that women are still not well-represented among the judiciary.

In order to test for the relationship between the sex of the judge and the length of sentence, the variable sex of judge was dichotomized. The variable was collapsed into the categories of "All Male" and "At least one female" in order to simplify the analysis and to facilitate the creation of meaningful tables. The final result was that in 64% of cases the judge was male, while 37% of all cases involved at least one female judge. A crosstabulation of sentence length by sex of judge was then conducted. The results of this procedure were not significant, with a p value of .68448. This finding of sex of the judge having no effect on sentence length is corroborated by the research conducted by LaFree Reskin and Visher (1985), Nelligan (1988) and Shotland and Goodstein

(1983). The only contrary evidence was the findings from the student surveys, and, given that these studies examined the effect of the sex of a juror rather than the sex of a judge, the conclusions from this study hold true.

Table 3.1

Sentence Length by Sex of Judge

Sentence Length	Sex of Judge: All Male (.00)	Sex of Judge: At least 1 female (1.00)	Row Total
.00 No time/Jail	27 44.3	14 40.0	41 42.7
1.00 Prison	34 55.7	21 60.0	55 57.3
Column Total	61 63.5	35 36.5	96 100.0

p >.05

Prior Record

Evidence of an accused's prior record has been hypothesized as a variable that will affect the length of sentence handed down. A prior record is often evidence that the offender is either dangerous and/or will be more difficult to rehabilitate[42] (Salhany:1989,347). When coding for evidence of prior offence, the categories of "no priors", "violent priors" and "other priors" were used. The category "no prior" specified those instances in which the judge mentioned that the offender had no prior record. "Violent priors" was used for cases in which the judge mentioned that the accused had a prior record for a violent criminal offence, such as sex offences or assaults. "Other priors" was used to categorize situations in which the judge said that the offender had a

[42]However, "[a]s a general rule, the court disapproves of the practice of increasing, because of a previous record, what would normally be an appropriate sentence for a particular crime since it must assume that the offender was dealt with for those offences, and must avoid punishing him twice" (Salhany:1989,347).

prior record, but in which the offence was not a violent crime. For example, this category includes property offences and drinking and driving convictions.

In order to examine the impact of prior offences on sentence length, a crosstabulation of prior offence by sentence length was conducted. In this first table (Table 3.2), sentence length was comprised of four categories: "No Time", "2 less a day", "24 through 36 months" and "36 months and higher". The results indicate that those offenders with violent priors are most likely to receive a sentence length of 36 months and up, while those with other priors received sentence lengths no higher than 24 through 36 months. These findings were significant with a p value of .00057. Thus, the type of prior offence can make a difference in the sentence length handed down, with violent priors leading to a longer length of incarceration followed by other priors.

Table 3.2

Sentence by Priors

SENTENCE	Count / Col Pct	PRIORS: No priors .00	Other Priors 2.00	Violent Priors 3.00	Row Total
No Time	.00	2 7.7		2 6.7	4 6.7
2 less a day	1.00	14 53.8	1 25.0	5 16.7	20 33.3
24 thru 36 month	2.00	1 3.8	3 75.0	4 13.3	8 13.3
36 months and up	3.00	9 34.6		19 63.3	28 46.7
	Column Total	26 43.3	4 6.7	30 50.0	60 100.0

P < .005

However, since there were only four cases in the category "other priors", it was collapsed with "priors" into one category. Furthermore, it was hypothesized that when there was no mention of an accused's prior record, it was equivalent to the accused

having *no* priors. A crosstabulation of "no priors" and "missing" was then conducted in order to test whether there was a significant difference between the two categories. The p value was .38636, which indicates a non significant relationship (Table 3.3). This leads to the conclusion that there is not a significant difference between "no priors" and the missing cases, and the two could be collapsed into one variable. After these manipulations, there were 56 cases in which the accused had no priors or there was no mention of prior offences (62%) and 34 in which there was evidence of a prior offence (38%).

Table 3.3

Sentence by Prior Offence

		PRIOR OFFENCE		
	Count Col Pct	no prior	N/A	Row
		.00	1.00	Total
SENTENCE				
No time/Jail	.00	16 61.5	15 50.0	31 55.4
Prison	1.00	10 38.5	15 50.0	25 44.6
	Column Total	26 46.4	30 53.6	56 100.0

P > .05

Finally, a crosstabulation of sentence length by dichotomized prior offence was conducted. Table 3.4 shows that if an accused had a prior record, the sentence length would be higher than if there was no prior record. Fully three-quarters of all accused who had priors received a sentence length greater than two years, while less than half of those with no priors received a similar sentence. The results were significant, with a p value of .00313. Prior offences, then, act as an aggravating factor in sentencing.

Table 3.4

Sentence by Prior offence

		PRIOR		
	Count Col Pct	no priors/ no mention .00	priors 1.00	Row Total
SENTENCE				
No time/Jail	.00	31 55.4	8 23.5	39 43.3
Prison	1.00	25 44.6	26 76.5	51 56.7
	Column Total	56 62.2	34 37.8	90 100.0

P < .005

These findings corroborate those from other studies. In research conducted at the University of Manitoba (1988b), it was found that if the offender has a previous record, the probability of incarceration increases. The presence of a previous record is also expected to increase the length of incarceration by 13.12 months (Manitoba 1988b). In addition, an offender's prior record has been found to be a good predictor of a guilty verdict by LaFree (1980) and LaFree (1989).

Furthermore, this finding is consistent with the following studies that looked to the mention of factors they deemed aggravating. Posynick and Benyk found that evidence of a prior violent criminal record was ranked third on a scale of specifically mentioned aggravating factors; however, it must be noted that it was only referred to in eleven percent of all cases (Posynick and Benyk:1991,42). Toews (1991) reports that if the sexual assault is the offender's first offence, then this lack of a prior record will act as a mitigating factor. Furthermore, this finding was corroborated by Benzvy-Miller (1998),

in a study comparing aggravating and mitigating factors in Alberta and Quebec. However, lack of a prior record was mentioned more often in Quebec than in Alberta (Benzvy-Miller:1988,14). The finding from Ellis' study provides a fitting conclusion: "[i]t can be assumed that a prior record is always an aggravating factor" (Ellis:1989,19).

It can therefore be concluded that evidence of an accused's prior record will be a factor which will increase sentence length. This finding is not surprising as part of the sentencing process is comprised of assessing an accused's risk to society (Salhany:1989,345). Evidence of a prior record may attest to the fact that the offender poses a greater risk than a person with no prior record. Furthermore, priors may indicate that the accused may be more difficult to rehabilitate as he has already reoffended.

Age of Offender

The age of the offender was also hypothesized as a good predictor of sentence length, with increasing age leading to shorter sentence lengths. The variable age of offender was broken down into 5 categories: "lowest through 20", "21 through 30", "31 through 40", "41 through 50" and "51 through highest". The greatest number of cases fell into the last category, with 30% of all offenders aged 51 and higher. As was seen in Chapter Two, the national data corroborate the finding that a large proportion of sexual assault offenders were older than 33 years old (Statistics Canada:1993,9; Roberts:1994,7). This finding may be explained by the high proportion of child sexual assaults both in this sample and nationally.

A crosstabulation of sentence length by age of offender was conducted in order to investigate whether the age of the offender impacted on sentence length. The results of the procedure were significant (p=.00360). Table 3.5 shows that the findings were slightly different than what was expected. While it was hypothesized that increasing age would lead to more lenient sentences, the relationship was in fact curvilinear: those

offenders who were on either side of the extremes (very young or very old) were least likely to get a sentence length greater than two years. Those most likely to receive a prison sentence were aged between 21 and 40 years old, followed by those aged 41 through 50 years old. The convicts least likely to get prison time are those who are younger than 20 and who are over 51.

Table 3.5

Sentence by Age of Offender

SENTENCE	Count / Col Pct	AGE lowest thru 20 (.00)	21 thru 30 (1.00)	31 thru 40 (2.00)	41 thru 50 (3.00)	51 thru highest (4.00)	Row Total
.00 No time/Jail		6	3	1	6	12	28
		85.7	23.1	8.3	46.2	60.0	43.1
1.00 Prison		1	10	11	7	8	37
		14.3	76.9	91.7	53.8	40.0	56.9
	Column Total	7	13	12	13	20	65
		10.8	20.0	18.5	20.0	30.8	100.0

P < .005

In studying the probablity of whether police laid charges in cases of child sexual assault, Gunn and Linden (1994,97) found that the age of the offender was not a significant factor. Given that Gunn and Linden (1994) investigated the specific issue of child sexual assault and the laying of charges, their findings can not disprove the conclusions of the present study. Furthermore, similar to the findings in this study, Toews reports that old age and youth seem to operate as mitigating factors (Toews:1991,31). Although Toews' finding was not based upon the specific effect of age on sentence length, it was based upon the context within which the factor was raised. Posynick and Benyk also reported that age of offender was mentioned as a mitigating factor in 6% of cases. Despite the seemingly low percentage, this factor was ranked seventh out of twenty-five (Posynick and Benyk:1991,43). However, the authors fail to mention the age at which judges considered it to be mitigating. Furthermore, the authors assumed

that age acted as a mitigating factor based upon the way the judges used the concept instead of the variable's impact on sentence length. A similar problem appears in the study conducted by Benzvy-Miller. In her research, she found that age of offender is mentioned more often in Québec than in Alberta. However, she does not specify whether the factor was considered mitigating or aggravating. Nor does she mention what age range she is referring to. Thus, the latter three studies only serve to show that age is a *factor* that is raised in sentencing hearings. Nevertheless, although the reviewed studies did not assess the impact of age on sentence length, their qualitative conclusions support the findings from this study. The finding from this study therefore corroborates the assertions and assumptions made by Toews, Posynick and Benyck and Benzvy-Miller.

In sum, this study supports the conclusion that old age and youth are considered mitigating factors. It may be that judges are excusing the young for their actions, with the hope that they will be rehabilitated. With respect to the elderly, judges may be reluctant to put them in jail for long periods of time. Furthermore, there were cases in which an elderly person was charged with an offence that had occurred between ten and twenty years prior to the sentencing hearing. In these cases, the judge may have considered that the offender had rehabilitated himself over the years, and that exemplary conduct since the offence occurred should mitigate the sentence. Another cause of these findings may be that the younger the offender, the less likely he was to have accumulated a history of prior offences, and will therefore be treated more leniently by the court than an older offender who has accumulated a greater number of prior offences.

Plea

Another variable which has been hypothesized as influencing sentence length is the plea of the accused. Often, a plea of guilt will be taken as a mitigating factor. This occurs because when an accused enters a guilty plea, the complainant need not testify at trial.

This is looked upon favourably as the complainant will not have to endure the trauma of recounting the events of the sexual assault. A guilty plea is also seen as an indicator of remorse on the part of the offender[43] (Salhany:1989,351; Posynick and Benyk:1991,5). Furthermore, a guilty plea is looked upon favourably as speedy trials reduce the financial cost of the administration of justice (Salhany:1989,351). In fact, Posynick and Benyk ranked a guilty plea as the variable most often mentioned in mitigation of sentence. This factor was referred to in 15% of all cases (Posynick and Benyk:1991,43). Furthermore, in her study of Quebec and Alberta sentencing decisions, Benzvy-Miller reports that a plea of guilt was mentioned often in mitigation of sentence in cases of sexual offences (Benzvy-Miller:1988,14). With the current data, however, one can test the specific effect of this variable on sentence length.

In this sample, 67% of all accused pled guilty, while 33% pled not guilty. In a crosstabulation of sentence length by plea, this finding did not prove to be significant since the p value was .28816 (Table 3.6). Thus, while the reviewed studies assumed

Table 3.6

Sentence by Plea

		PLEA		
	Count / Col Pct	Guilty .00	Not Guilty 1.00	Row Total
SENTENCE				
No time/Jail	.00	20 45.5	7 31.8	27 40.9
Prison	1.00	24 54.5	15 68.2	39 59.1
	Column Total	44 66.7	22 33.3	66 100.0

P > .05

[43]Please see below for further discussion on remorse.

that a guilty plea will act as a mitigating factor, the quantitative results from this study provide a contradictory result. This may indicate that while judges mention guilty pleas in the context of mitigating factors, this variable actually has no effect on sentence length.

Remorse

When an offender shows remorse for the crime that he committed, judges may often take this as a mitigating factor (Salhany:1989,351). Remorse is viewed as an offender taking responsibility for his offence, and may go towards showing that the offender will be able to be rehabilitated and not reoffend (Posynick and Benyk:1991,5). According to Posynick and Benyk, apparent remorse[44] was referred to in 9% of cases as a mitigating factor. This variable was ranked fourth out of twenty-five, indicating that despite the low percentage, it was considered to have occurred frequently. Furthermore, these authors found that evident *lack* of remorse was specifically mentioned in 5% of all cases. This factor was ranked seventh out of 16 variables considered to be aggravating (Posynick and Benyk:1991,42). Benzvy-Miller reports that a show of remorse was found to be a significant factor in mitigation of sentence in Alberta, while it was not used at all in Quebec (Benzvy-Miller:1988,14). Finally, Ellis also found that showing remorse was used as a mitigating factor (Ellis:1989,27). In all of these studies remorse is presumed to be mitigating by the way in which it was discussed by the judge, rather than by testing its effect on sentence length. Consequently, these studies merely indicate that remorse is mentioned often as a mitigating factor in sentencing.

In this study, data were compiled on remorse, and it was found that of the 39 cases for which data were available, over one half of all sentenced offenders expressed remorse, and 44% showed no remorse.

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[44]While the authors do not provide a definition of "apparent remorse", it is assumed that it means "expression of remorse".

Table 3.7

Sentence Length by Remorse

Count / Col Pct	Remorse .00	No Remorse 1.00	Row Total
Sentence Length .00 No time/Jail	11 / 50.0	6 / 35.3	17 / 43.6
1.00 Prison	11 / 50.0	11 / 64.7	22 / 56.4
Column Total	22 / 56.4	17 / 43.6	39 / 100.0

P > .05

As can be seen in the Table 3.7, above, 65% of those who showed no remorse received a prison sentence, compared to half of offenders who did show remorse. However, this finding was not significant with a p value of .35842. Thus, in contrast to the reviewed studies which assumed remorse to act as a mitigating factor, the data from this study indicate that remorse has no effect on sentence length. Given that there was a low number of cases in this sample, and that the other research on this issue did not test the specific effect of remorse on sentence length, further investigation on this variable is imperative.

Counts

a) Number of Different Counts

Often, an offender may be charged with a number of counts stemming from different offences. For example, an offender who sexually assaulted his daughter over a period of many years may be charged with incest, sexual assault and gross indecency. Furthermore, depending upon the nature of the crime committed, some offenders may be

charged with assault, aggravated sexual assault and robbery. Each charge requires a different burden of proof and responds to different acts. In this study it was hypothesized that if an offender was charged with a number of different counts his sentence length would be longer as his crime would be considered to be, on the whole, more severe. The variable number of different counts was used to code for the number of counts for different offences with which each offender was charged. The variable was dichotomized into the categories "up to two counts" and "3 counts or more". Of the 39 cases for which there was available information, there were 20 cases (51%) in which the offender had less than two different charges laid against him, while just under 50% of offenders were charged with three counts or more. Table 3.8 shows that the outcome of the crosstabulation was not significant with a p value of .12861.

Table 3.8

Sentence BY Number of Different Counts

		Different Counts		
	Count Col Pct	Up to 2 .00	Greater than 3 1.00	Row Total
SENTENCE				
No time/Jail	.00	10 50.0	5 26.3	15 38.5
Prison	1.00	10 50.0	14 73.7	24 61.5
	Column Total	20 51.3	19 48.7	39 100.0

P > .05

b) Number of Counts

It was also hypothesized that the number of counts of sexual assault an offender was charged with would affect the sentence handed down, with offenders charged with many

counts receiving harsher penalties than those charged with few counts. To code for this the variable count was used. This variable was dichotomized into the categories "one count" and "more than one count". More than half of all offenders in this sample had more than one count laid against them; 42% were charged with only one count of sexual assault. As Table 3.9 shows, the number of counts with which an offender was charged was not, however, significant since the p value was .73285.

Table 3.9

Sentence by Number of Count

Count / Col Pct	COUNT: 1 count (.00)	COUNT: more than 1 count (1.00)	Row Total
SENTENCE			
.00 No time/Jail	18 / 46.2	23 / 42.6	41 / 44.1
1.00 Prison	21 / 53.8	31 / 57.4	52 / 55.9
Column Total	39 / 41.9	54 / 58.1	93 / 100.0

P > .05

Breach of Trust

Some Theoretical Considerations

The rise of the women's movement led to the questioning of many assumptions regarding sexual assault. Feminists explain that one of the most pervasive myths surrounding the crime of sexual assault has been that of the 'stranger rape'. The rapist has often been characterized as a "sexual pervert who stalks his prey behind bushes only to release his aberrant sexual urges" (Stanko:1985,36; Estrich:1987,13; Brown:1991,5-7). Yet in recent years, the prevalence of 'acquaintance rape' has become recognised (Statistics Canada:1993,2). Acquaintance rape has become the term used to describe the numerous situations in which a sexual assault is perpetrated by someone familiar with

the complainant. While not always so, acquaintance rape "frequently involves an offender who is in a position of trust in relation to the victim" (Marshall and Symons:1992,2). A relationship of trust includes, but is not limited to, family members, teachers, clergy and professionals such as physicians and teachers (Marshall and Symons:1992,2).

The issue of breach of trust has become a focal point in recent years as feminists have urged for the recognition that a sexual assault by someone in a position of trust can have an especially devastating impact on the victim (Marshall and Symons:1992,1). While all victims of sexual assault suffer from both emotional and physical injuries, researchers have begun to highlight the different effects a breach of trust will have on the complainant (Panel:1993,36). When a relationship of trust is violated, the complainant must not only recover from the physical scars left behind, but from the deep emotional scars which hinder the ability to trust again. In response to this, as explained earlier, the law of sexual assault now states that if the accused induced consent by means of an abuse of power, authority or a position of trust, then consent is deemed not to have been given (s.273.1(2)(*c*)). Therefore, once there is an abuse of a trust relationship, the parties cannot legally consent to sexual activity.

Up until now, the literature review has been the main focus of the discussion, with a specific look at familial relationships. In the following section, the data from this study will be presented in order to form an understanding of the frequency and effect of breach of trust on sentence length.

Breach of Trust as a Factor in Sentencing

The first question to be addressed is the frequency with which breach of trust is acknowledged by the judiciary. Marshall and Symons report that 47% of the cases in their study involved breach of trust, yet in almost half the cases, breach of trust was not recognized explicitly (Marshall and Symons: 1992,10). For the purposes of this study,

two variables were used to collect information on breach of trust. The first variable was used to code for judicial mention of breach of trust, while the second was used to code for evidence of breach of trust independent of whether the judge referred to the variable. For this second variable, a trust relationship was defined as one which included family members, friends, teachers, babysitters, and members of the clergy or religious leaders, whether or not the judge made any mention of the concept. The findings of this study corroborate those found by Marshall and Symons: there was judicial mention of breach of trust in 40% of all cases, compared to 64% of all cases in which breach of trust existed on the facts of the case. These findings indicate that a large proportion of judges are not explicitly recognizing breach of trust when it is present, thereby not highlighting a key element of the crime.

Authors such as Marshall and Symons argue that when an existing relationship of trust is ignored, the crime itself may be misunderstood. When a judge fails to mention breach of trust, it intimates that the relationship between the complainant and the accused may have been ignored as a factor in sentencing[45]. Yet, as stated by feminist authors, when a relationship of trust exists between the complainant and the accused, a sexual assault takes on a new dimension, and therefore different issues may need to be addressed by the court. An omission of this sort also indicates that the notion of breach of trust is still ambiguous, which may lead to an inconsistent use of the concept by the courts. As long as the judiciary is not coherently articulating a clear and consistent message as to which relationships are "trust relationships", both the courts and the public will be uncertain about the ambit of "breach of trust".

The following cases will illustrate instances in which the specific concept of breach of trust was not articulated by the judiciary. In the case of *R* v. *T.F.C.*, [1992] A.J. No. 1170 (QL) (Prov. Ct. Crim. Div.), the accused was convicted of seven counts of sexual

[45]Some authors, such as Marshall and Symons, argue that even in cases where breach of trust is raised as an issue by the courts, "they are employing an unanalysed concept of it" (Marshall and Symons:1992,4).

assault involving two of his children and 5 of their friends. The accused, as the father of two of the complainants and as a trusted adult to their friends, was clearly breaching a trust relationship when committing the sexual assaults. The judge, however, makes no mention of his position of trust and its implication for the victims.

In another case, a 65 year old man was convicted on 15 counts of indecent assault which involved a total of 14 complainants. The complainant who was assaulted most often was one of his granddaughters, who commented, "I have been sexually assaulted by my grandfather for as long as I can remember" (*R.* v. *A.P.*, [1992] N.J. No. 235 (QL) (S.C.) at 1). The judge, in handing down a sentence of 22 months, made no mention of the breach of a trust relationship.

In these cases, a clear relationship of breach of trust is present, yet it is not specifically commented upon by the sentencing judge. Regardless of whether it would have impacted the sentence imposed, the omission has the potential to promote confusion in the courts. The courts must set out a clear definition of the ambit of "trust relationship" so that those relationships may be easily identified and dealt with in an appropriate manner by the courts.

The Effect of Breach of Trust on Sentence Length

Even when judges do recognize the existence of breach of trust in a specified case, does this influence the type of sentence handed down, and if so, how? In order to uncover the answers to these questions, a crosstabulation of sentence length by breach of trust was conducted. In investigating whether judicial recognition of a trust relationship impacted on sentence length, the variable breach of trust was used to represent those instances in which judges made a specific reference to the presence or absence of a breach of trust. This variable was coded as "yes" for those cases in which a specific reference to breach of trust was made, and "no" for those instances in which the judge specifically mentioned that the case did not involve a breach of trust. Table 3.10 shows that while 62% of accused who were considered to have breached a trust relationship

received a sentence length greater than 2 years, only half of those whom the judge believed to have specifically not breached a relationship of trust received a similar sentence. This finding was, however, not significant with a p value of .59121 (Table 3.10). The small sample size in this table may account for this non-significant result.

Table 3.10

Sentence by Breach of Trust

Count / Col Pct	BREACH No Breach (.00)	Breach (1.00)	Row Total
SENTENCE			
.00 No time/Jail	3 / 50.0	15 / 38.5	18 / 40.0
1.00 Prison	3 / 50.0	24 / 61.5	27 / 60.0
Column Total	6 / 13.3	39 / 86.7	45 / 100.0

P > .05

In the study conducted by Posynick and Benyk, the authors claim that breach of trust is used as an aggravating factor. They report that breach of trust was ranked as the aggravating factor mentioned most often in sentencing decisions (Posynick and Benyk:1991,42). However, since the authors only collected data on the frequency with which the variable appeared rather than testing the specific effect of breach of trust on sentence length, their study does not actually demonstrate that breach of trust acts as an aggravating factor.

Marni Allison also claimed that breach of trust is often used as an aggravating factor. However, she presents two caveats to this conclusion. First, breach of trust was exclusively based on the narrow definition of the parent-child relationship, thus ignoring the multitude of relationships which may involve trust such as doctor/patient, teacher/pupil and clergy/congregants. Furthermore, the author found that judges tend to

define the exploitation of a previous intimate relationship, such as a sexual assault of an ex-wife, as a *mitigating* factor; this indicates that full recognition of breach of trust as an aggravating factor is still questionable (Allison:1991,290). Despite these findings, Allison's conclusion that breach of trust acts as an aggravating factor is not based upon an analysis of the effect of breach of trust on sentence length. Instead, breach of trust was assumed from the outset to be an aggravating factor, and the author simply reported the frequency and the context within which it appeared (Allison:1991,287).

According to the data in this study, however, breach of trust has no effect on sentence length, while the data from Posynick and Benyk and Allison merely show that breach of trust was a variable often referred to as an aggravating factor. This indicates that while judges may refer to this variable in the context of aggravation, it in fact has no effect on sentence length in this study, and its effect in other studies is unknown.

Other Indicators of Breach of Trust

Relationship

While a relationship of trust can exist between two adults, the majority of victims in the sample used for this study are child victims of sexual assault. When dealing with child sexual abuse, one quickly notices that the vast majority of offenders are members of the child's family (Gunn and Linden:1994,92). In the sample used for this study, 68% of all offenders were family members when the victim was a child, compared to 35% for adult victims. As a result, when the victim is a child, judges may be inferring that a relationship of trust exists. Furthermore, the factors that a judge considers to be mitigating or aggravating may not also be specifically articulated in the decision as they are not required to do so. Thus, even when a judge does not explicitly mention the concept "breach of trust", s/he may still be taking that factor into account. This may occur as a judge may believe that the issue of breach of trust is so obvious, it need not be specifically articulated.

In this study, the variable complainant/accused relationship was used to code for the presence of differing types of relationships between the complainant and the offender. The variable was coded into the following categories:

- **Family:** for the primary familial relationships of husband-wife, parent-child and siblings (29%).
- **Extended Family**: included extended familial relationships such as aunts and uncles, grandparent-grandchild and cousins (20%).
- **Step Parent**: for relationships of step-parent to step-child and for relationships of foster-parent and child (9%).
- **Professional Relationship**: for the relationship between a teacher and student, doctor and patient, clergy and congregant (8%).
- **Boyfriend/Close Friend**: included the relationship of a friendship or in which the complainant and the accused were considered to be boyfriend and girlfriend (11%) [46].
- **Acquaintance:** this category characterized relationships in which the accused and the complainant were merely known to each other prior to the offence (12%).
- **Stranger:** this category was for cases in which the complainant and the offender did not know one another prior to the offence (8%).
- **Prostitute:** this characterized a relationship in which the complainant and the accused were engaged in a prostitute-client relationship (3%).
- **N/A:** represented those cases in which no information on the relationship between the offender and the complainant was available.

However, in order to conduct statistical procedures, the variable needed to be simplified, thus dichotomizing it into "Family" (which was comprised of the categories: Family, Extended Family and Step-Parent) and "Other" (for the remaining categories except for N/A). The cases which were not available (N/A) were treated as missing cases.

[46] There were no instances of same-sex couples in this sample.

Table 3.11 shows that 57% of accused who were family members of the complainant received a sentence length greater than two years, compared to 52% of offenders in the category "Other". However, as can be seen in Table 3.11, the percentages are not significantly different, with a p value of .6566. This finding indicates that the relationship between the complainant and the accused has no effect on sentence length.

Table 3.11

Sentence by Complainant/Accused Relationship

	Count / Col Pct	RELATIONSHIP Family .00	Other 1.00	Row Total
SENTENCE				
No time/Jail	.00	19 43.2	15 48.4	34 45.3
Prison	1.00	25 56.8	16 51.6	41 54.7
	Column Total	44 58.7	31 41.3	75 100.0

P > .05

When the complainant is a child, a relationship of trust may be presumed in a far greater array of relationships than when the complainant is an adult. Thus, judicial use of the concept "breach of trust" may be affected by the age of the complainant. Therefore, a crosstabulation was conducted of sentence length by the relationship between the complainant and accused, holding the age of complainant constant. Table 3.12 shows that when the complainant is an adult, over three quarters of all accused who were not related to the complainant received prison time compared to 57% of

accused who were related to the complainant. This finding was not significant, however, since the p value was .35720.

Table 3.12

Sentence by Complainant/Accused Relationship
Controlling for..
Age of complainant Value - .00 adult

Count / Col Pct	Complainant/Accused Relationship: Family (.00)	Other (1.00)	Row Total
SENTENCE			
.00 No time/Jail	3 / 42.9	3 / 23.1	6 / 30.0
1.00 Prison	4 / 57.1	10 / 76.9	14 / 70.0
Column Total	7 / 35.0	13 / 65.0	20 / 100.0

P > .05

Table 3.13 shows that, when the complainant is a child, fifty-six percent of those who were related to the complainant received prison time, compared to just over one third of those who were not related to the complainant. However, the relationship is also not significant (p .16843).

Table 3.13

Sentence by Complainant/Accused Relationship
Controlling for..
Age of complainant Value = 1.00 child

Count / Col Pct	RELATIONSHIP Family .00	Other 1.00	Row Total
SENTENCE .00 No time/Jail	16 / 44.4	11 / 64.7	27 / 50.9
1.00 Prison	20 / 55.6	6 / 35.3	26 / 49.1
Column Total	36 / 67.9	17 / 32.1	53 / 100.0

P > .05

Age of Complainant

It was also hypothesized that some judges would consider a relationship of trust to exist merely by virtue of the age of the complainant. As was explained earlier, when an adult commits a sexual assault against a child, judges may infer that the simple fact that the complainant is a child means that a relationship of trust exists without regard for the actual relationship between the complainant and the offender. While the prior hypothesis tested for the effects of age controlling for relationship, this hypothesis is based on the main effect of age alone. Thus, the impact of the age of the complainant as a factor in sentencing was investigated[47]. A crosstabulation of sentence length by the age of the complainant (Table 3.14) showed that the relationship was non significant since the p value was .11687. Age of the complainant, then, has no effect on sentence length.

[47]All offenders in this sample were over the age of 18 and were therefore all considered to be adults.

Table 3.14

Sentence by Age of Complainant

SENTENCE	Count / Col Pct	AGE of Complainant: adult .00	child 1.00	Row Total
.00 No time/Jail		7 29.2	31 47.7	38 42.7
1.00 Prison		17 70.8	34 52.3	51 57.3
	Column Total	24 27.0	65 73.0	89 100.0

P > .05

Discussion and Analysis

Researchers at the University of Manitoba (1988b) also investigated the impact of a complainant/accused relationship on the probability of incarceration and sentence length. After conducting a TOBIT regression, they found that if the accused was a parent of the complainant, the probability of incarceration decreases (University of Manitoba:1988b,71). As well, they found that the probability of incarceration would decrease if the complainant had knowledge of the offender, but the offender was not a parent. Furthermore, researchers found that a parental relationship is expected to decrease sentence length by 14.43 months and that a known offender/complainant relationship (other than parent) will decrease length of incarceration by 18.31 months (University of Manitoba:1988b,71).

In sum, the data from the University of Manitoba show that a parental relationship will act as a mitigating factor, as it decreases sentence length. In addition, a relationship in which the complainant knows the offender, but the offender is not a parent, will also act as a mitigating factor. This latter relationship, according to the University of Manitoba study, will be even more mitigating than a parental relationship as it leads to a greater

decrease in sentence lengths. If the assumption is correct that a parental or close relationship between the accused and the complainant reflects a relationship of trust, then the data from the University of Manitoba seem to imply that trust relationships act as *mitigating* factors in sentencing rather than as *aggravating* factors. This finding is in contradiction with the non-significant effect of the complainant/accused relationship on sentence length found in the present study. The difference between the two samples, is however, that the findings from the University of Manitoba are the result of a TOBIT regression, in which many variables are included in the equation. This procedure, then, examines the joint effect of the variables in question. Thus, the contradictory findings between the two studies may be explained by their different statistical techniques.

Researchers from the University of Manitoba also investigated the impact of the complainant's age on the probability of incarceration and sentence length. They reported that if the complainant is less than 18 years old, the probability of incarceration will increase. Furthermore, they found that an offender's length of incarceration will increase by 10.08 months if the complainant is less than 18 years old. In addition, the study by Posynick and Benyk report that the youthful age of the complainant was reported as an aggravating factor in 6% of cases (Posynick and Benyk:1991,42). This factor was ranked sixth on sixteen factors; thus it was considered to have been mentioned frequently. Unfortunately, Posynick and Benyk did not test the specific impact of age on sentence length, and it was thus simply inferred to be aggravating by the frequency with which it was mentioned. In contrast, then, the data from the University of Manitoba indicate that the youthful age of the complainant will act as an aggravating factor in sentencing, while the data from the present study indicate that age has a non-significant effect on sentence length.

An examination of the data in this study showed that breach of trust does not have a significant effect on sentence length. The same held true for the effect of age of the complainant and the impact of the relationship between the complainant and the accused on sentence length. In light of the lack of research which specifically addresses the

impact of these variables on sentence length, further research on this issue is necessary in order to truly understand judicial use of the concept.

Another problematic aspect of the concept of breach of trust, is its application by the courts. As seen above, judges are inconsistent in their use and application of the term. This inconsistency surrounding the definition of a breach of trust may lead to the confusion that is reflected in the courts. In light of this confusion, it is imperative that the issue of breach of trust receive more attention from the judiciary, so that clear guidelines and precedents may be set. The caveat remains, however, that judges are not under any obligation to articulate every factor that is taken into consideration. However, what can be seen from this study is that when breach of trust is raised in a judgement it is not interpreted in a consistent manner.

Conclusion

There was a wide range of findings generated from the data collected for this study. While some of the hypothesized relationships were confirmed, other hypotheses resulted in non-significant results which indicate that the variable in question had no effect on sentence length. For example, the effect of prior offence on sentence length was significant, showing that a prior offence will lead to a longer sentence length. Furthermore, it was found that either old age or youth will act as a mitigating factor in sentencing. However, the variables sex of judge, sex of complainant, plea, show of remorse, number of different counts as well as number of counts for sexual assault an offender was charged with were all found to have no effect on sentence length.

In addition, the data from this study indicate that the relationship between the complainant and the accused did not have a significant effect on sentence length. Furthermore, the impact of the relationship between the complainant and the accused was even non-significant when the age of the complainant was controlled for. The findings from this study may also indicate, as was seen in the cases of the offender's

plea and whether or not he showed remorse, that while certain factors are mentioned as mitigating or aggravating factors, they might have no impact on sentence length. This indicates that a statistical analysis of the impact of factors deemed aggravating and mitigating is crucial. Given that many of the studies reviewed did not test for the specific impact of the variable on sentence length and the small sample size in this study, further quantitative research should be conducted in order to confirm the present findings.

In the following chapter, the discussion will turn to the issue of the influence of the offender's psychiatric condition of sentence length. Here, the main focus will be on a presentation of the expected impact of psychiatric evidence on sentence length, compared to the findings from the present study. In Chapter Five, the issue will turn to the concept of violence. Here, the discussion will center upon judicial definition of the concept of violence, and its impact on sentence length.

Chapter Four

The Myth of Rapists and Other Normal Men: Psychiatric Considerations

> In the public imagination, the rapist is pictured as a misshapen satyr with pointed ears and cloven hoofs. He is consumed with lust, and totally unable to control his animal passions. The rapist represents the negative side of the masculine principle, in which lust is untempered by reason, and desire unmediated by morality (Clark and Lewis:1977,134).

In discussions concerning the issues of rape and sexual assault, much time is devoted to an analysis of the rapist. Early analyses claimed that rapists were mentally ill, psychotic, or in some way abnormal (Clark and Lewis:1977,134; Torrey:1991,1022). This view of the rapist has been called the "psychiatric model", as it stemmed from a traditional psychiatric analysis. Feminist theorists explain that the rapist was characterized in this manner because he could not be conceived of as "normal"; it would not be admitted that a "normal" man could rape a woman or a child. Rapists had to be mentally ill. As is explained in Chapter 5, there are certain aspects of a rape which serve to legitimize it. A mentally ill or deranged offender is integral to this myth; feminists explain that when a man rapes a woman or a child, it is automatically assumed that there is something wrong with this man, otherwise, he could not have done it.

In recent years feminists have asserted that rapists are *normal* men. According to feminist theory, the view of the rapist as mentally ill is simply a form of denial. It has been a way to excuse the behaviour of the men who rape women (Clark and Lewis:1997,135). Researchers have conducted studies in order to determine the validity of this feminist assertion. Check and Malamuth surveyed these studies, which included psychiatric tests of convicted rapists, surveys of the male population as well as student

*Note: The title for this chapter is a modification of one written by Clark and Lewis 1977.

surveys (Check and Malamuth:1985,415). The outcome of the psychiatric surveys indicate that there are "very few differences between rapists and non rapists which would justify any conclusion that rapists are grossly abnormal" (Check and Malamuth:1991,415). The other surveys they reviewed affirmed this result as well. Despite these conclusions, feminists posit that the myth of the rapist as mentally ill may still be thriving in the courts (Torrey:1991,1023; Ellis:1989,19; Toews:1991,31).

Some authors suggest that mental illness may be perceived by the judiciary as a way of excusing the offender's actions. Meg Ellis, in her study of sentencing patterns in British Columbia notes that there is a

> widespread assumption that many, if not most, of those who commit sexual offences are suffering from a mental condition, whether or not it is classified as 'illness', while those who commit bank robberies are not. A 'condition' or 'illness' implies the offender was not acting completely out of choice, that he is not completely to blame for his actions" (Ellis:1989,19).

Marni Allison reported that in her sample, judges used mental illness and sexual deviancy as a way to minimize the offender's culpability. She explains that:

> the 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 (Allison:1991,293).

According to both Ellis and Allison, then, judicial use of psychiatric labels is problematic. They argue that this reliance on psychiatry diverts the responsibility for the crime from the offender to the illness, and consequently fails to address the true cause of sexual assault in our society. According to this viewpoint, the "psychiatric model" is problematic because it is used to deny that rapists are normal men; it is a

denial that rape is the normal product of a society which devalues women (cf. MacKinnon 1991).

Indeed, in the sample used for this study, there was evidence of judicial use of psychiatric factors in sentencing. Moreover, the following cases are examples of instances in which judges raised the issue of psychiatry with no reference to a psychiatrist's report or diagnosis. For example, in *R.* v. *O'Brien*, [1992] O.J. No. 2818 (QL) (Gen. Div.) at 3, the judge was sentencing an offender who had sexually assaulted two girls. Justice Forestell stated that the accused in this case "has a bit of a fetish with women's breasts, as I note in both factual situations they played an important part in his actions". Here, there is no indication of a psychiatric report; the diagnosis of a "fetish" was made by the judge alone. The labelling of sexual assault offenders as "sick" is what Ellis and Allison may describe as the misguided notion that "normal" men do not rape women.

In the case of *R.* v. *A.P.*, [1992] N.J. No. 235 (QL) (S.C.) [hereinafter *A.P.*], the accused was convicted of the sexual and indecent assault of 14 girls. The judge, in describing the offender, characterized him as depraved and said, at page 4, that he was "obviously a sick man". In sentencing the offender to a total of 22 months in prison, Justice Roberts said, "[h]opefully the treatment he will receive in prison and during probation afterwards, and the fact of imprisonment itself, will teach the Accused that his sexual perversions will not be tolerated" (*A.P.* at 6). Here, there being no mention of a psychiatric report to corroborate his assertions, it seems that the judge "diagnosed" the accused himself.

In another case, a similar judicial attitude is expressed. This instance involved a doctor who made housecalls to two women who were ill. On each occasion, the accused made verbal sexual overtures toward them and attempted to kiss and embrace each woman. The court was presented with a psychiatric report which described the offender as "suffering from a distinct and diagnosed medical disorder" (*R.* v. *Sears*, [1992] O.J. No.

3059 (QL) (Gen. Div.) at 3 [hereinafter *Sears*]). Despite the presence of the psychiatric report, the judge proffered his own diagnosis: "[h]e has, medically speaking, *in my view*, a disease of the mind in more than one area" (*Sears* at 3; emphasis mine). It seems then, that this judge felt compelled to offer his own opinions on the matter -- his own, lay, opinion.

The above examples have illustrated that, as Ellis and Allison argue, there are instances in which judges seem to rely on psychiatric evidence in sentencing. This, they may argue, is evidence that psychiatric factors are being used to characterize sexual assault offenders as deviant or sick; a characterization that culminates in the denial of rapists being normal men.

While some feminist authors have questioned judicial reliance on psychiatric factors, Canadian sentencing commissions have endorsed it. In 1987, the Canadian Sentencing Commission suggested that "evidence of...mental impairment" should act as a mitigating factor in sentencing (CSC:1987,28). One year later, the Daubney Commission made the same recommendation that mitigating factors should include evidence of the mental impairment of the offender (Daubney:1988,67). Moreover, according to some studies, judges are indeed using psychiatric factors as a mitigating factor in sentencing. One study, conducted by Toews (1991), claims that "diminished responsibility" seems to act as a mitigating factor in the sentencing of sexual assault offenders (Toews:1991,31). In addition, the British Columbia Sentencing Study (Ellis 1989) classified mental health problems as a mitigating factor in sentencing. Nevertheless, these two studies did not test for the effect of psychiatric evidence on sentence length nor did they specify whether psychiatric factors were mitigating in all cases. Instead, this factor was assumed to be mitigating based upon the context within which it was raised.

In the sample used for this study, there were indeed cases in which judges specifically stated that mental illness was considered to be a mitigating factor. For example, in *R.* v. *Cryderman* (3 November 1992), No. 9201-1113-CO (Alta. Q.B.) at 8, the Court

stated that, "[t]he accused's psychiatric illness was regarded by the court here as a mitigating factor". In *R.* v. *F.G.B.*, [1993] M.J. No.99 (QL) (C.A.) [hereinafter *F.G.B.*], the accused was convicted of indecent assault and sexual assault, and was sentenced to fourteen months' incarceration. He then appealed the sentence on the grounds that the original sentence did not take into account the special circumstances of his case. In essence, he argued that he has been in therapy for several years, and that his emotional state is fragile. The accused's psychiatrist submitted that "incarceration over an extended period of time could result in harm to the accused" (*F.G.B.* at 3). Justice Helper, speaking for the Court, agreed with the argument, and substituted the fourteen month sentence with a prison term of nine months. The original three-year probation order was confirmed. Mental illness[48], then, was said to mitigate the offender's sentence in both of these cases.

Finally, in *R.* v. *R.S.R.*, [1993] N.S.J. No.42 (QL) (S.C.A.D.) [hereinafter *R.S.R.*], the accused was appealing his sentence on the conviction of sexual assault. He was convicted of sexually assaulting his wife, from whom he had been separated for 14 months. The Crown introduced a psychiatric report into evidence. This report stated that the accused was suffering from: "a Bipolar Affective Disorder - Manic Type, with alcohol abuse" (*R.S.R.* at 5). Both the Crown and the defence agreed that this mental illness should be taken into consideration as a mitigating factor. The judge did indeed take the accused's mental condition into account as the "primary mitigating factor" (*R.S.R.* at 10). It seems then, that in these cases, judges are implementing the recommendations of the two sentencing commissions and are using psychiatric evidence as mitigating factors.

[48]In *R.* v. *F.G.B.*, mental illness was expressed in terms of a 'fragile emotional state.'

Testing the Hypothesis

In light of the above discussion, the present study, given the available data collected on psychiatric factors, conducts an analysis to see if judges use mental illness as a method to divert the responsibility for the crime from the offender to the illness. As explained above, such a shift in responsibility would act as a mitigating factor in determining sentence length. In order to test this hypothesis, information was collected on whether judges mentioned the presence or absence of mental illness when speaking to sentence, and was coded as the variable psychiatric. The variable is comprised of two categories: "Yes" for those cases in which the judge specifically mentioned that mental illness was a factor in the sentencing decision and "No", for cases when the judge articulated that mental illness was specifically *not* a factor in the sentencing decision.

It was then assumed that those cases where data on psychiatric factors were not available, in essence, the missing cases, were no different from the category "No" (when the judge specifically mentioned that mental illness was not a factor in sentencing)[49]. Thus, the cases where psychiatric conditions were not specified were combined with the category "No" in order to create a new category, labelled "No Psychiatric Conditions". Then, in order to test the impact of psychiatric evidence on sentence length, a crosstabulation of Sentence Length by Psychiatry was conducted. Table 4.1 shows that there is a significant difference between the sentence lengths given to offenders whom the judge specifically mentioned to be mentally ill compared to those cases in which there was no data on psychiatry or in which psychiatry was specifically mentioned as a non-factor. This finding was significant, with a p value of .05593. The impact of this variable turned out to be opposite of what the literature would expect one to find.

[49]Before combining the two categories, a crosstabulation was conducted in order to test whether there was not a significant difference between the category "no" and the missing cases. The results of this procedure showed that there was not a significant difference between the two categories (p= .67429) and that they could therefore be combined.

Psychiatric factors, according to the data in this study, act as *aggravating* factors in sentencing.

Table 4.1

Sentence by Psychiatric Evidence (n/a-no)

SENTENCE	Count / Col Pct	Psychiatric No/N/A (.00)	Psychiatric Yes (1.00)	Row Total
.00 No time/Jail		33	8	41
		48.5	27.6	42.3
1.00 Prison		35	21	56
		51.5	72.4	57.7
	Column Total	68	29	97
		70.1	29.9	100.0

P- .05593

Surprisingly then, those offenders who are believed to be mentally ill received harsher penalties than those cases where psychiatric factors were not explicitly mentioned or considered. In fact, when psychiatry was deemed to be a factor in sentencing, 72% of cases received a sentence length greater than two years, compared to only 52% of cases in which psychiatry was specifically not a factor in sentencing or when no mention of psychiatry was made. Thus, this finding contradicts the studies cited above, in which mental illness was found, or assumed, to be a mitigating factor.

Furthermore, another crosstabulation was conducted with sentence length and those cases where there was only specific mention of the offender's psychiatric condition; the instances where there was no psychiatric condition specified were simply left as missing cases. Thus, there were seventeen cases where judges determined that a psychiatric condition was not a factor in the case and 29 cases where psychiatric conditions were specified as factors. This allowed for an examination of the difference between the distinct categories of "Yes" and "No", without the interference of the missing cases. Table 4.2 shows that seventy-two percent of cases which contained a reference to mental illness involved a prison sentence, compared to just under half of those cases which did not include any such reference. This finding was not significant, however, with a p value of .08549. While this finding is not significant, it is close enough to the .05 level that, taking into account the findings from Table 4.1, a trend may be identified that judges are using mental illness as an aggravating factor in sentencing. One of the

Table 4.2

Sentence by Psychiatry

		PSYCHIATRY		
	Count Col Pct	No .00	Yes 1.00	Row Total
SENTENCE				
No time/Jail	.00	9 52.9	8 27.6	17 37.0
Prison	1.00	8 47.1	21 72.4	29 63.0
	Column Total	17 37.0	29 63.0	46 100.0

P > .05

reasons that this finding is not significant may be that there are 51 missing cases, while Table 4.1 has no missing cases.

One might suspect that what accounts for the significant impact of psychiatric assessments is confounded with severity of the act committed. Perhaps those cases where the offender was considered to be mentally ill were cases that were aggravated because of the offender used force in the commission of the offence. Therefore, the severity of the act was controlled to determine if psychiatric assessment has an effect independent of the severity of the act. Thus, a crosstabulation was conducted of sentence length by psychiatric assessment controlling for the severity of the act. In this study, the severity of the act was coded for using the variable use of force. The variable was coded as "yes" for instances when the judge specifically mentioned that the accused used force, coercion or threats to gain the complainant's submission. Furthermore, cases were coded "no" when the judge articulated that threats, force, or coercion were *not* a factor in the case. In addition, the variable was defined as including either verbal, psychological or physical force.

Table 4.3 shows that, controlling for the severity of the offence, there remains a significant difference between the categories of "yes" and "no", with a p value of .02923. In other words, when severity of the act is controlled for, those offenders whom the judges believed to be mentally ill are still more likely to receive a harsher penalty than those cases in which psychiatry was not believed to be a factor in sentencing. Unfortunately, there was not a sufficient number of cases in the category "no" for the variable force to present a table. The sub-table for the category no force was comprised of only six cases: 4 in which there was no psychiatric evidence and 2 in which there was. The remaining cases were missing because there were so few instances in which judges specified the absence of force. Thus, there is insufficient data at this time to examine the effect of psychiatric considerations on sentence length when the judge specified an absence of force. Nevertheless, the data from the "yes" category are sufficient to show that evidence of a psychiatric problem will act as an aggravating factor in sentencing when the offender uses force. Thus, offenders who are considered to be mentally ill, and who are perceived to have used force in the commission of the offence are almost certain to go to prison.

Table 4.3

Sentence by Psychiatry
Controlling for..
Force Value - 1.00 Yes

	Count / Col Pct	PSYCHIATRY: No (.00)	PSYCHIATRY: Yes (1.00)	Row Total
SENTENCE				
No time/Jail	.00	3 50.0	2 10.0	5 19.2
Prison	1.00	3 50.0	18 90.0	21 80.8
	Column Total	6 23.1	20 76.9	26 100.0

P < .05

Conclusion

In sum, the data from this study contradict the assertions made in the studies by Ellis (1989) and Toews (1991) reviewed above. While the latter two studies claimed that psychiatric factors mitigated sentence length, the data from this study unquestionably show that this factor is aggravating. However, as explained above, a reason for this contradiction may lie in methodological issues. Toews and Ellis used a qualitative approach, in which the variable was considered to be mitigating based upon the context within it was raised, rather than its effect on sentence length. In this study, information was collected on whether psychiatric considerations were raised as an issue, and then, based upon the variable's impact on sentence length, it was deemed to be aggravating. It seems then, that there is a contradiction between the qualitative conclusions and the quantitative conclusion. Herein lies the quandary: there seems to be a contradiction

between what judges are saying, and what judges are doing. While judges may speak about psychiatry as a mitigating factor and may refer to it in a manner which suggests the diversion of responsibility, judges are in fact giving harsher penalties in these cases. Even in this study there were instances in which judges stated that psychiatry was a mitigating factor, yet, nevertheless, they gave unusually severe sentences. Furthermore, the finding that psychiatric evidence acts as an aggravating factor counters the recommendation made by both the Canadian Sentencing Commission and the Daubney Commission that mental illness should be used as a mitigating factor. Evidently, there is a fundamental tension with respect to the treatment and effect of psychiatric evidence in the courts. The issue of the impact of psychiatric evidence then, is certainly an area that is in need of further study.

The finding that psychiatric evidence aggravates sentence length has some grave implications for those concerned with understanding the crime of sexual assault. First, the seemingly accepted notion that such factors mitigate sentence length must be reevaluated. If legislators truly believe that psychiatric assessments should influence sentencing in such a manner, clearly some changes need to be made and the actual impact of this variable should be taken into consideration. Second, the implications of this finding should be considered in light of feminist theory. Feminist theorists have been wary of the use of psychiatric factors in the mitigation of sentence, when, in fact, the data from this study indicate an opposite relationship. The feminist critique may thus need to be reevaluated, with more attention being placed on the ways in which judges determine an offender to be mentally ill. Since the data show that when judges believe and offender to be mentally ill they will give longer sentences, an investigation into judicial construction of this label would be informative. Since the implications of this study are so widespread and question some of the basic assumptions made by those involved in the criminal justice system, it is certainly an issue that should be explored in further research.

Chapter Five

REAL RAPE: Exploring the impact of the myth

> Many Nova Scotia judges, mirroring a confusion in our society, can't seem to agree on whether sexual assault is violent or sex itself is violent, whether sexual assault is caused by lust or illness or lack of morals, and whether sexual assault is even harmful to the victim (Toews:1991,37).

As the definition of sexual assault has evolved over the years, there has been a gradual understanding that victims of sexual assault are legitimate victims of violence. Yet with this shift in the interpretation of sexual violation as a sex crime to a form of assault, some feminists assert that the reality of the crime has been distorted. As merely a form of assault, the focus tends to fall upon the physically violent nature of sexual assaults; violence limited to physical violence. Feminists assert that a complainant will suffer from harm and injury regardless of whether overt violence and force were manifested in the sexual assault.

There is overwhelming evidence that sexual assaults are more likely to be committed by someone known to the victim than by a stranger. As both U.S. and Canadian statistics demonstrate, many incidents of sexual assault are perpetrated by an acquaintance, friend or family member (Violence Against Women:1993; Schafran:1993,443). These instances of sexual assault are often not manifested in an overtly assaultive manner, however, "the impact of these assaults is now known to be at least as great as that of stranger sexual assault" (Marshall and Symons:1992,1; Toews:1991,26). Physical violence may not be prevalent in these cases of 'acquaintance rape' as an element of trust may exist between the complainant and the perpetrator. Thus, in this type of case, coercion or threats may be used rather than physical force.

Nevertheless, the myth that "real rapes" are only those committed by strangers persists (Brown:1991,5-7). The "real rape" is limited to a physically violent rape of an "innocent" woman by a stranger. When a woman's experience of rape does not fit in with this stereotypical depiction of the crime, it has historically been dismissed as a fantasy or as a woman's 'cry of rape' (Estrich:1987,5)[50]. Susan Estrich, a law professor, was herself a rape victim. While exploring the concept of "real rape", she says,

> In many respects I was a very lucky rape victim; if there can be such a thing....I am lucky because everyone agrees that I was really raped. When I tell my story no one doubts my status as a victim. No one suggests that I was "asking for it." No one wonders, at least out loud, if it was really my fault....But the most important thing is that he was a stranger; that he approached me not only armed, but uninvited; that he was after my money and car...as well as my body (Estrich:1987,3).

Feminists explain that the myth of "real rape" is powerful; indeed it is the reason many women do not report the crime to the police (Estrich:1987,14; Mackinnon:1987,81; Brown:1991,5-32). When a woman is sexually assaulted by someone she knows, she fears that she will not be believed because her reality of rape does not conform to the myth of "real rape". She is not lucky.

In light of the viewpoint described above, the effect of the relationship between the accused and the complainant on sentence length was investigated. According to police and prosecutorial studies, police are less likely to make arrests when there is a prior relationship between the complainant and the accused (LaFree 1981). Court studies (LaFree, Reskin and Visher 1985; Ekos 1988a), which consist of jury outcomes and interviews with criminal justice personnel, as well as student surveys (Weiner and Vodanovich 1986) have found that a prior relationship between the victim and the

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[50]The term "cry rape" has been used in reference to women who make false accusations of rape. Rape has often been referred to as the crime which is 'easily claimed but hard to prove'. Some feminist theorists posit that this arose because of men's fear of women's power to name them as rapists (Tong:1989,101).

accused tends to lead to acquittals. The question remains whether sentence lengths are influenced by the relationship between the complainant and the accused.

In this study, the presence of a relationship between the complainant and the accused was coded as the variable Relationship. Data on the following categories were collected: Family, Extended Family, Step Parent, Professional Relationship, Boyfriend/Close Friend, Acquaintance, Stranger, Prostitute[51]. However, in order to facilitate the analysis, this variable was dichotomized into the categories of Family (consisting of the categories Family, Extended Family and Step Parent) and Other (the remainder of the categories). A crosstabulation of sentence length by relationship between the complainant and accused was then conducted in order to test whether such a relationship impacted on the length of sentence handed down. However, as Table 5.1 shows, these findings were not statistically significant, with a p value of .65566. Thus, contrary to the theoretical viewpoints discussed above, the data from this study indicate that the relationship between the complainant and the accused will not affect sentence length. Since the relationship between the complainant and the accused does not impact on sentence length, this may in fact indicate that feminist concerns are being addressed; in essence, the data show that "stranger" rapes are not considered to be more serious than a sexual assault by a family member.

[51]Please refer to Chapter Four for a full description of this variable.

Table 5.1

Sentence by Complainant/Accused Relationship

Count / Col Pct	RELATIONSHIP: Family (.00)	Other (1.00)	Row Total
SENTENCE			
.00 No time/Jail	19 / 43.2	15 / 48.4	34 / 45.3
1.00 Prison	25 / 56.8	16 / 51.6	41 / 54.7
Column Total	44 / 58.7	31 / 41.3	75 / 100.0

P > .05

Violence: Judicial Use of the Concept

Theoretical and Methodological Considerations

As indicated in the first section, the "real rape" is circumscribed by the notion that in addition to the perpetrator being a stranger, violence must be an integral part of the crime in order for it to be deemed legitimate. Violence may be defined by excess physical force used by the offender in addition to the crime itself or even by the sexual act that was committed. As will be illustrated in this chapter, judicial definitions of sexual assault vary greatly and may be applied to a wide range of acts.

Before discussing the issue of violence, it is necessary to discuss the particular dynamics of the sample collected for this study, as they will form a backdrop for the discussion. In this sample, 68% of all accused were related to the complainant, while only 6% involved "stranger rape". The majority of cases in this sample, while falling under the rubric of "acquaintance rape", involve unique dynamics, with 67% of all complainants being children. It should be noted that when dealing with child sexual abuse, a relationship between the accused and the complainant is often characterized as a

relationship of trust. Therefore, in these cases, the courts' focus tends to be on the breach of trust, rather than the concept of acquaintance rape[52].

While there is a high number of child complainants in this sample, the following discussion will present data from studies which consider both adult and child complainants of sexual assault. These studies deal with issues of violence, injury and force, issues that affect both adult and child complainants. Furthermore, certain authors have posited that child and female complainants are treated in a similar fashion by members of the criminal justice system (Smart 1989). Both child and female complainants have been traditionally viewed as making unsubstantiated claims of sexual assaults. This perception has prompted one judge to opine that, "[i]t is well known that women in particular and small boys are liable to be untruthful and invent stories" (as quoted in Smart:1989,53). Furthermore, both women and children have been the subjects of corroboration requirements when alleging of sexual assault. It is in this context that the following is presented.

As mentioned earlier, feminists assert that integral to the myth of the real rape is the notion of violence. Not only must the assailant be a stranger for the crime to be a real rape, the complainant must also suffer physical harm. Here then, the concept of violence is intertwined with the concept of physical injury. This is evidenced by the historical legal requirement which included proof of violence and/or physical injuries to the complainant. The requirement of corroboration in the pre 1983 rape law stemmed from the belief that a woman's accusation of rape could not be believed without corroborating evidence[53]. The rape victim needed evidence such as torn clothing, injuries or a witness in order to corroborate her testimony of the rape (Clark and Lewis:1977,48). If the judge reasoned, in a particular case, that no corroborative

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[52]Please refer to the Chapter Three for a discussion of this topic.

[53]The "corroboration requirement" was abrogated with the passing of Bill C-127. Authors have argued that while the requirement was legally abrogated, it is still being used. Please see Clarke 1993 for more information.

evidence had been presented, a guilty verdict would not be entered (Clark and Lewis:1977,49).

When a woman is attacked she is expected to fight off her assailant. As a consequence of her struggle to protect her sexuality, a "real" victim of rape is expected to suffer from physical injuries (Estrich:1987,19). Feminists explain that the notion that a woman must fight her attacker is a product of the belief that she can prevent the sexual assault from occurring. As a psychiatrist remarked, "It's not possible to rape a woman unless she is willing--physiologically possible, I mean--is it?" (Hazelwood and Burgess:1987,12). When a complainant does not attempt to physically resist the attack, she is often considered to have consented to it; she is not a victim of "real rape" (Brown:1991,5-18).

The myth of violence in sexual assault is one which permeates all levels of the criminal justice system. Two measures of violence are the physical injury sustained by the complainant, and the degree of force used by the accused in order to gain the submission of the complainant. In their study of police behaviour, Bradmiller and Walters (1985) found that amount of force was one of the two most powerful predictors of the seriousness of a charge. Loh's 1980 police and prosecutorial investigation revealed that the degree of force used by the perpetrator has been found to increase the likelihood that an offender will be charged and prosecuted. Student surveys have shown that the degree of force used by the perpetrator will increase the likelihood that an offender will be convicted, with a greater degree of force associated with more perpetrator guilt (Langley et al. 1991; Shotland and Goodstein 1983; Burt and Albin 1981). Force, then, may also be a variable which will aggravate sentence length.

In police and prosecutorial studies investigating the impact of the presence of an injury to the complainant, injury has been found to be a good predictor of a charge (Kerstetter 1990; University of Manitoba 1988b; Clark and Lewis 1977; LaFree 1981). A recent study on the police processing of child sexual abuse cases reports that charges were more likely to be laid where the complainant sustained injuries

(Gunn and Linden:1994,97). The study conducted by the University of Manitoba (1988b) reports that 3 out of eight prosecutors regarded injury to the complainant as not important in the decision to prosecute, but significant for corroborating the charge. Finally, Minch, Linden and Johnson (1987) found that the presence of an injury was associated with a case being retained at the police level.

However, in terms of convictions, findings from court studies (which consist of jury outcomes and interviews with criminal justice personnel) have been mixed. The presence of injury to the complainant has been found to be a good predictor of guilt in some studies (Reskin and Visher 1986; Feldman-Summers and Palmer 1980), yet in others injury did not have an effect on the conviction of an offender (LaFree, Reskin and Visher 1985; Baril, Bettez and Viau 1989; University of Manitoba 1988b). The study conducted by Ekos Research (1988a) reports that 53% of the cases in which the victim was injured resulted in a conviction. When there were no physical injuries to the victim, 56% resulted in convictions. Finally, Minch, Linden and Johnson (1987) found that the presence of an injury was not associated with a case being "retained" in the system. In light of these contradictory findings, the effect of presence of an injury on convictions is uncertain.

Nonetheless, a great deal of the current literature seems to argue that:

> judges' sentencing practices frequently ignore victims' psychological injuries and minimize the seriousness of the crime when there is no evidence of physical injury as it is commonly understood, or, bashing and slashing (Schafran:1993,441).

Patricia Marshall also reported that "in case after case, the inherent violence involved in sexual violation is not recognized" (Marshall:1988,220). Posynick and Benyk found that the lack of violence or injury to the complainant was mentioned as a mitigating factor in 11% of all cases. Despite this low percentage, it was ranked as the third most frequently occurring variable out of 25 factors (Posynick and Benyk:1991,43). Marni

Allison explains that, "while the law delineates varying degrees of violence, judges delineate the absence or presence of violence. This distinction presupposes that a sexual assault can occur without violence" (Allison:1991,288). In a recent study by Renate Mohr, she explains that in cases where there was extraneous physical violence the sentences are "higher than most of the sentences for simple sexual assault, revealing that threats of power are underestimated, bodily harm resulting from rape is underestimated, and violence is often considered as an 'added' consequence of sexual assault" (Mohr:1994,165). The latter four studies are not, however, based upon an analysis of the specific effect of violence on sentence length. Thus, while the studies attest to the context of judicial understandings of violence and the frequency with which it is mentioned, they do not offer information with respect to the impact of the variable on sentencing.

Although there is some contradictory evidence in the court studies, the emphasis in the above research seems to indicate that judges are placing a greater focus on what is called "fist-in-the-face" violence rather than the psychological injuries and violence that, some claim, are inherent in sexual assault (Schafran:1993,442; Mackinnon: 1991,1285; Toews:1991,38). As Allison explains,

> [t]he analysis also reveals a tendency by judges to minimize the physical impact of sexual violence. It is clear that judges tend to view the physical impact of most sexual attacks as relatively minor. During sentencing, judges tend to rely on the need for medical treatment as evidence of "injury" (Allison:1991,289).

Some authors argue that this focus on violence is especially damaging due to the high rates of acquaintance rape, in which most complainants do not report physical injuries, but rather psychological and emotional harm (Schafran:1993,443). As Meg Ellis points out, "[c]learly there is a need to provide information to judges to show the nature of post-sexual abuse and post-rape trauma, to quash any notions that there was no injury or no lasting harm" (Ellis:1989,34).

The assessment of the impact of violence in the current study examines those cases in which a judge made mention of force or violence being used in the sexual assault. The variable use of force was coded as "yes" for instances when the judge specifically mentioned that the accused used force, coercion or threats to gain the complainant's submission. Furthermore, cases were coded "no" when the judge articulated that threats, force, or coercion were *not* a factor in the case. As the coding relied upon judicial definitions of force, the variable included either verbal, psychological or physical force. Since, in this sample, judicial definitions of force were not limited to physical force, the variable could not be confined to such instances. In essence, since there was no coherent standard among judges for what constituted force, the coding of this variable relied strictly upon specific judicial mention of this factor, which meant that force was defined very broadly.

Overall, judges mentioned force in 48% of cases, and specified "no" force in 6% of cases[54]. Furthermore, in a crosstabulation of sentence length by force, it is clear that when the judge recognizes force as a factor in a sexual assault, the sentence will be harsher. As Table 5.2 shows, this finding was significant, with a p value of .00019. In fact, 76% of cases in which the judge mentioned force, the penalty was two years or greater, and when no force was specified, the sentence length was always less than two years. Thus, in accordance with the studies reviewed, the recognition of force as a factor in a sexual assault has an aggravating impact on the severity of the sentence.

[54]46% of cases were missing information on this variable.

Table 5.2

Sentence by Force

Count / Col Pct	FORCE: No (.00)	FORCE: Yes (1.00)	Row Total
SENTENCE			
.00 No time/Jail	6 100.0	11 23.9	17 32.7
1.00 Prison		35 76.1	35 67.3
Column Total	6 11.5	46 88.5	52 100.0

P < .005

Another measure of the severity of the crime of sexual assault is the precise act that was committed. Ellis, in her study of British Columbia sentencing decisions, claims that the *absence* of penetration was sometimes considered to be a mitigating factor. She notes that while the advocates of legal reforms hoped to, and succeeded in, removing penetration as a required element of the offence of sexual assault, it still has a great impact on the judiciary. She explains: "[t]his is a very strange approach, rather like finding it favourable to an accused robber that he left behind valuables he might have taken" (Ellis:1989,12). Marni Allison presents a similar point of view: "[t]he findings also indicate that judges continue to focus on the type of sexual act involved in the offence. They tend to emphasize penile-vaginal penetration as the ultimate violation and thereby underestimate the significance of other forms of violation" (Allison:1991,290). Thus, to these authors, that the type of act is used as an aggravating factor in sentencing is problematic because it tends to emphasize the aspect of the sexual assault that most resembles a "real rape". The type of act, then may influence judicial definitions of violence. Depending upon the judge, the type of act may lead to different perceptions

of violence; while some judges may only consider penetration to be a violent act, others may define any sexual act as inherently violent.

In the current study, it was hypothesized that if the act is, for example, intercourse, the sexual assault will be considered to have been more severe than if the act was not intercourse. For the purposes of this study, the presence of the sexual acts of intercourse, digital penetration, fellatio and cunnilingus, and other acts were coded for. Given the size of the sample, the variable had to be simplified in order to adequately consider its impact on sentence length. Thus, the variable was collapsed into the categories "intercourse" and "all other acts". In order to arrive at this dichotomy, a crosstabulation of the categories: digital penetration, fellatio and cunnilingus and other acts was conducted. This procedure was undertaken in order to verify that the acts other than intercourse were not significantly different from each other to warrant separate categories. Indeed, Table 5.3 shows that the categories are not significantly different form one another, with a p value of .68803. Consequently, the acts other than intercourse (ie. digital penetration, fellatio and cunnilingus and other acts) were collapsed into one category.

Table 5.3

Sentence by All other acts

		Other Acts			
	Count / Col Pct	digital penetration 1.00	fellatio & cunnilingus 2.00	other 3.00	Row Total
SENTENCE					
No time/Jail	.00	5 / 62.5	6 / 54.5	14 / 70.0	25 / 64.1
Prison	1.00	3 / 37.5	5 / 45.5	6 / 30.0	14 / 35.9
	Column Total	8 / 20.5	11 / 28.2	20 / 51.3	39 / 100.0

P > .05

Using the dichotomous variable, the impact of the type of act on sentence length was assessed. Table 5.4 shows that the procedure yielded significant results (p=.00060). The findings indicate that when the act is intercourse, the accused will receive a harsher penalty than if the act is not intercourse. In three-quarters of cases in which intercourse occurred, offenders received sentence lengths greater than two years while only 36% of cases involving other acts received a similar sentence. In other words, when the act committed is intercourse, judges seem to consider the sexual assault to be more severe, and this will be considered to be an aggravating factor in sentencing.

Table 5.4

Sentence by Act

	Count / Col Pct	ACT: Intercourse (.00)	ACT: All Others (1.00)	Row Total
SENTENCE				
.00 No time/Jail		11 26.2	25 64.1	36 44.4
1.00 Prison		31 73.8	14 35.9	45 55.6
	Column Total	42 51.9	39 48.1	81 100.0

P < .005

Given the large number of children in the sample, however, one must control for age to see if the relationship between the act committed and sentence length holds true for both adults and children. In this case, it could be argued that the key issue in sentencing is whether or not the complainant was a child, rather than the act that was committed. In order to test this hypothesis a crosstabulation was conducted of sentence length by act, controlling for age of complainant. Table 5.5 shows that, for the category of child, 73% of all cases in which the act was intercourse received a prison sentence compared to less than one-third of cases in which the act was *not* intercourse. This finding is significant,

with a p value of .00311. Thus, for the category of child, when the act is intercourse, sentence lengths will be longer. In other words, when the complainants are children, those cases in which the act was intercourse are still more likely to receive a harsher penalty than those cases in which the act was not intercourse.

Table 5.5

Sentence by Act
Controlling for..
Age of complainant Value = 1.00 child

	Count / Col Pct	ACT: Intercourse .00	ACT: All Others 1.00	Row Total
SENTENCE				
.00 No time/Jail		7 28.0	21 67.7	28 50.0
1.00 Prison		18 72.0	10 32.3	28 50.0
	Column Total	25 44.6	31 55.4	56 100.0

P < .005

However, when the complainant is an adult and the act is intercourse, the relationship is not significant (p=.69589). As Table 5.6 shows, the difference in percentages was not very high, with 75% of all cases which involved intercourse receiving a prison term, and 67% of all non-intercourse cases receiving a similar sentence length. Thus, when the complainants are adults, the type of act will have no impact on sentence length. In essence, the two tables reveal that there is an interaction between the act committed and the age of the complainant; the impact of act on sentence length holds true but only under the condition of the victim being a child. When the victim is an adult, if the act was intercourse, this will not aggravate the sentence imposed by the judge.

Table 5.6

Sentence by Act
Controlling for..
Age of complainant Value = .00 adult

		ACT		
	Count / Col Pct	Intercourse	All Others	Row Total
		.00	1.00	
SENTENCE				
No time/Jail	.00	4 25.0	2 33.3	6 27.3
Prison	1.00	12 75.0	4 66.7	16 72.7
	Column Total	16 72.7	6 27.3	22 100.0

P > .05

In sum, the data from the current study show that, for children, when the act committed is intercourse, this will act as an aggravating factor. Conversely, when the act is not intercourse, this will be used as a mitigating factor. This finding is corroborated by research conducted at the University of Manitoba (1988b). Researchers found that if the act committed is touching/grabbing, this too will decrease the probability of incarceration, and is expected to decrease sentence length by 20.71. Their conclusion with respect to the mitigating effect of "touching/grabbing" is similar to the mitigating effect (under the condition of children) of the category "other acts" in this study. Thus the two sets of data corroborate each other with respect to this variable. Therefore, it can be concluded that when the act is *not* intercourse, this will act as a mitigating factor in sentencing.

Researchers at the University of Manitoba (1988b) also found that if the sexual contact was attempted intercourse, the probability of incarceration decreases and attempted intercourse is expected to decrease the length of incarceration by 8.06 months (University of Manitoba:1988b,71). Researchers theorize that this result is probably due to the fact that penetration is no longer a legal requirement for a charge of sexual assault[55]. However, the University of Manitoba study investigated the impact of *attempted* intercourse, rather than intercourse, while the current study focused on intercourse versus all other acts. Thus, while the data from the present study found that, for the category of children, intercourse will aggravate sentence length, the data from the University of Manitoba show that *attempted* intercourse will mitigate sentence length. This fundamental difference between the two sets of data means that, with respect to this variable, the data are not comparable.

The findings from this study also have direct implications for some of the feminist concerns raised earlier. Ellis and Allison both argue that judges rely too heavily on the type of act that was committed, highlighting the aspect of the crime that most resembles a "real rape". However, in this study, the type of act that was committed has no effect on sentence length for the category of adults. Thus, while for child complainants, the feminist concerns ring true, judges are not using the type of act to aggravate sentence lengths when the complainant is an adult. This indicates that while there may still be some problematic aspects regarding judicial treatment and understanding of the crime of sexual assault, especially considering that penetration has been removed as a legal requirement for this crime, the judiciary does seem to be responding to some of the issues raised by feminist writers.

[55]Please refer to Chapter 2 for further discussion on the changing legal requirements for the offence of sexual assault.

Judicial Conceptions of Force and Violence

While the findings from this study show that force and act (in some cases) are used as aggravating factors, only the qualitative data can speak to which cases and instances are defined as comprising force. As explained above, by relying on judicial definitions of force, the coding of the variable could not be confined to instances of physical violence. Instead, force included incidents of physical, psychological or verbal force. Thus, a qualitative investigation will reveal the content and context of judicial definitions of the variable. With this knowledge, an attempt can be made to construct judicial understanding of the definition of violence. However, as the following examples illustrate, there is an inconsistency in the use of the concepts of force, violence and injury in the courts. The problem of judicial concepts of violence and force still remains. Many judges are basing the definition of violence upon the notion of physical violence and, in the absence of such overt physical force are labelling such incidents as non-violent.

In the case of *R.* v. *H.C.P.*, [1992] N.J. No. 23 (QL) (S.C.T.D.) [hereinafter *H.C.P.*], a fifty-one year old man was convicted of indecently assaulting an eight year old boy over the course of eight years. The acts consisted of touching, anal and oral sex, which the judge characterized as "reprehensible in the extreme" (*H.C.P.* at 34). However, the sentencing judge later commented that there was actually "no violence involved" (*H.C.P.* at 30). In this case then, since there was no other physical force described, the judge is equating violence with the physical force and assaultive acts that may accompany sexual acts in some cases of sexual assault. Since, in this case, the complainants were children, verbal or psychological force, rather than physical force may have been used by the offender. This lack of overt physical violence seems to have led the judge to conclude that these sexual assault were non-violent.

In another case, a 49 year old man was convicted on four counts of sexual and indecent assault of two young girls. The accused lived with the mother of the complainants, and he assaulted her children for many years. The accused touched the breasts and genital

area of the first child from the time she was five years old. The second child was digitally penetrated by the accused and after each incident he gave her money and told her not to tell her mother. In discussing mitigating and aggravating factors, the judge explained that with regards to the first child, "[t]here was no violence during the assaults" (*R.* v. *D.C.*, [1992] N.J. No. 375 (QL) (S.C.T.D.) at 7 [hereinafter *D.C.*]). Had there been violence, he said, it would have been considered an aggravating factor (*D.C.* at 7). In equating violence with physical injury, the judge disregarded what Schafran, Mackinnon, Ellis and others consider a distorted perception of sexual assault. According to their viewpoint, to label the incident as non-violent is to adhere to the notion of "fist-in-the-face" violence, ignoring the victim's reality of the crime.

Other members of the judiciary demonstrate a different understanding of the nature of sexual assault. They express an understanding of sexual assault as a violent crime in itself; for them, the definitions of violence, injury and harm are conflated. For example, in *R.* v. *P.V.K.* , [1993] N.S.J. No.208 (QL) (C.A.) [hereinafter *P.V.K.*], Justice Saunders, of the Nova Scotia Supreme Court Trial Division, sentenced a 36 year old man to five years imprisonment. The accused had been convicted of sexually assaulting his daughter when she was between the ages of five and ten years old. Even after the accused and his wife were separated, the sexual assaults continued when the child visited him every second weekend. The sexual assaults ranged from sexual touching to intercourse. While counsel for the defendant argued that the accused should not receive a lengthy prison term because there was no clear evidence of violence, the judge replied, "I cannot agree. One cannot say that your conduct did not amount to acts of violence....one must recognize that *any sexual assault is a violent act.* You violated her sexual integrity and her self-worth" (*P.V.K.* at 112; emphasis mine). Here we see a clearly articulated understanding of violence as encompassing a wide range of acts and of the varying ways in which harm can be inflicted on a victim of sexual violence.

In the case of *R.* v. *P.R.P.*, [1993] N.S.J. No.117 (QL) (C.A.) [hereinafter *P.R.P*], the Crown appealed a sentence in which the accused was the complainant's uncle, convicted

f raping her when she was approximately 14 years old. The trial judge had remarked: "[t]he sexual act it appears was not a particularly violent act, there were no threats...there was no beating or bruising or anything of that nature..." (*P.R.P.* at 9). Mathews J.A., speaking for the appellate court, commented that, "[r]ape is a particularly violent act. With deference, the fact that there was no beating or bruising, fails to take into consideration the disastrous effect this offence has..." (*P.R.P.* at 9). Mathews J.A. makes the effort to express that violence is an inherent aspect of all sexual assaults, as did Justice Saunders in *P.V.K.*.

Similar understandings of the violence inherent in sexual assault are evident from other cases:

> Even in the absence of collateral violence or overt threats, sexual assault is a crime of violence (*R.* v. *Weaver*, [1993] N.S.J. No.91 (QL) (S.C.) at 15).
>
> L'absence de violence physique contre la personne de la victime sera normalement un facteur à prendre en considération sauf que le viol est par soi même un acte de violence et laisse des cicatrices psychologiques qui sont probablement plus sérieuses que des marques laissées par des coups (*R.* v. *Macryllos*, [1993] A.Q. No.1040 (QL) (C.A.) at 5).
>
> [It is not necessary that threats be] articulated for a situation such as this to be deemed threatening...[W]hile degrees of violence or threats may undoubtedly be considered as more or less aggravating factors in sentencing, it does not necessarily follow that their absence operates to reduce the seriousness of the offence (*R.* v. *G.M.* (1992), 58 O.A.C. 390 at 394).
>
> [S]exual assault is a crime of violence (*R.* v. *R.S.R.*, [1993] N.S.J. No.42 (QL) (S.C.A.D.) at 10).

In the above cases the definition of violence is broadened to encompasses harm that may be both physical and psychological.

Yet, in some cases, despite overt physical violence, harm to the victim is grossly underestimated. In *R.* v. *Savoie*, [1993] N.J. No.319 (QL) (Q.B.) [hereinafter *Savoie*], the 37 year old accused was convicted of sexually assaulting a 16 year old girl with the help of two other men. The judge considered as an aggravating factor that there was "violence and force used in this case"; in fact, the accused and his accomplices held down the complainant and used Vaseline in order to facilitate intercourse (*Savoie* at 15). However, in discussing factors in mitigation of sentence, the judge said, "the victim in this case, although forced to submit to sexual activities, was not in fact physically hurt and it appears with the help of specialized personnel will eventually be able to put behind her the negative effects of the crime perpetrated upon her" (*Savoie* at 15). Here, a classic case of real rape is presented; yet, the judge does not acknowledge the physical and emotional harm inflicted upon the complainant. Feminists argue that when judges define violence as physical injury, and do not acknowledge the lasting harm inflicted by a sexual assault, this further victimizes the complainant, but this time by the criminal process and the administration of justice.

Judicial definitions of force, violence and harm diverge greatly. On one end of the spectrum are the judges who define sexual assault as inherently violent, while other judges look for indicators of physical violence and injuries before conceding that the sexual assault was a violent act. While it appears that some judges are defining sexual assault in a way which addresses feminist concerns, there still remains some antiquated concepts that guide judicial decisions. Thus, while force and act (for the category of child complainants) were undoubtedly used as aggravating factors in sentencing, the scope of judicial constructions of the concept of violence remains undefined.

In conclusion, there are some definite indicators that can be used to predict judicial perception of the severity of sexual assault. The presence of force and the type of act, for the category of children, will affect the length of sentence handed down. When force, as defined by the judiciary, is present and when the act is penetration, it seems that judges view the crime as more severe, and will hand down longer sentences. While

these are certainly aggravating circumstances, reliance upon them tends to overshadow the violence inherent in sexual assault.

The myth of real rape and the equation of violence with physical injury, and of physical injury being its sole cause, is still prevalent among some members of the judiciary. However, there is evidence that the women's movement has made some impact on judicial understanding of this concept. Judges are acknowledging that there can be many types of injury, harm and violence. Yet, the courts are still far from articulating a coherent and consistent understanding of the many forms of injury which result from sexual assault. Consistency from the bench on this matter, along with a clear understanding of the nature and meaning of violence and injury, is critical.

Concluding Remarks

Feminist concerns regarding judicial treatment of sexual assault deal with a wide scope of issues, ranging from breach of trust and violence, to psychiatric considerations. This thesis has canvassed the main issues that have been raised both by feminist authors and by the literature surrounding sexual assault. The data from this study have been used to investigate judicial treatment of sexual assault and the validity of the claims, assumptions and concerns regarding the sentencing of adults convicted of sexual assault. Specifically, the main goal of this thesis has been to investigate the impact of certain variables on sentence length. This was done in an effort to determine which factors are considered by the judiciary in the mitigation and aggravation of sentence.

The findings from the data in this study have shown that some feminist considerations are being dealt with adequately by the legal system, from the legislature to the judiciary. The legislature's response to the concerns of some women's groups seems to have led to

a change in the courts. For example, recall the discussion about breach of trust in Chapter Three. The feminist literature on the topic indicates that, with the rise of child sexual assault and acquaintance rape, relationships of trust should be taken into account in sentencing as aggravating factors. The literature also raises the concern that the myth of "real rape", with its focus on "stranger rapes", would overshadow the reality of sexual violence perpetrated by someone known to the victim. In order to address these concerns, this study analysed the relevant variables, with mixed results. With respect to the relationship between the complainant and the accused, it was found that there was no effect on sentence length. This indicated that feminist concerns regarding "stranger rape" were not substantiated. In effect, feminist considerations seem to have been taken into account, as "stranger rapes" did not receive harsher sentences than those cases in which the offender was related to the complainant; both were understood as legitimate crimes. With respect to breach of trust, however, feminist concerns remain valid. The data showed that whether or not the judge recognized breach of trust as a factor in the case, this had no effect on sentence length. This indicates that a breach of a trust relationship does not act as an aggravating factor in sentencing.

When dealing with sexual assault, much of the literature has focussed upon the offender. As was explained in Chapter 4, one of the main issues has been the perception of the offender as mentally ill. Feminist authors have argued that this has operated as a denial that "normal" men rape women and children. Consequently, offenders are not held fully responsible for their crime and may be treated more leniently by the courts. It was also explained that two Canadian sentencing commissions recommended that psychiatric factors be taken into account in mitigation of sentence. Furthermore, this tension between the feminist viewpoint and the position of the sentencing commissions was investigated. The results were surprising: the data showed that psychiatric considerations actually worked to aggravate sentence length. This finding raises important questions not only with respect to the commissions' recommendations, but to the implications of feminist concerns. In essence, it was found that when offenders were believed to be mentally ill, and when they used force in the commission of the

offence, they would almost be sure to go to prison. Thus, in light of this conclusion, further research might look to questions of judicial construction of the mentally ill offender.

The last chapter dealt with an issue that lies at the heart of sexual assault: violence. Here, the impact of judicial perceptions of violence on sentence length was analysed, in addition to an exploration of the varying ways in which judges defined the concept. In an investigation of the impact of the type of act on sentence length, some encouraging results were found. The data showed that, with respect to adult complainants, the type of act will not impact on sentence length. This indicates that for the category of adults, penetration, which is no longer a legal requirement for sexual assault, is not considered to be an important factor by the judiciary. With respect to child victims of sexual assault, however, the act committed still has an impact on the judiciary, indicating that intercourse is considered to be a more severe violation of the child complainant than any other act. Feminist authors have argued that such a view is damaging to the complainant, as it ignores the harmful effects of *any* sexual act perpetrated against a complainant.

The impact of judicial perceptions of force was also investigated. With respect to this variable, it was found that when judges perceived force to have been an element of the sexual assault, sentence lengths would be longer. Since, in this study, force was not confined to physical force, the interpretation of the results may be ambiguous. A qualitative investigation of this concept revealed that no single definition of violence is employed by the judiciary. While some state that any sexual assault is inherently violent, others assert that when no physical injuries are sustained by the complainant, then the sexual assault was not violent. Further research, which utilizes a specific measure of injury would help to shed light this issue which is integral to a proper understanding of judicial attitudes and perceptions of violence in sexual assaults. On a more general level, the limitation of this study is that the data was based upon those issues that the judges addressed in their judgements. Since the judiciary does not

necessarily articulate all the factors used in mitigation and aggravation, the study was limited to those that were specifically mentioned. Further research, then, may include data from interviews with judges, in which they are asked to specifically list those factors they believe to be relevant in sentencing sexual offenders. Finally, this study was also limited by its focus on one year's worth of data soon after Bill C-49 was passed.

In conclusion, the data from this study showed that feminist concerns are, to a certain extent, being addressed by the judiciary. It is evident that judicial attitudes are changing with respect to the antiquated notion that penetration is a required element of sexual assault, yet with respect to children, this notion still holds true. Awareness of the reality of acquaintance rape has also influenced the judiciary, as evidenced by the relationship between the complainant and the accused having no effect on sentence length. Thus, there is evidence that judges are responding to the victim's reality of the crime. This change, however, is not complete. There are still issues where the influence of outdated myths and conceptions show through, as was seen with the case of breach of trust. This thesis has also shown, through qualitative data, that sentencing issues are not dealt with in a consistent and coherent manner by the judiciary. The definitions of force, violence, and breach of trust are all crucial to an understanding of sexual assault, yet judges continue to offer contradictory interpretations of these concepts. As long as this inconsistency remains, both the courts and the public will be receiving mixed messages. This, in turn, will lead to a continued lack of understanding of both the crime of sexual assault and the needs of its victims. Until the judiciary defines these concepts in a clear and consistent manner, victims of sexual assault will continue to be victimized by the criminal justice system. This goal, however, is attainable. As this study has shown, change can, and is, occurring.

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