

Summer 1984

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### Recommended Citation

Anthony Walsh, *Differential Sentencing Patterns among Felony Sex Offenders and Non-Sex Offenders*, 75 *J. Crim. L. & Criminology* 443 (1984)

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# DIFFERENTIAL SENTENCING PATTERNS AMONG FELONY SEX OFFENDERS AND NON-SEX OFFENDERS\*

ANTHONY WALSH\*\*

## I. INTRODUCTION

More than thirty years ago, commentators noted that "there is doubtless no subject on which one can obtain more definite opinions and less definite knowledge" than in the area of the sentencing of sex offenders.<sup>1</sup> The literature is no less deficient today. There are numerous assertions to the effect that sex offenders receive draconian penalties<sup>2</sup> while certain feminist theorists maintain that sex offenders receive overly lenient treatment.<sup>3</sup> In both cases, however, the unanswered question is, "In relation to what?"

Available studies of the sentencing of sex offenders deal almost exclusively with differential sentencing among various types of sex offenders. For example, there are studies looking at the relationship between sentencing and such factors as the age of the victim and offender, and the violence of the attack;<sup>4</sup> whether the assault was heterosexual or homosexual;<sup>5</sup> and whether it was intra- or interracial.<sup>6</sup>

Empirical studies addressing the issue of differential sentencing between sex offenders and non-sex offenders, on the other hand, are extremely rare. In a computer search conducted by the National Institute

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\* The author wishes to thank Dr. Richard Zeller for his valuable statistical assistance.

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<sup>1</sup> M. GUTTENMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 110 (1952).

<sup>2</sup> See B. DELIN, *THE SEX OFFENDER* (1978); D. MACNAMARA & E. SAGARIN, *SEX, CRIME, AND THE LAW* (1977); Tappan, *Sentencing for Sex Criminals*, 42 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 332 (1951).

<sup>3</sup> See S. BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* (1975); Rafter & Natalizia, *Marxist Feminism: Implications for Criminal Justice*, 27 CRIME & DELINQ. 81 (1981).

<sup>4</sup> See Samuels, *Sentencing the Sex Offender*, 128 NEW L.J. 676 (1978).

<sup>5</sup> See R. WALMSELY, *SEXUAL OFFENCES, CONSENT AND SENTENCING* (1979).

<sup>6</sup> See LaFree, *The Effects of Stratification by Race on Official Reactions to Rape*, 45 AM. SOC. REV. (1980); Wolfgang & Riedel, *Rape, Race, and the Death Penalty in Georgia*, 47 AM. J. ORTHOPSYCHIATRY 658 (1975).

of Criminal Justice on our behalf, only two of 181 sex offender studies uncovered dealt with this issue.<sup>7</sup> Given the extreme statements in the theoretical literature regarding the punishment of sex offenders, this lack of an empirical foundation is embarrassing.

The absence of empirical work on the sentencing of sex offenders also is perplexing in light of the strong public sentiment regarding sex offenders. As with any broad categorization of offender types, there is no common denominator adequately describing the sex offender. He is everything from the sexual sadist who uses his penis to degrade and defile to the gentle and unassuming deacon who "playfully" molests a neighborhood child.<sup>8</sup> Nevertheless, the public image of the generic sex offender is an odious one:

The man in the street is convinced that the sexual criminal is insane and mentally retarded; that he is brutal, depraved, and oversexed. He is a social isolate who spends his time reading "dirty" books or haunting "dirty" movies: a godless, brainless, fellow, a "dirty" old man, crippled or disfigured, dope addicted and incurable.<sup>9</sup>

Put another way, the public sees the sex offender as an inhuman "species apart," either a "super male" in an interminable state of tumescence, or a pathetic and evil old man searching for sparks of sensuality in the unwilling arms of a child.

Moreover, this image is not confined to the general public. The animus elicited by sex offenders is also reflected in American laws.<sup>10</sup> The American legal system's sensitivity to sexual matters—a sensitivity evident in its legal proscriptions, which extend even into the marital bed—is almost unparalleled in the modern world.<sup>11</sup>

This paper explores whether this presumed animus and legalistic Puritanism result in sanctions against sex offenders that are disproportionately harsh in relation to those received by non-sex offenders. On

<sup>7</sup> See J. Black, *The Sentencing of Sex Offenders* (1966) (Ph.D. Dissertation, University of Iowa); L. Fannin, *A Study of Social Class Affiliation and Societal Reaction to Convicted Sex and Non-Sex Offenders* (1962) (Ph.D. Dissertation, University of Wisconsin).

<sup>8</sup> For typologies of sex offenders, see, e.g., B. DELIN, *supra* note 2, and L. Fannin, *supra* note 7.

<sup>9</sup> Cohen & Boucher, *Misunderstandings About Sex Criminals*, 2 SEX. BEHAV. 57 (1972).

<sup>10</sup> Beit-Hallahmi, *Treating the Sex Offender*, 20 CRIME & DELINQ. 33 (1974).

<sup>11</sup> See D. BELL, *CRIME AS AN AMERICAN WAY OF LIFE* 132 (Bobbs Merrill Reprints, 1953) ("In no other country have there been such spectacular attempts to curb human appetites and brand them illicit."); N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 15 (1969) (terming our criminal law as "the most moralistic criminal law in history" with the exception of Calvin's Geneva); I. ROBERTSON, *SOCIOLOGY* 196 (1977) ("The laws [pertaining] to sexual behavior have few parallels in the modern world outside of the Soviet Union and its satellites. Western European nations have generally abandoned similar legislation, in some cases as long as a century ago."). While these statements reveal a certain historical naivete, they do point to the moral and legal background against which the sex offender is defined and punished.

the one hand, judges may feel pressured into dealing harshly with sex offenders because of the strong public sentiment.<sup>12</sup> On the other hand, this pressure may be mitigated somewhat by the fact that judges receive guidance and advice in sentencing from professionals (probation officers and mental health workers) who are relatively free of public pressure and ostensibly guided by concerns of rehabilitation and individualized justice. Moreover, because sex offenders appear, as a group, to occupy a higher social class position than non-sex offenders,<sup>13</sup> and to possess more of the social "controls" said to explain why people move into, or away from, criminal careers,<sup>14</sup> they may actually receive more lenient sentences.<sup>15</sup>

## II. METHODS AND PROCEDURES

The data used in this paper are derived from every felony sexual assault case for which a conviction was obtained in a metropolitan Ohio county during the years 1978 through 1981, inclusive.<sup>16</sup> A sample of felony non-sex offenders was drawn for comparison purposes.<sup>17</sup> Because all of the sex offenders were male, the control sample was likewise composed exclusively of males. "Victimless" crimes, such as drug abuse and carrying a concealed weapon, were not included in the control sample. Pertinent background information on the offender, the circumstances of the offense, and the sentence received were taken from probation files.

Using this data, we examined the severity of sentences imposed on sex and non-sex offenders and the relationship between the sentence severity and different variables. One variable of central concern was the severity of each individual crime for which a sentence was imposed. To measure this, we used the felony sentencing worksheet (FSW) guideline used by the probation department involved. The FSW, which was developed by the Ohio Bar Research Foundation, provides a method of numerically rating both the offense and the offender in a given case.<sup>18</sup>

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<sup>12</sup> See C. Bohmer, *Judicial Use of Psychiatric Reports in the Sentencing of Sex Offenders* (1975) (Ph.D. Dissertation, University of Pennsylvania).

<sup>13</sup> See L. Fannin, *supra* note 7, at 127; see generally D. GIBBONS, *SOCIETY, CRIME, AND CRIMINAL CAREERS* (1973).

<sup>14</sup> See, e.g., G. NETTLER, *EXPLAINING CRIME* 306-26 (1978).

<sup>15</sup> In one study, 90% of the sex offenders involved who were not labelled "sex deviates" received probation. L. Fannin, *supra* note 7. "Sex deviate" is a medico-legal term applied to repeat sex offenders in Wisconsin. See L. Fannin, *supra* note 7, at 78, for a full explanation of this term and its legal implications. Another study found that, on the whole, judges disposed of sex offense cases "in an impartial and consistent manner." J. Black, *supra* note 7, at 134.

<sup>16</sup> N = 208.

<sup>17</sup> The crimes used in this study are listed in Table 1.

<sup>18</sup> These ratings are then applied to a grid that suggests, but does not require, a suitable sentencing package. The FSW was developed as a form of presumptive sentencing to avoid disparities that arise when extralegal factors are allowed to influence sentencing decisions.

In rating the offense, the FSW uses such factors as the statutory gravity of the offense, the amount of financial loss and/or physical harm suffered by the victim, and whether a weapon was used in the crime.<sup>19</sup> In rating the offender, the FSW uses such factors as the number of the offender's prior felony convictions, the number of his prior misdemeanor convictions, and whether he was on probation or parole at the time of his arrest.<sup>20</sup>

It should be noted that the FSW scores were assigned by the probation officers processing the offenders. Although it is fashionable to criticize the use of "official" measures, we believe that the measures actually used by the courts in making sentencing decisions possess greater pragmatic validity than measures generated and used by researchers.<sup>21</sup> Using FSW measures also avoids the ambiguities inherent in distinguishing "legal" from "extralegal" variables.<sup>22</sup> Because the variables contained in the FSW are *intended* to influence judicial discretion, both they and the ultimate measures are "legal". By the same token, any variables not considered by the FSW, such as sex versus non-sex crimes, are "extralegal".

A common flaw in earlier studies of sentencing variation is the failure to examine the full range of sentencing options, such as probation, fines, work release programs, jail terms, and various combinations of these options.<sup>23</sup> To measure the relative severity of all types of sentences, we generated an interval level sentence severity scale with the cooperation of 17 probation officers. Each officer assessed the relative severity of a number of sentencing options given a base score of 10 sever-

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*See, e.g.*, A. VON HIRSCH, *DOING JUSTICE* (1976); Lagoy, Hussey, & Kramer, *A Comparative Assessment of Determinate Sentencing in Four Pioneer States*, 24 *CRIME & DELINQ.* 385 (1978). The FSW has a claimed predictive validity of 85%; that is, the suggested sentence was imposed in 85% of the cases during a two-year validation study. *See* T. SWISHER, *SENTENCING IN OHIO* (1978). It incorporates measures of criminal activity suggested in the Sellin-Wolfgang index. *See* T. SELLIN & M. WOLFGANG, *THE MEASUREMENT OF DELINQUENCY* (1964), and the suggestions of Wolfgang & Reidel, *supra* note 6. *See also infra* text accompanying notes 39-40.

<sup>19</sup> *See* T. SWISHER, *SENTENCING IN OHIO* 7.8-7.10 (1978)

<sup>20</sup> *Id.*

<sup>21</sup> *See* Carter & Clelland, *A Neo-Marxian Critique, Formulation and Test of Juvenile Dispositions as a Function of Social Class*, 27 *SOC. PROB.* 101 (1979).

<sup>22</sup> *See* Bernstein, Kick, Leung & Schultz, *Charge Reduction: An Intermediary Stage in the Process of Labelling Criminals*, 56 *SOC. FORCES* 362, 367 (1977). Legally relevant variables are those variables that the legislature and/or the courts openly acknowledge as appropriate to the consideration of sentencing dispositions. Extralegal variables are variables deemed inappropriate in the rendering of such decisions. Extralegal variables such as race, class, and sex may influence decisions. *See, e.g.*, Carter & Clelland, *supra* note 21; Wolfgang & Reidel, *supra* note 6; LaFree, *supra* note 6. The decision maker, however, is not likely to acknowledge this. Although FSW measures are intended to influence judicial discretion, other legal factors, such as whether the offense is non-probationable, will override them.

<sup>23</sup> This failure places constraints on statistical analysis. *See* LaFree, *supra* note 6; Carter & Clelland, *supra* note 21.

ity points for one year of probation. We then averaged the rating of each option. The results, rounded to the nearest tenth of a point, are as follows:

Each year of probation .....	10.0 points
Each \$25 of a fine .....	1.0 point
Each day in the county jail .....	1.0 point
Each two days in the work release program .....	1.0 point
Each day in a state prison .....	1.1 points

This scale allows for the additive scoring of "split" sentences. For example: a sentence of three years probation, 90 days in jail, and a \$250 fine translates into 130 sentence severity points ( $30 + 90 + 10 = 130$ ); one year in the work release program and a \$1000 fine equals 222 points ( $182 + 40 = 222$ ). Because the assessment of sentence severity is an extremely subjective process, others will undoubtedly disagree with the scoring of this scale. It represents, however, the pooled judgments of 17 probation officers—professionals more intimately acquainted with such matters than the members of any other profession.<sup>24</sup>

We acknowledge that neither the sentence severity scale nor the measures of crime seriousness and prior record generated by the FSW are "true" interval scales. The assumptions underlying the use of interval scales, however, are sufficiently robust to satisfy the requirements of valid interpretation.<sup>25</sup> As can be determined by the eta value presented in Table 1, the scale has a minimum reliability coefficient of .813.

### III. RESULTS

Table 1 presents the crimes used in this study ordered by rank determined by the mean severity of the sentences imposed as measured by the sentencing scale.<sup>26</sup> Squaring the eta correlation, we find that 66.1% of the variance in sentence severity is associated with the type of crime. The large standard deviations observed for each individual crime, however, reflect a great deal of inconsistency within each crime type. This inconsistency is to be expected in a system of individualized justice. Nonetheless, those convicted of forcible rape received the most punitive

<sup>24</sup> See, e.g., Hagan, Hewitt & Alwin, *Ceremonial Justice: Crime and Punishment in a Loosely Coupled System*, 58 SOC. FORCES 506 (1979); Hoffman, *A Sentencing Philosophy*, 32 FED. PROBATION, Dec. 1968, at 3.

<sup>25</sup> As with many other continuous measures in sociological research, our sentence severity scale and the FSW scales provide only approximations to the equi-distance functions that produce "true" interval level scales. That is, although we have continuous variables, they possess properties that are somewhere between the ordinal and interval levels of measurement. It has been argued that the assignment of a linear scoring system to "partial interval" data results in negligible error. For a complete discussion of this point, see Labowitz, *The Assignment of Numbers to Rank Order Categories*, 35 AM. SOC. REV. 515 (1970).

<sup>26</sup> See *supra* notes 23, 25 and accompanying text.

**TABLE 1**  
 RANK ORDER OF CRIMES REPRESENTED IN THIS STUDY,  
 THEIR STATUTORY GRAVITY, MEAN SENTENCE  
 SEVERITY SCORES, AND STANDARD  
 DEVIATIONS

NAME OF CRIME	FELONY DEGREE	MEAN SEVERITY	S.D.	N
Rape	1	2226.1	542.8	29
Voluntary Manslaughter	1	1804.5	401.0	4
Aggravated Robbery	1	1319.2	1202.9	2
Attempted Rape	2	1124.5	697.7	8
Involuntary Manslaughter in Commission of a Felony	1	108.4	401.0	5
Aggravated Burglary	1	893.2	936.7	6
Involuntary Manslaughter in Commission of Misdemeanor	2	749.7	640.3	9
Felonious Assault	2	573.1	716.0	12
Robbery	2	465.2	626.9	25
Corruption of a Minor	3	441.0	409.9	9
Sexual Battery	3	352.1	1367.0	59
Burglary	2	312.9	333.1	19
Gross Sexual Imposition	4*	190.5	196.4	95
Attempted Gross Sexual Imposition	4**	177.0	199.5	8
Forgery	4	150.3	194.2	6
Aggravated Assault	4	136.8	217.5	23
Breaking and Entering	4	100.1	127.3	41
Grand Theft	4	80.3	127.9	30
Arson	4	70.0	56.6	2
Receiving Stolen Property	4	44.6	43.8	21
All Crimes (within Groups total)		444.5	401.5	416
Variance = 475683.3	Standard Deviation = 698.7		E = .813	

\*Gross sexual imposition is a felony of the third-degree if the victim is 13 years of age or younger.

\*\*Attempted gross sexual imposition is a fourth-degree felony only if the victim is 13 years of age or younger. If the victim is older than 13, attempted gross sexual imposition is a first-degree misdemeanor. No misdemeanor cases were included in this study.

mean sentences. The mean sentence severity scores for forcible rapists translate into sentences of 5.54 years, while those convicted of voluntary manslaughter received mean sentences of only 4.49 years. This refutes

the contention that rapists are dealt with leniently; indeed, it is consistent with the bromide that rape is "a fate worse than death."

Table 2 presents a comparison of sex and non-sex offender groups with regard to variables of significant interest. It shows that there are no significant differences between the two groups in education, IQ, race, type of attorney, or trial versus plea bargain. Sex offenders, however, are significantly more likely to be older, to have a higher mean annual income, to have higher occupational status, to have been married and employed at the time of conviction, and not to have used a weapon in the commission of their crimes. Sex offenders, therefore, possess more of the ties binding them to society that are said to produce judicial leniency.<sup>27</sup> If we had no further knowledge of the two groups beyond these demographics—that is, if we were ignorant of the offense types represented by the two groups—both control and class-based theories would predict slightly more lenient sentences for the sex offender group.<sup>28</sup>

**TABLE 2**  
COMPARISON OF SEX AND NON-SEX OFFENDERS ON  
SELECTED VARIABLES

GROUP	N	$\bar{X}$	S.D.	T-VALUE	D.F.	Two-tail PROB.	E <sup>2</sup>
				<u>AGE</u>			
Sex	208	32.0	12.1	6.62	414	0.0001	0.096
Non-sex	208	24.9	9.5				

<sup>27</sup> See Lotz & Hewitt, *The Influence of Legally Irrelevant Factors on Felony Sentencing*, 47 SOC. INQUIRY 39 (1977).

<sup>28</sup> Control theorists point to a set of interlocking factors or "controls" that bind the actor to the moral community. Broadly stated, these controls are attachment, commitment, involvement, and belief in the moral precepts of the community. As we noted in Table 2, sex offenders are more likely to be married (attachment), employed, and employed in occupations of higher prestige (commitment and involvement). Our data do not allow us to draw any conclusions relevant to the fourth element of control theory. Lighter sentences could reasonably be expected for persons with greater measures of these characteristics because they, presumably, are less likely to jeopardize their stake in conformity by committing further crimes. See Lotz & Hewitt, *supra* note 27. On the other hand, class-based theories argue that the severity of criminal penalties depends more on who one is than on what one has done. That is, socio-economic status is a central variable influencing official reactions to crime, and sentence severity is said to vary inversely with socio-economic status. See, e.g., R. QUINNEY, *CRIMINOLOGY: ANALYSIS AND CRITIQUE OF CRIME IN AMERICA* (1975).

TABLE 2 (continued)

		<u>ANNUAL INCOME IN THOUSANDS OF DOLLARS</u>					
Sex	208	11.0	6.6				
				5.26	414	0.0001	0.063
Non-sex	208	7.9	5.5				
		<u>OCCUPATIONAL SCORE*</u>					
Sex	208	11.0	4.7				
				4.56	414	0.0001	0.046
Non-sex	208	9.0	3.9				
		<u>YEARS OF EDUCATION</u>					
Sex	208	10.5	2.1				
				-1.11	414	0.267	0.003
Non-sex	208	10.7	1.9				
		<u>IQ</u>					
Sex	121	93.7	12.2				
				0.84	201	0.401	0.003
Non-sex	82	91.9	12.4				
		<u>RACE</u>					
		Sex	Non-Sex				
White	119 (57.2%)	112 (53.8%)					
Non-White	89 (42.8%)	96 (46.2%)					$X^2 = 0.048, n.s.$
	208 (100%)	208 (100%)					
		<u>MARRIED OR NOT MARRIED AT TIME OF CONVICTION</u>					
		Sex	Non-Sex				
Married	86 (41.3%)	54 (26.0%)					
Unmarried	122 (58.7%)	154 (74.0%)					$X^2 = 11.02, p < 0.001.$
	208 (100%)	208 (100%)					
		<u>EMPLOYED OR UNEMPLOYED AT TIME OF CONVICTION</u>					
		Sex	Non-Sex				
Employed	137 (65.9%)	95 (45.7%)					
Unemployed	71 (34.1%)	113 (54.3%)					$X^2 = 17.2, p < 0.001.$
	208 (100%)	208 (100%)					
		<u>ATTORNEY</u>					
		Sex	Non-Sex				
Private	130 (62.5%)	120 (57.7%)					
Court-Appointed	78 (37.5%)	88 (42.3%)					$X^2 = 0.64, n.s.$
	208 (100%)	208 (100%)					

TABLE 2 (continued)

	TRIAL OR PLEA		
	Sex	Non-Sex	
Trial	18 (08.6%)	25 (12.0%)	X <sup>2</sup> = 1.27, n.s.
Plea	190 (91.4%)	183 (88.0%)	
	208 (100%)	208 (100%)	
	WEAPON INVOLVED		
	Sex	Non-Sex	
Yes	36 (17.3%)	64 (30.8%)	X <sup>2</sup> = 13.86, p<0.001.
No	172 (82.7%)	144 (69.2%)	
	208 (100%)	208 (100%)	

\*Occupational score: Never worked or casual = 6, unskilled = 12, skilled = 18, lower white collar = 24, managerial and technical = 30, professional and executive = 36.

Table 3 presents regression coefficients and related statistics divided into three panels.<sup>29</sup> The matrix of zero order correlations presented in panel I reveals no problems of multi-collinearity because none of the correlations between the independent variables exceed plus or minus 0.50.<sup>30</sup> The table shows that non-sex offenders commit the more serious crimes as defined by the FSW, and that those with the most serious prior records tend to commit the most serious offenses. More importantly, despite the more positive attributes of the sex offender group, they receive significantly more severe sentences.

Panel II presents a simple bivariate regression of the three predictor variables. It reveals that, without considering the effects of legally relevant variables on sentence severity, the effect of being a sex offender is 243.8 points. In substantive terms, this translates into approximately seven additional months of state incarceration, or the equivalent in

<sup>29</sup> In examining the issue of differential sentencing between sex and non-sex offenders, we used correlation coefficients and ordinary least squares multiple regressions. Correlation coefficients are measures of the degree to which variables—in this case, sentence severity and offender group—are related. The partial correlation tells us the strength of the association between variables after the effects of other variables—in this case, crime seriousness and prior record—have been removed. Regression coefficients estimate the unique contribution of each independent variable in predicting the dependent variable controlling for the other independent variables in the equation. We render these coefficients in both metric (b) and standardized (B) form. The metric coefficient informs us of the amount of change in the dependent variable—sentence severity—for a one unit change in the independent variable. The standardized coefficient permits a comparison of the relative effects of each independent variable on the dependent variable. Finally, the coefficient of determination (R<sup>2</sup>) expresses the amount of variation in the dependent variable explained by the independent variables in the regression equation taken together.

<sup>30</sup> See, e.g., E. HANUSHEK & J. JACKSON, *STATISTICAL METHODS FOR SOCIAL SCIENTISTS* 88-89 (1977).

**TABLE 3**  
REGRESSION COEFFICIENTS AND RELATED STATISTICS FOR  
THE SENTENCING OF SEX AND NON-SEX  
OFFENDERS

PANEL		ZERO ORDER r MATRIX OF PREDICTOR AND CRITERION VARIABLES						
I			X	Y	V	W		
		Sentence Severity	X	1.000	-.177*	.691*	.431*	
		Group (Sex/Non-sex)	Y		1.000	.180*	-.062	
		Crime Seriousness	V			1.000	.296*	
		Prior Record	W				1.000	
		BIVARIATE REGRESSION						
		Predictor Variable	b	F**	Prob.	R <sup>2</sup>		
II		Group (Sex/Non-sex)	-243.8	13.39	.0001	.031		
		Crime Seriousness	244.8	13.91	.0001	.032		
		Prior Record	59.8	1.61	.204	.004		
STEPWISE MULTIPLE REGRESSION								
		Predictor Variable	b	B	Std. Error	f	Multiple R <sup>2</sup>	R <sup>2</sup> change
III		Crime Seriousness	240.9	.68	11.6	428.1	.478	.478
		Group (Sex/Non-sex)	-394.8	-.29	43.3	83.1	.572	.094
		Prior Record	29.2	.21	4.5	42.4	.612	.040
			Adjusted R <sup>2</sup> = .609    P <sub>xy.vw</sub> = -.410    N = 416					

\*p<.001.

\*\*F and related statistics represent significance tests between the means of the sex and non-sex groups on the predictor variables.

other punitive options, for convicted sex offenders.<sup>31</sup> It should also be noted that the impact of each FSW crime seriousness point on sentence severity is almost exactly the same as the impact of offender group. There is no significant difference between the prior record means of the two groups.

Panel III presents the results of the stepwise multiple regression.

<sup>31</sup>  $243.8 + 1.1 + 31 = 7.1$  months. This merely reverses the scoring process outlined above (number of mean difference points divided by score for each day in a state prison divided by days in a month). This emphasizes the advantage of the present scoring system in that the obtained statistical values are readily "translated" into substantive sentences.

When the effects of crime seriousness and prior record are statistically controlled, there is a 394.8 unit difference in sentence severity between the two groups. This difference represents 11.57 additional months of incarceration for those convicted of sex crimes rather than non-sex crimes.<sup>32</sup> The standardized regression coefficients (B's) reveal that crime seriousness has the greatest relative effect on sentence severity, followed by offender group and prior record, respectively.<sup>33</sup> The partial correlation indicates that 16.8% of the variance in sentence severity is accounted for by offender group after adjusting for the effects of legally relevant variables.<sup>34</sup> Finally, the adjusted coefficient of determination reveals that our three independent variables jointly account for 60.9% of the variance in sentence severity.

#### IV. SENTENCING AS A FUNCTION OF THE PERSONAL NATURE OF THE CRIME

While these data leave little room for doubting the hypothesis that sex offenders are punished more severely than non-sex offenders, this may be more a function of the personal nature of sex offenses than their sexual nature *per se*. Accordingly, we recoded the data on non-sex offenders into "property" and "other personal"<sup>35</sup> categories in order to compare the sentencing of offenders who committed crimes of both a sexual and non-sexual nature against the person.

In examining this issue, another variable is of central importance: the degree of harm suffered by the victim. Table 4 presents a breakdown of harm suffered by the victim, ranging from no apparent harm to death, for each of the two (sex and other personal) categories.<sup>36</sup> It is clear that other personal offenders are much more likely to cause serious physical harm to their victims than are sex offenders. While 83% of the victims of sexual assault were not *overtly* harmed, only 3% of the victims of non-sexual assault escaped harm (these two persons were shot at but missed). Moreover, 30% of the other personal victims were killed and 55% were harmed seriously enough to require inpatient hospitalization.

<sup>32</sup>  $394.8 \div 1.1 \div 31 = 11.57$  months. *See supra* note 31.

<sup>33</sup>  $B_{xv} = .68$ ;  $B_{xy} = -.29$ ;  $B_{xw} = .21$ , respectively.

<sup>34</sup>  $P_{xy.vw^2} = -.410^2 = .168$ .

<sup>35</sup> Other personal harm  $N = 60$ .

<sup>36</sup> No Harm means that no physical or psychological harm was indicated in the presentence report. Minor or Psychological Harm means that the victim was treated and released from the hospital on the same day or that psychological harm was attested to by a mental health professional. Hospitalized means in-patient hospitalization lasting for more than one day. Pregnancy means that the victim was impregnated. Death means that victim was killed.

**TABLE 4**  
A COMPARISON OF VICTIM HARM BY TYPE OF ASSAULTIVE  
OFFENSE

Offense Type	No Harm		Minor or Psycho- logical		Hospital- ized		Preg- nancy		Death		Total N
	N	%	N	%	N	%	N	%	N	%	
Sex	172	(83)	25	(12)	6	(03)	5	(02)	0	(00)	208
Non-sex	2	(03)	7	(12)	33	(55)	0	(00)	18	(30)	60
Totals	174	(65)	32	(12)	39	(14)	5	(01)	18	(07)	268

It is important to note, however, that these categorizations of victim harm refer only to the degree of physical harm or to psychological harm attested to by mental health professionals. We recognize that the trauma of sexual assault may constitute harm qualitatively different than that suffered by victims of non-sexual assault. Sexual assault is invariably committed by the powerful (adult men) against the relatively powerless and innocent (women and children). Non-sexual assault, on the other hand, is most likely to be an all-male affair and may well have been victim-precipitated.<sup>37</sup> The sense of helplessness, powerlessness, violation, and outrage felt by many victims of sexual assault, regardless of the degree of physical harm, may have more deleterious effects than the more serious physical harm suffered as a result of a non-sexual assault.

Table 5 examines the issue of differential sentencing between sex offenders and other personal offenders using the same statistical procedures used in Table 3. We have included victim harm in the correlation matrix presented in Panel I merely to allow for an examination of this variable's relationship to other variables. It is not included in the regression equation because it is part of the FSW composite crime seriousness measure. Of specific interest is the strong correlation between victim harm and offender group. The table also shows a non-significant tendency to punish other personal offenders more severely, and that other personal offenders commit significantly more serious crimes.

The bivariate regression presented in panel II shows that only crime seriousness is significantly related to sentence severity. Each crime

<sup>37</sup> It has been shown, for instance, that many homicides are actually precipitated by the victim. See, e.g., M. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 203 (1958).

**TABLE 5**  
REGRESSION COEFFICIENTS AND RELATED STATISTICS FOR  
THE SENTENCING OF SEX AND NON-SEX  
ASSAULTIVE GROUPS

PANEL	ZERO ORDER r MATRIX OF PREDICTOR AND CRITERION VARIABLES						
		X	Y	V	W	Z	
I	Sentence Severity	X	1.000	-.040	.746 <sup>a</sup>	.343 <sup>a</sup>	.182 <sup>b</sup>
	Group (Sex/non-sex)	Y		1.000	.316 <sup>a</sup>	-.066	.596 <sup>a</sup>
	Crime Seriousness	V			1.000	.217*	.430 <sup>a</sup>
	Prior Record	W				1.000	.003
	Victim Harm	Z					1.000
BIVARIATE REGRESSION							
	Predictor Variable	b	f <sup>c</sup>	Prob.	R <sup>2</sup>		
II	Group (Sex/non-sex)	73.4	.42	.518	.002		
	Crime Seriousness	297.3	47.47	.0001	.151		
	Prior Record	-65.5	.32	.568	.002		
STEPWISE MULTIPLE REGRESSION							
	Predictor Variable	b	B	Std. Error	f	Multiple R <sup>2</sup>	R <sup>2</sup> change
III	Crime Seriousness	300.2	.80	15.6	369.3	.559	.559
	Group (Sex/Non-sex)	-496.9	-.27	73.9	45.2	.634	.074
	Prior Record	23.8	.15	5.9	16.0	.655	.021
	Adjusted R <sup>2</sup> = .651 P <sub>xy.vw</sub> = -.285 N = 268						

<sup>a</sup> p<.0001.

<sup>b</sup> p<.001.

<sup>c</sup> f and related statistics represent significance tests between the means of the two groups on the predictor variables.

seriousness point has a far greater impact on sentence severity when only assaultive crimes are considered.

Turning to panel III, we note that crime seriousness again enters the regression equation as the most powerful predictor of sentence severity. The statistic of greatest salience to the present issue is the striking impact of offender group on sentence severity after statistical adjustment for the effects of the two legally relevant variables. The 496.9 unit increase associated with offender group translates into a substantive differ-

TABLE 6

Cross-tabulation of Offenders in Each Offense Category  
Who Received Higher Sentences Than Indicated  
by the FSW, Were Sentenced  
Congruent With FSW Indication, and Were Sentenced More  
Leniently Than Indicated

FSW CONGRUENCE	SEX		NON-SEX (all crimes)		SEX		NON-SEX (assault)	
	N	%	N	%	N	%	N	%
Higher	82	(39.4)	29	(13.9)	82	(39.4)	12	(20.1)
Congruent	123	(59.1)	160	(76.9)	123	(59.1)	44	(73.3)
Lower	3	(01.0)	19	(09.0)	3	(01.0)	4	(06.6)
Totals	208	(100)*	208	(100)	208	(100)	60	(100)

$X^2 = 41.74$ ,  $df = 2$ ,  $p < .0001$

$X^2 = 11.97$ ,  $df = 2$ ,  $p < .01$ .

\*Percentages do not add to 100% due to rounding approximates.

ence of approximately 14.6 additional months of state incarceration for sex offenders as compared with assaultive non-sex offenders.<sup>38</sup> This is a substantial and obviously meaningful difference that quite strongly suggests that judicial opprobrium is attached more to the sexual nature of sex offenses than to their assaultive nature.

#### V. EVALUATING THE FSW'S EFFECTIVENESS AS A GUIDELINE

The FSW is designed to guide and structure sentencing discretion based on a rational policy of "just deserts."<sup>39</sup> An evaluation conducted by the Ohio Bar Research Foundation indicates that it performs this task reasonably well. That study found the FSW to have an overall compliance rate of 85%, with 8% of the observed sentences being harsher than indicated, and 7% more lenient than indicated.<sup>40</sup> Table 6, however, shows that this 85:8:7 ratio is considerably wide of the mark for the cases in this study, particularly for sex offenders. The FSW compliance rate for sex cases was only 59.1%, but it was somewhat higher for non-sex cases (76.9%). More importantly, only 1% of the sex cases received a sentence more lenient than that indicated by the FSW, while 39.9% received a sentence more severe than indicated. The corresponding per-

<sup>38</sup>  $496.9 \div 1.1 \div 31 = 14.6$  months. See *supra* note 31.

<sup>39</sup> See *supra* note 18 and accompanying text.

<sup>40</sup> See SWISHER, *supra* note 18, at 7.3.

centages for non-sex offenders were 9% and 13.9%, respectively. The discrepancy between the same percentages for sex cases and non-sexual assault cases was only slightly less. It is, evidently, more difficult to be "objective"—to the extent that the FSW can be so considered—when sentencing sex offenders than when sentencing non-sex offenders.

## VI. CONCLUSION

Our data strongly suggest that the sex offender label is an extremely negative one that substantially influences sentencing severity. Despite the fact that sex offenders are, in general, of higher socio-economic standing, more likely to be employed and married, likely to commit less serious crimes, and less likely to use a weapon or do serious physical harm to their victims, they are punished significantly more severely than non-sex offenders. Moreover, they are significantly less likely to be sentenced according to the standards of consistency and equity as these concepts are defined by the FSW. In fact, it seems as though the FSW had little effect at all in guiding sentencing decisions for sex offenders. This finding adds credence to the statement that, "[t]he sex offender has been the object of so much hatred and venom that it is difficult to study him on a scientific and rational basis, one that is free of prejudice."<sup>41</sup>

One commentator has opined that it is "[p]erhaps the anxiety and guilt feelings that are associated with sex in the American mentality" that lead the agents of social control to deal so harshly with sex offenders.<sup>42</sup> Punishing sex offenders severely has the effect of assuaging guilt and anxiety about the perverse elements in their (and our own) make up and emphasizes the "moral distance" between actor and reactor. Punishment serves the function of defining the boundaries of acceptability; it sets the "normal" apart from the "deviant." Most of us would admit that under certain well-defined circumstances, we would be capable of theft or even murder. Few would admit that they would, under any circumstances, stoop to sexual assault, especially against a child. The urge toward illicit sex, however, is probably stronger and more pervasive among men than is the urge toward any other illegal activity.<sup>43</sup> By

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<sup>41</sup> See, D. ABRAHAMSEN, *THE PSYCHOLOGY OF CRIME* 151 (1960).

<sup>42</sup> See Tappan, *supra* note 2, at 335.

<sup>43</sup> While this statement may be viewed as offensive by some, it is almost a psychoanalytic truism. The sex act is an expressive act of psychobiological origin that is regulated by social mores. While other crimes used in this study are also regulated by the mores, they certainly do not emanate from inner urgings in the "normal" male. The very strength of the reaction against sex offenders constitutes support for this position in psychoanalytic theory. The so-called "reaction formation" is a common ego defense mechanism that is viewed as functioning to suppress unacceptable impulses by reacting strongly against them. Thus, extreme

dramatizing the evil of sexual crimes, we are able to draw the line between the "perverts" and ourselves; the harsher the punishment, the sharper the line.

Lest it be thought that we are waxing too sympathetically toward the sex offender, let us state that there are many sex offenders who are justifiably incarcerated. This is especially true of the repeat offender and the offender who uses force and violence to accomplish his ends. We merely wish to emphasize that by the standards applied to non-sex offenders, sex offenders receive disproportionately severe sentences.

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reactions to sexual offenses may be a method of pruriently indulging in sexual fantasies. *See, e.g.,* Ellis, *Contemporary Sex Attitudes*, in *PROBLEMS OF SEX BEHAVIOR* (E. Sagarin & D. MacNamara eds. 1968). Similarly, it has been asserted, "[i]n no normal person does the normal sexual aim lack some designable perverse elements," *See* S. FREUD, *THREE CONTRIBUTIONS TO A THEORY OF SEX* 30 (1962). Finally, this seems to be the position of many feminist theorists. *See* Rafter & Natalizia, *supra* note 3; S. BROWNMILLER, *supra* note 3.