

An Examination of the Sentencing Remarks of Indigenous and Non-Indigenous Criminal Defendants in South Australia's Higher Courts

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Abstract

Recent Australian research on Indigenous sentencing primarily explores whether disparities in sentencing outcomes exist. Little is known about how judges perceive or refer to Indigenous defendants and their histories, and how they interpret the circumstances of Indigenous defendants in justifying their sentencing decisions. Drawing on the 'focal concerns' approach, this study presents a narrative analysis of a sample of judges' sentencing remarks for Indigenous and non-Indigenous criminal defendants convicted in South Australia's Higher Courts. The analysis found that the sentencing stories of Indigenous and non-Indigenous offenders differed in ways that possibly reduced assessments of blameworthiness and risk for Indigenous defendants.

Keywords: Sentencing, Indigenous, Courts, Narratives, Mitigation

Introduction

Recent research from three Australian jurisdictions (South Australia, New South Wales and Western Australia) has shown that the higher statistical likelihood of Indigenous defendants being imprisoned than non-Indigenous defendants largely disappears or reverses direction after controlling for other factors known to influence the sentencing process (New South Wales: Snowball and Weatherburn 2006, 2007; South Australia and Western Australia: Jeffries and Bond 2009; Bond and Jeffries 2009). However, this body of research has focused primarily on exploring whether disparities in imprisonment outcomes exist. The quantitative methods used by researchers such as Snowball and Weatherburn (2007) and Jeffries and Bond (2009) are limited, as the details of offenders' sentencing stories are partially lost during the

process of quantification. For example, little is known about how judges perceive or refer to Indigenous defendants and their histories when making sentencing decisions. The, current study seeks to fill this research gap.

Explaining Judicial Sentencing

Within sentencing research, the ‘focal concerns’ approach has emerged as the dominant paradigm for understanding the decision-making process. This theoretical approach argues that judges’ sentencing decisions are driven by three focal concerns (Johnson 2006; Steffensmeier et al. 1998), namely:

- ***Offender Blameworthiness.*** Sentencing judges make assessments of offender blameworthiness, based on the context of the offence (e.g. the seriousness of the offence, the role played by the offender in the crime, and evidence of criminal premeditation: Steffensmeier et al. 1998), and offenders’ personal histories (e.g. victimisation experiences, poor health and substance abuse: Jeffries, Newbold, and Fletcher 2003; Jeffries 2002; Allen 1987).
- ***Community Protection.*** Sentencing judges also make predictions about the risk offenders pose to the community, based on factors such as current crime seriousness, criminal history, and remand outcomes. Offender characteristics which may indicate increased or decreased levels of informal social control in offenders’ lives, such as familial situation, employment status, and drug abuse may also be considered (Jeffries, Newbold and Fletcher 2003; Jeffries 2002; Daly 1994).
- ***Practical Constraints and Consequences.*** This focal concern takes account of the practical constraints presented by organisational resources, individual offenders, and political and community expectations (Steffensmeier et al. 1998; Johnson

2006). This focal concern also draws attention to the possible mitigating influences of offender limitations, and of expectations held at the political and community levels.

Indigeneity and Judicial Assessments

A range of factors, that could influence assessments of blameworthiness and risk, may appear in the histories of Indigenous defendants. For example, in contrast to non-Indigenous persons, the lives of Indigenous Australians are more likely characterised by high levels of familial discord, abuse, victimisation, poor health, and substance abuse (e.g. Australian Bureau of Statistics, 2007; Commonwealth of Australia, 2007; Mullighan, 2008). While some of the factors associated with traumatic life experiences are common to both Indigenous and non-Indigenous offenders, among Indigenous offenders, experiences of trauma may be more substantial, and may introduce unique variables into the sentencing process.

Further, judges may be constrained in their sentencing decisions by concerns regarding Indigenous offenders' ability to 'do time' in prison and the broader social cost of incarceration on Indigenous families and communities. Political and community expectations after the *Royal Commission into Aboriginal Deaths in Custody* (1991) could also mean that the judiciary are aware of the marginalised position of Indigenous people and the need to reduce levels of Indigenous over-representation in prison populations.

However, over and above the individual circumstances of offenders, stereotypical assumptions about criminality and threat may also influence the sentencing decision (e.g. Steffensmeier et al. 1998; Johnson 2006). In making these assessments, a range of constraints, such as lack of available information, may cause judges to rely on

‘perceptual shorthand’. This ‘shorthand’ may result in the use of characteristics of the offender (such as race/ethnicity) to make particular inferences about the offender’s blameworthiness and dangerousness. In other words, judges may subconsciously rely on offender characteristics like race, and corresponding negative stereotypes, as indicators of increased culpability and risk. Therefore, these inferences of increased criminality and threat for certain minority offenders aggravate sentencing severity (Steffensmeier et al. 1998; Peterson and Hagan, 1984). To date, Australian research findings do not support this argument of harsher outcomes for Indigenous defendants (see e.g. Jeffries and Bond 2009; Snowball and Weatherburn 2007).

Thus, the Indigenous status of an offender may trigger judicial perceptions of critical importance to the sentencing decision in relation the lives of Indigenous offenders and the impact of colonisation on their lived experiences.

The Current Research

This study presents a qualitative analysis of sentencing remarks for a sample of criminal cases in South Australia’s Higher Courts. The research explores the stories about Indigenous and non-Indigenous defendants that judges use to justify their sentencing decisions. It asks how defendants’ sentencing stories (as told by judges) differ by Indigenous status in terms of blameworthiness, risk and practical constraints and consequences. This extends Jeffries and Bond’s (2009) quantitative analyses, which found that Indigenous defendants were less likely to receive a sentence of imprisonment, compared to non-Indigenous defendants in similar circumstances.

Sample and Method

A matched sample of 254 criminal offenders sentenced in South Australia's higher courts in 2005 and 2006 was selected. Non-Indigenous and Indigenous offenders were first matched by current offence seriousness, based on the National Offence Index (NOI) codes for the principal offence (the most serious offence convicted). Then offenders were matched as closely as possible by number of current and prior convictions, sentencing court, and plea. Thus, a 1:1 Indigenous to non-Indigenous ratio was obtained. The matched sample consisted of 50% Indigenous offenders and 11.4% female offenders, with an average offender age of 31.5 years. The most common principal offences in the sample were offences against the person (48.8%), and offences against property (44.5%).

From the original matched sample, transcripts of judges' sentencing remarks were located for 220 offenders. Of the 34 missing transcripts, 15 were for non-Indigenous offenders and 19 for Indigenous offenders. In total, transcripts for 108 Indigenous offenders and 112 non-Indigenous offenders were analysed.

The sentencing remarks are *verbatim* transcriptions of the comments made by the judge¹ at the time of sentencing. In general, the remarks have a three part structure: a summation of the context of the offence, a discussion of the different factors of mitigation or aggravation, and the imposition of a sentence. These transcripts were exported into Nvivo. Drawing on the findings of sentencing research and the focal concerns perspective, the transcripts were thematically coded.

Findings: Themes used by Sentencing Judges

Acknowledgement of Offenders' Indigeneity

Indigenous status was identified by judges in 55% of remarks for Indigenous offenders. These references sometimes took the form of a simple acknowledgment

that a particular offender was an Indigenous person (“You have an Aboriginal background”). At other times, this acknowledgement of Indigenous status included more details about the defendant’s connectedness to tradition, community and lands:

You were born and grew up at [A] community, just south of [B]. That is a community in which a number of Aborigines live in a traditional manner.

Further reading of the sentencing remarks revealed explicit references to Indigenous status as an important sentencing determinant (“I recognise and take into account your aboriginality”).

Reducing Blameworthiness

In contrast to non-Indigenous persons, Indigenous offenders’ life stories were more strongly rooted in descriptions of extreme trauma and dysfunction. Indigenous defendants’ negative experiences were more prolific and disconcerting. In 65% of sentencing remarks for Indigenous offenders, references were made to familial traumas in childhood and/or adulthood, compared with approximately 48% of non-Indigenous transcripts. Further, certain life traumas were presented as being unique to the Indigenous experience: community dislocation, community dysfunction, societal marginalisation and traditional law were factors raised as relevant to Indigenous sentencing only.

Dislocation from Community

Indigenous offenders’ dislocation from their communities and traditions was presented as a precursor to offending. In these cases, ‘cultural upheaval’, being ‘away from’ the Indigenous community, and possessing ‘feelings of not belonging’ to these

communities were considered a source of trauma for Indigenous offenders, reducing assessments of blameworthiness in these Indigenous offenders:

In your case I should also take into account the fact that you have been a traditional Aboriginal, living in a traditional way, at least for the early part of your life, and that these offences were committed when you were away from your community (Indigenous offender).

Although you enjoy a close relationship with your adoptive parents, you have experienced feelings of not belonging to either the Aboriginal or Caucasian community. Over the years this has led to a sense of worthlessness and despair and the development of depression and anxiety. As a result, you abused alcohol in your 20s and 30s and amphetamines in more recent years (Indigenous offender).

Community Dysfunction

While community disconnection presented as a possible cause for Indigenous offending, paradoxically, so did connectedness with what were described as ‘disintegrated’ Indigenous communities. Sentencing narratives described Indigenous communities as being in a constant state of ‘disorder’, ravaged by substance abuse, violence and limited life opportunities, with individual offending an inevitable outcome:

You are of Aboriginal background and you were brought up in an exclusively Aboriginal environment being a fringe dweller’s environment. Much of your life was spent in a compound known as the [B] Community...Much of your early life was marked with poverty, violence, and by persistent and ongoing sexual abuse and intimidation....I am satisfied...that in your short life you have experienced both family and community disintegration. Horrific sexual abuse from your earliest years combined with poverty and homelessness meant that educational and employment prospects have been minimal for you. Your addiction to substances is said to be reflective of the pattern of many child abuse victims (Indigenous offender).

Societal Marginalisation

Discourses around societal marginalisation appeared to reduce offenders’ perceived culpability. Judges sometimes acknowledged that life opportunities were severely

restricted for Indigenous peoples due to their disadvantaged position in Australian society. It was seen as more difficult for Indigenous people to access support services, take advantage of opportunities (including rehabilitative ones), and escape from their 'dysfunctional' lives and marginalised status:

Your Aboriginality of itself is not a matter of mitigation. However, it is a relevant and important factor for consideration in relation to your particular circumstances. For example, opportunities taken for granted by most members of the community are more often than not lacking in Aboriginal communities, thereby contributing to their isolation and their unhappiness. In your case I am of the view that your Aboriginality has likely inhibited your capacity to seek assistance from a mainly non-Aboriginal society and has limited your opportunities (Indigenous offender).

Traditional Law

Finally, assessments of culpability were also framed in terms of Indigenous traditional law and custom. Although not common in the judges' sentencing remarks, acting within the bounds of Indigenous traditional law or custom was, at least to some degree, accepted by the sentencing judges as relevant to their assessments:

There was an element of cultural and traditional conduct in your offending behaviour. You were responding to damage that had been caused to property that you were entitled to. Although I note the element of payback, I cannot give you a substantial reduction of the punishment. (Indigenous offender).

Reducing Risk

Overall, employment status and strong familial ties were portrayed as important in assessing the risk of future reoffending. Compared with non-Indigenous offenders, fewer Indigenous offenders (19% versus 39%) were employed. Of those who had jobs, regardless of Indigenous status, the degree of stability that employment brought to their lives was noted as important by judges. Familial ties, as a measure of stability

in offenders' lives, were also presented at sentencing as a factor of mitigation irrespective of Indigenous status.

Again, Indigenous-specific assessments of risk were made. A close connection to, or a plan to reconnect with, Indigenous communities and culture was considered highly positive for Indigenous offenders. Community and cultural (re)connection was portrayed as a risk reduction mechanism and a subsequent mitigation factor for Indigenous offenders:

I have had regard to the prospects of rehabilitation held out by a re-enlivened awareness of your cultural obligations. I accept that, if you carry out those intentions, you will be less likely to re-offend (Indigenous offender).

Practical Constraints and Consequences

For both Indigenous and non-Indigenous offenders, poor health and the probability of imprisonment causing disruption to familial ties were highlighted at sentencing as mitigating circumstances. However, Indigenous offenders were also presented as having special needs: their Indigenous status would make serving a prison term especially difficult. For example:

You have experienced difficulties in prison, where you have been away from the community and the culture in which you were brought up...I reduce [the sentence] to reflect... and the difficulty you have had and will have in serving a sentence of imprisonment away from your community and culture (Indigenous offender).

.... I take into account...your Aboriginality. By that, I mean to include your difficult background and the ways in which your cultural differences from many of your fellow prisoners will make serving prison harder (Indigenous offender).

In addition to Indigeneity making prison a potentially harsher punishment, the social cost of imprisonment on the broader Indigenous community was frequently

highlighted. The impact of imprisonment on communities rather than just families was a story uniquely present in the Indigenous sentencing remarks. This argument was only relevant when the Indigenous offender was thought to have made a positive contribution to ‘his/her people’:

...you have been a hardworking member of the community...You are committed to helping Aboriginal people especially through the [A] Group with whom you work closely. You were a champion [tennis player] yourself and have been using your knowledge and skills to develop indigenous [tennis]....It has become apparent to me that the [A] Group is one of very few agencies which provides sorely needed services to Aboriginal people...In your special case I regard it as more important that you remain in the community than locked in prison (Indigenous offender).

Judges made no direct references to the *Royal Commission into Aboriginal Deaths in Custody* in their sentencing remarks. However, the results already presented suggest that judges were aware of changing community and political expectations as a result of the Royal Commission’s findings. Although the impact of colonisation on Indigenous peoples also received no comment, the sentencing remarks revealed that judges were attuned to the differential circumstances and needs of Indigenous offenders, while also being cognisant of the additional trauma imprisonment might have on them and the broader Indigenous community.

Discussion and Conclusion

A major finding of this research is that Indigenous and non-Indigenous sentencing stories differed. Consistent with the ‘focal concerns’ approach to sentencing, Indigeneity affected judicial assessments of blameworthiness and risk in ways that perhaps mitigated sentence severity more substantially for Indigenous offenders. In addition, Indigenous offenders were viewed differently in terms of offender level constraints and broader consequences.

Are these findings unique to South Australia? South Australia does have a reputation for being receptive to liberal legal reforms. For example, South Australia was the first Australian jurisdiction to establish what have been referred to as the ‘new’ Indigenous Courts (i.e. Nunga Court) (e.g. Harris, 2004). However, evidence of sentencing leniency in favour of Indigenous defendants (at least for the decision to imprison) has also been found in Western Australia (e.g. Bond and Jeffries 2009). This suggests that the types of stories identified in our study may have broader relevance to the understanding of Indigeneity in sentencing.

In North America, researchers have found negative racial/ethnic stereo-typing can increase perceptions of offender blameworthiness, resulting in the attribution of increased threat to racial/ethnic minority offenders and harsher sentencing outcomes. Arguably however, Indigenous Australians are also subject to negative attributions during sentencing. Compared with non-Indigenous offenders, judges in South Australia frequently contextualised Indigenous offending within the context of broader Indigenous ‘dysfunction’ and ‘trauma’. This is despite the fact that non-Indigenous crime is feasibly also a product of these same circumstances. For example, residing in communities ravaged by ‘dysfunction’ was linked to Indigenous offending, even though non-Indigenous offenders also are the likely inhabitants of ‘pathological’ neighbourhoods. Unlike in North American sentencing research, negative attributions — of dysfunction in this instance — reduced offender blameworthiness and in turn, sentencing severity.

Discourses of Indigenous ‘dysfunction’, ‘disintegration’ and ‘pathology’ are frequently utilised in Australian government, populist, and sometimes even academic environments to explain high rates of Indigenous crime (see e.g., State of Queensland

1999:xxxiv Northern Territory Government 2007:12, 18, 57 and 226). Therefore, it is perhaps not surprising to find similar discourses of Indigenous ‘pathology’ in sentencing narratives. While sentencing leniency could be viewed as a positive short term outcome of these narratives, the concern is that discourses of this type contribute to maintaining deeply embedded stereotypes which are often used to draw attention away from responsibilities of the coloniser, shift blame to the colonised and further aggravate the colonisation process (Webb 2004).

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¹ The transcripts analysed came from different judges. However ethical considerations meant that we did not attach individual judges to sentencing remarks even de-identified.