Gender, Indigeneity and the Criminal Courts:
A Narrative Exploration of Women's Sentencing in Western Australia

Dr Samantha Jeffries

Dr Christine E.W. Bond

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Abstract

Using the focal concerns perspective, this study extends Bond and Jeffries' (2010) past statistical sentencing research on Indigeneity and gender by undertaking a narrative exploration of sentencing transcripts. In contrast to statistical studies that have explored intersections between gender and race-ethnicity in North American, this Australian based research suggests that gender does not bypass Indigenous (minority) female defendants. Rather, differences in the sentencing stories by Indigenous status appeared to reduce assessments of blameworthiness and risk for Indigenous female defendants. Further, Indigenous women were viewed differently to non-Indigenous females in terms of social cost (i.e. practical constraints and consequences). These findings suggest a possible explanation for sentencing leniency being extended to Indigenous female defendants.

Keywords: women; race; ethnicity; Indigenous; sentencing narratives; focal concerns

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Introduction

The argument that female offenders were afforded leniency within the criminal justice system has a long history. Over 60 years ago, Pollak (1950) claimed that female offenders were the recipients of male notions of chivalry from a male-dominated criminal justice system (Tjaden and Tjaden 1981). However, the universality of chivalry was later questioned by the paternalism thesis, which suggested that preferential treatment was only afforded to certain ‘types’ of women: whether female defendants received leniency would depend on the extent to which they fulfilled gender role expectations (Herzog and Oreg 2008, 49). Also known as the ‘evil woman’ hypothesis, paternalism suggests that, when making sentencing decisions, the judiciary not only consider the crimes women commit, but also how they are positioned as women within societal expectations of gender (Herzog and Oreg 2008, 49). In this sense, women who deviate from the ‘gendered ideal’ are accused of double deviance: once for the crime they have committed, and once more for departing from ‘gender-appropriate behavior’.

This paternalistic application of leniency may be particularly problematic for racial/ethnic minority women. Because the ideal of ‘womanhood’ is white and middle class, those from racial/ethnic minority groups could fail to behave in ways perceptually “deserving of protection” (Steffensmeir and Demuth 2006, 247). From this perspective, racial/ethnic minority women are likely to be sentenced more harshly than white women because they represent the greatest risk or ‘threat’ to the dominance of both men and whiteness. These early explanations for gendered differences in court sanctioning can be viewed as sitting within a conflict interpretation, assuming that the courts perform as a societal conjugant through which

adherence to the dominant (in this case gender) ideologies are reinforced (Peterson and Hagan 1984, 67).

However, the view that leniency in court sanctioning typically bypasses racial/ethnic minority women has recently been challenged by research findings of no statistical racial/ethnic differences in the sentencing of female offenders (Steffensmier and Demuth 2006, 257). In response to these findings, Steffensmier and Demuth (2006, 257-259) argue that there is a “crucial need” for qualitative investigations to more fully explore the apparent silencing of race-ethnicity in cases of female defendants.

This paper responds to this challenge, by exploring the sentencing narratives of a sample of Indigenous and non-Indigenous women convicted in Western Australia. In North America sentencing scholars are virtually mute on the subject of Indigenous status and sentencing, and there have been no specific sentencing explorations of Indigenous women. Outside of North America, the sentencing of Indigenous/non-Indigenous women has been previously explored once (also in Australia) using statistical analyses only (Bond and Jeffries, 2010). Thus, the present study is timely, contributing to broader debates within the gender, racial-ethnic-Indigenous sentencing disparities research.

Prior Research and Sentencing Theory

Recent statistical research seems to contradict early arguments that leniency (and chivalry/paternalism theses) typically bypasses ‘women of color’: North American studies show that African-American or Latina women and white women are, albeit in statistical terms, treated equally (Steffensmier and Demuth 2006; see also Ulmer and

Kramer 1998; Spohn and Beichner 2000; Freiburger and Hilinski 2009; Doerner and Demuth 2009). In other words, there is no statistically significant interaction between gender and race-ethnicity (at least for African-American and Latina women).

Meanwhile Australian research suggests that, rather than bypassing Indigenous women, sentencing leniency may be extended to them. In the only published investigation of the intersection between Indigenous status and genderⁱ, Bond and Jeffries (2010) statistically examined whether Indigenous women were more likely than non-Indigenous women to receive a sentence of imprisonment for comparable offending behavior and histories over a nine year period (1996 to 2005) in Western Australia's higher courts. Indigenous women were found, on average, less likely than their non-Indigenous counterparts to receive a prison sentence when being sentenced under statistically similar circumstances to non-Indigenous females.

Increasingly, in the more recent research on gender/race interactions, traditional conflict-style arguments (such as paternalism) are being subsumed into the now dominant framework for understanding sentencing outcomes, that of focal concerns. This approach argues that judges' sentencing decisions are driven by judicial assessments around three key focal concerns about offenders and their cases (Steffensmeier and Demuth 2001, 708-710; Steffensmeier, Ulmer and Kramer 1998).

The first focal concern, blameworthiness, is about judicial assessments of offender culpability and the amount of harm caused by their crime. The second focal concern of community protection involves sentencing judges making assessments about the risk offenders pose to the community. The final focal concern—practical constraints

and consequences—highlights the host of practical concerns that judges consider in deciding what penalty to impose, including the social costs of sentencing as well as community or political expectations that may impact the court's general societal standing. (For further discussion of this approach, see Johnson, Ulmer and Kramer 2008, 744-746; Steffensmeier and Demuth 2001, 708-710; Steffensmeier, Ulmer and Kramer 1998, 766-767; Ulmer, Kurlychek and Kramer 2007, 431-436).

These assessments are not made under ideal conditions, but are frequently made under circumstances where time is lacking and/or there is insufficient reliable information about cases and offenders (Steffensmeier, Ulmer and Kramer 1998; Kramer and Ulmer 2002). These conditions allow attributions about cases and offenders based on racialised and gendered evaluations of behavior and social relationships to inform the decision-making process (see Steffensmeier and Demuth 2000, 708-710; Ulmer, Kurlychek and Kramer 2007, 431-436; Johnson, Ulmer and Kramer 2008, 744-746). For example, gendered attributions about women's care-giving roles may result in judges assessing women's imprisonment as having a higher social cost than men's imprisonment (Jeffries 2002a and 2002b).

However, the statistical investigations of sentencing decision making undertaken so far cannot completely ascertain how these judicial focal concerns 'play out'. Quantitative analyses can tell us whether gender and race-ethnicity-Indigeneity matters in judicial sentencing decisions, but not why or how it comes to be significant and/or insignificant. Thus, although important, the quantitative methods used by past researchers means that the details of offenders' sentencing stories are partially lost during the process of quantification (Daly 1994). We know surprisingly little about

how judges construct intersections of gender and race-ethnicity-Indigeneity in rationalizing their sentencing decisions.

There are a few (now outdated) qualitative investigations of gender and sentencing (see Allen 1987; Daly 1994; Eaton 1986; Jeffries 2002a, 2002b; Worrall 1990). A common feature of this past research is the use of narrative analysis of court documents, including pre-sentencing reports and judicial sentencing remarks. These documents are useful for researchers, as they provide a formal account of the rationales used by criminal justice actors (such as judges) for their decisions. While the court process involves a complex interplay between the judge and other actors (i.e. lawyers, probation officers, defendants), sentencing (and other court) documents can provide a window into how cultural ideals of femininity operate and impact on sentencing (Gelsthorpe and Loucks 1997; Jeffries 2002a, 2002b).

Overall, this research shows that women may avoid imprisonment because they are constructed within three key discourses of mitigation. First, the blameworthiness of female criminality is often reduced as it is placed within discourses of mental health, or dysfunctional families and intimate relationships which reduce female offenders' agency and control. Second, judicial assessments of the likelihood of future offending, and thus risk to the community, is viewed as being constrained by women's familial roles, such as their dependence on others (e.g. husbands) as well as others being dependent on them (e.g. children). Finally, judges often express concern about the social costs of removing primary carers, usually women, from families (For further discussions, see Allen 1987; Daly 1994; Eaton 1986; Jeffries, 2002a, 2002b; Worrall 1990).

There is only one published qualitative analysis of judicial sentencing remarks for Indigenous offenders (Jeffries and Bond 2010). Extending their prior statistical work on Indigeneity and sentencing—which found that Indigenous defendants in South Australia’s higher courts were less likely to receive a sentence of imprisonment (Jeffries and Bond 2009)—Jeffries and Bond (2010) undertook a narrative investigation of judges sentencing remarks focusing on the ways in which Indigeneity impacts the focal concerns of sentencing judges. The purpose of the narrative analyses was to establish whether and in what ways, Indigeneity came to exert a *mitigating influence* over sentencing (as indicated by the authors’ prior statistical analyses). Jeffries and Bond (2010) asked how defendants’ sentencing stories (as told by judges) differed by Indigenous status with regard to assessments of blameworthiness, risk and in terms of practical constraints and consequences.

Although focusing on narratives around Indigeneity (in this research, over 90% of the sample was male), Jeffries and Bond’s (2010) work revealed themes similar to those found in the prior narrative explorations of gender and sentencing. Consistent with the focal concerns perspective, discourses constructed around Indigeneity in sentencing narratives affected judicial assessments in ways that mitigated sentencing outcomes for Indigenous defendants. In particular, there was evidence of discourses within the Indigenous sentencing remarks of reduced blameworthiness due to dysfunctional backgrounds (e.g. Indigenous defendants familial backgrounds were more frequently rooted in dysfunction) and risk (e.g. community ties were an important source of Indigenous social control). In addition, Indigenous offenders were viewed differently

in terms of offender level constraints and broader consequences (e.g. imprisonment was construed as a significant social cost to Indigenous communities).

Thus, qualitative analyses may help us to better articulate how gender, race-ethnicity-Indigeneity are expressed in judicial sentencing assessments of blameworthiness, risk, practical constraints and consequences. To date, there have been no narrative explorations of how Indigeneity and gender intersect, impact on, and are expressed in, sentencing for women. As noted by Steffensmeier and Demuth (2006, 257), research is needed to “better articulate how judges express both gender and race-ethnicity in their sentencing assessments”.

The Current Research

This study extends Bond and Jeffries’ (2010) prior statistical work—which found that female Indigenous defendants in Western Australia’s higher courts are less likely (compared to female non-Indigenous offenders) to be sentenced to prison—through a qualitative investigation of judges sentencing remarks for a matched pair sub-sample of female defendants drawn from the larger sample used in the earlier study. To achieve a more comprehensive explanation for how Indigenous women in Western Australia are less likely to be sentence to prison than non-Indigenous women under like statistical circumstances (see Bond and Jeffries, 2010), we need to have a more meaningful account of judicial sentencing decisions. This can be achieved by analyzing discourse around the sentencing of offenders (Spencer 1984: 208). This analytical approach recognizes the need for an understanding of how gender ‘gets done’ for both Indigenous and non-Indigenous women. To do this, our analysis uses a conceptual framework grounded in understandings of gender in feminist thought,

although we recognize that there is no single feminist perspective. Thus, as Daly and Chesney-Lind (1988: 504) point out, gender is: (1) “a complex social, historical, and cultural product”; (2) “orders social life and social institutions in fundamental ways”; (3) “is not symmetrical or universal but based on an organizing principle reflecting the superiority of some groups” of women (e.g. non-Indigenous) over others (e.g. Indigenous).

Judges sentencing remarks are formal records of exchanges between offenders and other judicial actors, a site where discourses about femininity and Indigeneity are constructed. Using the focal concerns perspective as a guide, we explore how judicial concern about blameworthiness, risk, practical constraints and consequences are qualitatively expressed during the sentencing of Indigenous and non-Indigenous women.

Research Site

As noted above, the current study was undertaken in the higher courts of Western Australia. Western Australia is geographically the largest state in Australia, with a population of over two million (or about 10 percent) of the national Australian total (Australian Bureau of Statistics 2010). Of which, Indigenous people comprise around 3.8 percent (Australian Bureau of Statistics 2006). As in the United States, Australia operates under a federal system of government with political power divided between a central government and six states (and two territories). Each state and territory has their own body of criminal law and criminal justice system (Newbold and Jeffries 2010). Sentencing in Western Australia is governed by legislation which preserves a broad sentencing discretion for judges.

In Western Australia (and Australia more generally), the type of offence determines the level of court in which an offender will be sentenced. Offences are classified as summary, indictable, or as indictable offences that can be dealt with summarily. Summary offences are considered minor (generally equivalent to misdemeanors in the United States) because the sentencing penalties attached to them are at the lowest end of the sentencing scale. Those charged with summary offences are sentenced in what are generically referred to as lower courts (such as Local Courts, Magistrates Courts, and Courts of Petty Session). Indictable offences (generally equivalent to felonies in the United States) incorporate the most serious types of crimes with the most serious statutory sentencing penalties attached to them. Defendants found guilty of indictable offences will be sentenced in intermediate (known as District Courts) and/or higher courts (known as Supreme Courts) (Findlay et al 2009).

Sample

In this study, we rely on a matched-pair sample ($n= 41$) (drawn from the larger stratified sample, see Bond and Jeffries 2010, 2011 for details) of female offenders convicted in Western Australia's higher courts (District and Supreme) from 2003 to 2005. The pairs were matched exactly on offence classification, number of conviction counts, and numbers of prior arrests. If there was more than one match, pairs were first matched on plea, and then if necessary, the match was selected randomly. In our sample of match pairs, Indigenous women were imprisoned less often than non-Indigenous females.ⁱⁱ Overall, 12 non Indigenous women were imprisoned compared with only six Indigenous women.

Analytic techniques

We explore the construction of gender and Indigenous status through a narrative analysis of judicial sentencing remarks. Sentencing remarks are *verbatim* transcripts of comments made by the judge, prosecution and defense at the sentencing hearing. In general, the remarks are structured around a summary of the context of the offence, a discussion of mitigation and aggravation factors, and the imposition of a sentence. By using a matched pairs approach, we control for the impact of key predictors of sentencing.

The transcripts were exported into Nvivo for analysis. Using a reiterative process, the transcripts were coded using themes from the focal concerns perspective. We not only consider what is said but what is not said. We ask if information is screen or presented in contradictory ways, according to the Indigenous status of the female defendants (Reed and Their 1981: 238; Worrall, 1990: 9). This process should provide a more nuanced understanding of the intersectionality between gender/Indigeneity and the sentencing process, which may in turn assist in our understanding of why there are Indigenous/non-Indigenous differences in sentencing outcomes for female offenders in the higher courts of Western Australia (as per prior statistical analyses, see Bond and Jeffries, 2010).

The analysis is structured around themes derived from the focal concerns perspective (blameworthiness, community protection (risk), practical concerns and consequences). Within each theme, we examine how Indigeneity and gender are expressed in the sentencing transcripts.

Blameworthiness

In our sample, appraisals of blameworthiness were primarily based on offence contexts, including crime seriousness and offenders' roles, although personal histories of familial trauma (e.g. domestic violence, childhood sexual abuse), poor mental health, and substance abuse were also relevant. Although all these factors appeared important in the sentencing of both Indigenous and non-Indigenous women, it is in the construction of offender antecedents that differences by Indigenous status were seen.

Offence Seriousness

All sentencing transcripts in our sample contained detailed accounts of the crimes for which the defendants had been convicted. Overall, no differences were found: in just over 50 per cent of the sentencing remarks for both Indigenous and non-Indigenous women, the judges noted that the offence was "serious" and one that "required" or was "likely to result in a sentence of imprisonment."

Familial Trauma, Mental Health and Substance Abuse

In the sentencing transcripts, discussion around familial trauma, mental health and substance abuse were common, but were difficult to disentangle. Regardless of Indigenous status, victimisation, psychological trauma and substance abuse often came together in judicial assessments of the antecedents for the offending. This can be seen in the following excerpt for a non-Indigenous defendant:

"One might say that the genesis of all of these charges is ... essentially the event of the defendant being brutalised [i.e. raped] ... I should say ... that the defendant's heroin problem which she had at that point in time largely stems from that occasion. It's used as a form of self-medication. It's used as a form of, if you will, trying to deal with the immense grief, immense stress. What can be said is that the actions there are classically, a person who is suffering under a heavy drug habit and is dealing with a violent partner at home" (defense lawyer). "The last few years of your life have been pretty ghastly, in that you had this terrible thing happen to you. No doubt that made any drug addiction or even drug dependence ... worse. You were also in a violent relationship and your life just spiralled out of control" (judge, non-Indigenous defendant).

Although interwoven, the precursors of non-Indigenous offending (compared to Indigenous offending) were more frequently positioned within discourses of mental instability (18 vs. 7 cases), substance abuse (31 vs. 26), familial trauma (including domestic violence) (28 vs. 19) and coercion (15 vs. 8) (often at the hands of their domestically violent partners). However, more references to these types of circumstances did not automatically result in the mitigation of blameworthiness. Instead, while noted to be a contributing factor in female offending, these factors were presented in the narratives as demanding, rather than disavowing, responsibility.

Rather than denying individual agency, judges expected female defendants to take control of their lives by addressing the underlying causes of their criminality. Women who came before the court with histories of substance abuse, familial trauma (including coercion by domestically violent partners) and mental health problems were expected to understand the connection between these issues and their criminality, and actively pursue change in their negative circumstances (e.g. undertake drug rehabilitation programs, remove themselves from the coercive or 'bad' influences of deviant peer groups and partners, seek counselling for domestic violence and psychological problems). Women who did this were perceived positively by the judge:

"The pre-sentence report gives me a great deal of information about your background and the difficulties that you have had in your life and it seems that for the first time in a long while you have got yourself more organised ... and having talked to community corrections you realise that they can offer you some assistance to deal with issues which you need to address and what I intend to do is to give you the opportunity to undertake that work which only you can do" (judge, non-Indigenous defendant).

On the other hand, blameworthiness could be aggravated for women who failed to 'get themselves more organised', and in particular, to take advantage of rehabilitative opportunities.

Assessments of such failures were more typically made in the cases of non-Indigenous women. More non-Indigenous (n=18) than Indigenous women (n=10) were noted to have performed badly when sentenced to prior community based sentences. Further, judges more frequently expressed exasperation about the failure of non-Indigenous women to take advantage of their rehabilitative opportunities. Typical judicial comments can be seen in the following examples from the non-Indigenous sentencing transcripts.

In the first, the defendant is chastised for not exerting control over her situation, for being “unable or unwilling to accept help,” and as a result, the judge is unprepared to waste anymore resources extending help to her:

“The defendant [has] an extensive history of both physical and sexual abuse, the emotional and psychological effects of which she appears to have self-medicated ... I'm not going to ... impose any more community supervision, although I think that you undoubtedly need it, but for one reason or another you are unable or unwilling to accept that help. You clearly need help. Your problems are not all of your making, but what is within your control is to do something about those problems and I'm said that you don't seem to be able to or want to do something about the problems. I'm not going to waste the community's resources on you again. It seems to me that those resources are better used for people who want to be helped” (judge, non-Indigenous defendant).

Similarly, in the next example, the judge notes that while this non-Indigenous defendant needs help, her failure to attend treatment and continued use of drugs whilst on a prior community based sentence, suggests that she is “unable or unwilling” to accept help. As a result, the judge is not prepared to impose a sentence with a rehabilitative component:

“You were directed to report to community based corrections for supervision ... You failed to report. Thereafter you failed to report for the psychological treatment you need ... urine analysis reports ... were positive for amphetamines and methamphetamine. I'm not going to, therefore, impose any more community supervision [because]....you are unable or unwilling to accept that help. You clearly need help. It's a terrible situation that you are in the dock of the District Court and you are in jeopardy of having [someone else] have to look after your children and I would have thought that was enough to make you do something about your problems” (judge, non-Indigenous defendant).

The following non-Indigenous woman is lectured for, ‘thumbing her nose’ at the prior rehabilitative sentencing opportunities provided to her:

“Within six months of being placed on the intensive supervision order you were heavily back into drugs, cannabis and amphetamines ... It hardly reflects well on you that you would commit offences so soon after ... being told that you were going to be provided with the support services to help you continue to overcome your problem with drugs. You simply seemingly thumb your nose at the law and the opportunity which is being given to you” (judge, non-Indigenous defendant).

Finally, in the last example, the judge acknowledges the “unfortunate” circumstances of the defendant’s childhood (i.e. sexual abuse). However, as the non-Indigenous defendant has not taken advantage of the rehabilitative opportunities provided to her (i.e. to address the childhood sexual abuse and subsequent drug dependency), sentencing her to another community-based sentence is seen as a ‘postponing the inevitable’. The judge tells the defendant that although she has had a tragic life, she needs to exert her “will” and “give away” her dysfunction lifestyle (e.g. drug abuse):

“The [pre-sentence] report ... is not really supportive of [you] being given any further opportunity in the community. [It states] that this young woman having been given an opportunity has not really succeeded with it. I think it [giving the defendant another community based sentence] would simply be postponing the inevitable and that there is a need for there to be some kind of break in your behaviour. The causes of the behaviour, as with all of us no doubt, are complex and manifold and as I pointed out some very unfortunate things have happened to you in your early life that was certainly not your fault and no doubt those things play a role but those things don't, as with anyone, tell the whole story and there's personal will involved in your case, as with all of us, and it's only when you decide that you want badly enough to give away this pattern of life that something will happen” (judge, non-Indigenous defendant).

Only one Indigenous woman was lectured about her failure to respond to prior community-based sentences and told that help would no longer be extended to her. More frequently, in the Indigenous narratives, judges simply noted that the women had failed to comply with prior community sentences: “The defendant has not complied with previous community based orders” (judge, Indigenous defendant).

Remorse

In contrast to offenders who fail to express remorse, judicial perceptions regarding culpability may be more positive in cases where offenders express regret for their crimes. Overall, female defendants were noted to be remorseful in 21 of the sentencing transcripts. However, comments about whether an offender felt compunction were more frequent in Indigenous (n=13) than non-Indigenous transcripts (n=8). Further, in seven of the non-Indigenous transcripts, compared with one Indigenous, defendants were described as having expressed no remorse. As the following examples demonstrate, failing to express remorse was viewed negatively by judges, while remorsefulness was construed positively and noted to be a mitigating factor:

“Essentially you admit the facts of this offending and say that you are very sorry for what you have done. I accept that you are genuinely very remorseful for your behaviour ... [in addition to other factors] given your genuine remorse, I believe it would be in your best interests and those of the community ... for you to have an opportunity to show that you can behave and be law-abiding way [i.e. by being given a community based sentence]” (judge, Indigenous defendant).

“It seems to me that there is no real remorse being shown by you in as much as you have pleaded not guilty and the matter went to trial. Having said that though, there are some other matters that I will comment on in a moment that I think provide some mitigation for you, but I don't think it can be properly said that you have shown any remorse. It seems to me if you did you would have pleaded guilty” (judge, non-Indigenous defendant).

Community Protection/Risk

Past researchers have argued that sentencing judges make predictions about the risk offenders pose to the community based on factors such as current crime seriousness and criminal history (Steffensmeier et al 1998; Mitchell 2005; Spohn 2000). Interestingly, in our transcripts, current crime seriousness was positioned within the context of blameworthiness, not risk. Offender characteristics and backgrounds (such as familial situation/trauma, employment status, and drug abuse) may be part of the construction of future risk of offending (Jeffries et al. 2003).

We identified four main themes around narratives of risk and community protection. These are: substance abuse and other criminal antecedents, criminal history, familial ties, and employment. In addition, we also found a further theme—community ties—which was present only in the Indigenous narratives.

Substance Abuse and Other Criminal Antecedents

Our exploration of the sentencing transcripts revealed that continuing, and unaddressed, drug dependence was viewed as contributing to a high risk of re-offending. Although drug dependence was more likely to be found in the narratives of non-Indigenous females, there was no difference in the way in which drug dependence was viewed as a risk factor in the Indigenous transcripts. Overall, judges identified nine non-Indigenous women as posing a high re-offending risk and in each case; on-going problems with substance abuse were present. While only three non-Indigenous women were noted as having a high risk of re-offending, all three were also battling substance dependency.

The following example demonstrates how an inability on the part of a defendant to address a substance abuse problem presents as a re-offending risk:

[You have had a] ... “most regrettable and unfortunate background and I think that ought be taken into account as a factor that was likely to have been a most significant factor in causing you to become involved and addicted to illicit substances, that of course being the direct cause of the subsequent offending. [The pre-sentence report] does express the view that you do have a tendency to attempt to escape responsibility for your actions, [it notes that] this young woman having been given an opportunity has not really succeeded” (judge). “She has not taken advantage of any counselling component that has been provided in the intensive supervision order in order to deal with her substance abuse problems” (prosecution). “Community based sanctions have failed to deter you and that there is an established pattern of offending [linked to substance abuse]. I think to simply tell you you are going to be released back into the community and you have got to go and see the community corrections officer would not be of any effect at all. I think, as I say, it would simply be a pointless exercise and you would be back here again in six months with another string of offences” (judge, non-Indigenous defendant).

Criminal History

In the sentencing remarks, a defendant's criminal history appeared part of judicial assessments of re-offending risk. Few differences emerged in the frequency to which judges made references to past offending behavior by Indigenous status. In 75 percent of the sentencing remarks, judges made reference to the criminal histories of both Indigenous and non-Indigenous women and the serious and/or significant criminal histories of both groups were noted with similar frequency.

Employment

The employment status of the female defendants was highlighted in over 70 percent of the sentencing transcripts. Women who were either employed or committed to finding employment were spoken about positively in the sentencing transcripts:

"It is to your credit that you state you wish to complete your studies and obtain employment" (judge, Indigenous defendant).

I note that you are currently employed in work ... you are to be commended for engaging in that work (judge, Indigenous defendant).

"You are getting your life on track ... You have got a job" (judge, non-Indigenous defendant).

Employment participation can mitigate sentencing outcomes because it is seen to provide a degree of informal social control over an offender's life, and thus reduce the possibility of re-offending (Jeffries, 2002a; Jeffries, 2002b). Interestingly, more Indigenous (n=15) than non-Indigenous women (n=10) were noted to be employed or committed to finding employment.

Familial Ties

Although familial ties (particularly childcare) were more frequently constructed within discourses of social cost (see practical concerns and consequences section),

judges also made references to familial ties in ways that denoted social control.ⁱⁱⁱ Risk may be reduced for women who are subject to supportive, non-deviant, familial relationships, because in these contexts levels of ‘positive’ informal social control increase. In the following example, the defendant has severed her relationship with her dysfunctional partner and is now living with her parents who are described as “supportive”. Her life is now described as “settled” and as “reset” in a more “positive fashion”. Perceptually, the risk of re-offending may have been reduced:

“She has finally brought the relationship to an end [with her violent, drug abusing partner]. She is currently living with her parents ... she is supported by her father ... she is now in a position where her life is starting to come back together ... She has disposed of what is probably the most disruptive force in her life and that was her defacto. She is back with her parents. She is on a settled basis. She is on a settled background.” (defense lawyer). “I accept that she managed to break free of a very bad relationship and reset her goals and reset her life in a much more positive fashion” (judge, non-Indigenous defendant).

Similarly, the next defendant appears to have ended her dysfunctional relationship with her violent and drug abusing partner. This woman now lives with her sister who is described as being a “responsible young woman” and a “positive influence” on the defendant. As a result, the judge now holds some hope with regard to her future (i.e. re-offending risk is reduced):

“She was involved in an abusive and a mutually destructive relationship with a young man who was a known substance abuser and a persistent and consistent offender. Ms Kelly claims she no longer wishes to pursue this relationship. Her sister, who apparently has a positive influence on Ms Kelly, has offered her accommodation ... and indicated that she would be willing to help her discharge her obligations to any form of community supervision” (defense lawyer). “She has the option of staying with her sister and I’m advised that her sister is a responsible young woman and someone who can be of assistance to Ms Kelly, so she has somewhere to go and it would seem that her present situation does hold some hope” (judge, Indigenous defendant).

Overall, the presence of strong ‘healthy’ familial ties were noted with similarly frequency for the Indigenous (n=29) and non-Indigenous women (n= 30). Further, there were no obvious differences in narratives around familial bonds by Indigenous status.

Community Ties

Unlike the narratives of non-Indigenous woman, the bonds between Indigenous women and their communities were sometimes raised in the sentencing transcripts (n=7). In five cases, these bonds were described positively and as worthy of further support. For example, one judge noted that “I think you need support from the community and I gather that at [Indigenous community] they have made some arrangements about that, so I don’t want to upset that.” Maintaining community support and bonds thus appeared as an Indigenous-specific mechanism through which informal social control was increased and perceptions of risk reduced.

However, community dysfunction, which could be construed as a risk for re-offending, was also noted in two Indigenous transcripts. In the first, the defendant’s likelihood of re-offending was mitigated by the fact that she was no longer residing in a particular community known to be “trouble” for “young Aboriginal people”:

“It’s pretty easy for young people, particularly young Aboriginal people, to get into trouble in [this Indigenous community], but you are no longer living there” (judge, Indigenous defendant).

In the second example, the judge notes the dysfunctional context of the Indigenous community in which the defendant lives. Yet, rather than this being a cause for concern with regard to risk, the judge appeals to the defendant’s conscience, perhaps in an attempt to lessen the likelihood of re-offending, and asks her, “to set a good example” in the future, to be “a leader” by demonstrating appropriate behavior:

“I am aware that there are difficulties in the community because of grog coming into the community and other substances, cannabis, being used. That is a very, very sad thing for that to be happening because [this] is otherwise a good community and is looked upon by people of your culture and my people as being a good community where Aboriginal people can live happily and without problems at other places, but it is very sad that grog and other substances are getting into the community. What the community needs is strong people like you ... to say, “No, we don’t it” and to set an example by not using grog yourself, or alcohol, and those who use cannabis not to use cannabis. Only in that way can the problems which they bring upon the community be reduced or avoided by setting a good and appropriate example to the younger people in the community. I hope that in the future you can set that good example and be a leader in the community, not a participant in drinking alcohol, but rather be strong and not participate in the drinking

and try and help your community in that way. In that way you will help the young people in the community also” (judge, Indigenous defendant).

Practical Constraints and Consequences

In our sample of sentencing transcripts, the focal concern of practical constraints and consequences was predominately expressed through the notion of the social costs to defendants’ children and communities.

Child care

A total of 49 women were identified in the sentencing transcripts as having childcare responsibilities. Judges often expressed concern about the detrimental impact of imprisonment on female defendants’ children. As demonstrated by the following typical examples, the social cost of removing women from their children via imprisonment was an “independent sentencing consideration” and for “the sake of the children” mothers often avoided incarceration:

“... my first reaction was to send you to an immediate term of imprisonment and you deserve that, but I’m not going to do it because, as I have indicated to your counsel, it is intolerable that your children have to be looked after by another child, namely your ... son” (judge, non-Indigenous defendant).

“However, in all of the circumstances, including ... the fact that you are the carer for two young children, which is an independent sentencing consideration ... I consider that it is open to me to suspend that sentence of imprisonment” (judge, Indigenous defendant).

The number of Indigenous and non-Indigenous women noted to be responsible for children was similar: 25 compared to 24. Of the 49 women who were identified as having child care responsibilities, six received a prison sentence but only one of these women was Indigenous. An explanation for this was found in the sentencing narratives. Compared with non-Indigenous defendants, judges were more than twice as likely to express concern that incarceration would adversely affect Indigenous children (n=7 vs. n=15). Further, while never present in the Indigenous remarks, in

some of non-Indigenous sentencing narratives, imprisoning the mother was deemed to be in the best interests of the child.

In the following example, the non-Indigenous defendant's substance abuse is described as having "undermined her parenthood", but since being held in custody she has become "drug free." Further, once a sentenced prisoner, she will be able to have her child with her in prison. Rather than being a social cost, prison subsequently presents as beneficial to both mother and child:

"... because of her drug abuse, substance abuse and drinking alcohol [she] has really created problems for herself and has undermined her parenthood ... [however] you have been in prison now for six months. It might seem strange to say that but you have been off drugs for six months; you're in a drug-free unit; she understands that in all likelihood she is going to receive a sentence of immediate imprisonment. Fortunately for her, apparently once she does receive a sentence of immediate imprisonment she will be moved to the new women's prison ... and she understands that she will be able to have her child in her full-time care once she is moved to that prison and she is looking forward to that" (defense lawyer, non-Indigenous defendant).

In the next quote, imprisonment is again presented as being of possible benefit to the non-Indigenous defendant's children. In this case, the defendant asks to remain in prison to address the underlying causes of her offending so that she might be able to 'get her children' back once she is released. The judge agrees and notes that imprisonment is likely the safest option for both the defendant and her children:

"... they [the children] have ...gone into foster care. [The defendant] believes the placement ... is going to be excellent and one of the best things that will have happened to them and looking at her life with them up till a - day that probably a very fair comment ... She doesn't want to upset that. Her aim is to complete the course she set herself to do in prison ... to impress the Department [who removed the children from her care]" (defense lawyer). "They're certainly not going to give children back to a mother if there's a risk of drug issues raising their ugly heads again" (Judge). "Her firm instructions have been she wishes to [be] in gaol so she can do the courses she has indicated ... from her standpoint [this is] a very realistic view of where she is at present and what she needs to do to start what she sees as her journey to get her children back and rehabilitate herself" (defence lawyer). "I appreciate what [your defence lawyer] ... has said, that is that you think that in your present predicament the best thing for you is to stay in prison, stay off drugs, see what help you can get with the various matters that you have to confront and in due course, hopefully, get your children back. I agree with you from what I know ... that at the moment it's probably safer for them and you to be where you respectively are" (judge, non-Indigenous defendant).

Social Cost to the Community

In the sentencing remarks, judges sometimes referred to what can perhaps be loosely described as the social cost of imprisoning women who were either thought to be, or had the potential of making, a positive contribution to their community. However, these narratives were more common in the Indigenous (n=11) than non-Indigenous sentencing remarks (n=4).

In the following example, the judge notes that it is a “tragedy” of the Indigenous woman’s offending because she has a “leadership role” and is doing “important” things in her community. The judge does not imprison the defendant as she has “a heavy” community “responsibility” and she must “live up to it”:

“But it's a tragedy for you ... to be involved in something as serious as this when you do face [a] term of imprisonment. I mean you've got so much to offer the community ... You have been involved in community projects and research and history and all those things which are so important ...[you have a] leadership role in relation to the youth side of things ... I will suspend [this] term of imprisonment. I hope that this is behind you and you ... get on with the good work that you are doing ... The community deserves more of you than getting yourself involved in this. I think in a leadership role it's not very good if ... young leaders like you get themselves in this type of thing ... You've got a heavy responsibility and you've got to live up to it” (judge, Indigenous defendant).

In the next extract, the judge notes that the Indigenous defendant has the potential to “do a lot of good work for her community”:

“... I think you're a young lady who can do a lot of good work for your community ... You have got the ability to be able to help the young people and contribute to their upbringing in the community and that would be good for the community” (judge, Indigenous defendant).

In the final example, the non-Indigenous defendant is told that it would be in the “community’s interests” if she were given another chance to “prove” she could “contribute” to it:

“it may well be in the end that the community's interests ... are best served by giving you a final chance to prove that you can overcome the difficulties you have had in your life and lead a law-abiding lifestyle and contribute to the community rather than detracting from it in the very obvious way that you have done by this offending” (judge, non-Indigenous defendant).

Summary and Discussion

Prior statistical analyses by the current authors show that in contrast to non-Indigenous females, Indigenous women in the Western Australian higher courts are likely to receive lenient sentences when they appear before the court under like statistical circumstances (i.e. with similar current and past criminality) (see Bond and Jeffries, 2010). The current research extends this prior statistical research through a qualitative investigation of judges sentencing remarks for a matched pair sub-sample of female defendants drawn from the larger sample used in the earlier study. Consistent with our prior statistical analyses, a major finding of the current qualitative study is that the sentencing stories of Indigenous and non-Indigenous women differed in ways that may have mitigated sentence severity more substantially for Indigenous females.

Consistent with the ‘focal concerns’ approach to sentencing, Indigeneity affected judicial assessments of women’s blameworthiness, risk, practical constraints and consequences. More specifically, our analysis of the sentencing transcripts, showed that narratives of blameworthiness and risk around mental health, familial trauma and substance abuse differed by Indigeneity. Employment participation and community ties (risk reduction factors) and expressions of remorse (which may mitigate blameworthiness) also varied between the Indigenous and non-Indigenous sentencing transcripts. Further, Indigenous females were viewed differently in terms of social cost (i.e. practical constraints and consequences). However, there were few differences by Indigenous status for offence seriousness (blameworthiness), criminal history (risk) and familial ties (risk).

There are three particular Indigenous/non-Indigenous differences that deserve further discussion. First, we found that employment status was referred to frequently in our female sample, with references to employment more likely for Indigenous women: unlike prior narrative explorations of sentencing in which employment participation was construed as an important source of informal social control (and thus risk reduction mechanism) only for men (e.g. Jeffries 2002a, 2002b; Eaton 1986; Worrall 1990). The changing roles of women in western society (i.e. they are now expected to work both within and outside the home) likely explain the different current and past findings. Why Indigenous women in this study were more likely than non-Indigenous women to be talked about in terms of their employment situation was not clear. Perhaps they were more likely to be committed to employment. In any case, the outcome may have been that Indigenous women were construed as having higher levels of informal social control which could have reduced judicial perceptions of risk.

Second, the precursors of non-Indigenous women's offending were more frequently positioned in the sentencing remarks within discourses of mental ill health, substance abuse, familial trauma and coercion (often at the hands of domestically violent partners). However, compared to Indigenous women, blameworthiness and possibly risk were frequently exacerbated for non-Indigenous women because of their failure to embrace prior rehabilitative opportunities and address their criminal antecedents. This finding contradicts a number of earlier qualitative studies of female sentencing which showed that women's agency was frequently denied at sentencing through discourses of pathology and trauma: narratives around mental ill health, substance abuse, familial trauma and coercion generally resulted in the neutralization of

women's blameworthiness, detracting from their potential dangerousness (i.e. risk) (Allen 1987; Jeffries 2002a, 2002b; Worrall 1990). In our research, judges clearly expected non-Indigenous women to express agency by 'stepping up' and taking control over their dysfunctional lives. Failure to do so aggravated blameworthiness and risk. In contrast to non-Indigenous women, there were few discourses about the underlying causes of Indigenous criminality, or the lack of Indigenous women to engage in rehabilitation.

We expect that this may be due to the differential impact of a lack of social services including rehabilitation programs available in regional and remote locations. Indigenous people disproportionately live in geographically remote locations.^{iv} Thus, in contrast to the non-Indigenous women, few Indigenous defendants may have been extended the opportunity to engage in rehabilitation, making it difficult to hold them fully responsible for their offending. Moreover, judges are likely aware of the marginalized status of Indigenous people. As one judge in the current study noted, he was "well-aware of the fact that many Aboriginal people suffer prejudice and they have a great many difficulties". There has been widespread political and public recognition of how the marginalized status of Indigenous Australians as a colonized people, alongside problems in criminal justice system responses to them, has led to a massive over-representation of Indigenous people in prison,^v including a national inquiry in the 1990s (the Australian Government's Royal Commission into Aboriginal [Indigenous] Deaths in Custody, 1991). In line with the arguments of the focal concern of practical constraints and consequences, the Western Australian judiciary may be attuned to this broader social context. Coupled with the underlying disquiet of Indigenous over-representation, the "prejudices" and "difficulties" Indigenous women

experience may have reduced (either consciously or unconsciously) blameworthiness in the eyes of the judiciary, as evidenced by fewer narratives concerning Indigenous women's inability to address their criminal antecedents.

Finally, consistent with prior qualitative research on gender and sentencing (Eaton, 1986; Daly, 1994), discourses about the social cost of removing women with childcare responsibilities from their families via incarceration were common in the sentencing transcripts. Interestingly, however, judges were more likely to express concern about the removal of Indigenous women from their children, while at times justifying the imprisonment of non-Indigenous mothers as in the best interests of the child, as openly voiced by one judge in the case of a non-Indigenous women: "I don't know what is worse for children, a drug addicted mother or a mother who is in prison."

There is an additional practical concern that arises in making decisions about imprisoning Indigenous mothers. One of non-Indigenous Australia's great national shames has been the forced removal of Indigenous children from their families. Parallel to policies around Native American children in the United States, governmental policies of protectionism and forced assimilation resulted in the removal of Indigenous children from their 'uncivilized' and later 'dysfunctional' families until the late 1970s (Commonwealth of Australia 1997: 22; Haebich 2000). A National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (Commonwealth of Australia 1997: 31) concluded "with confidence that between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910

until 1970.” The removal of Indigenous children was devastating for those taken, their families and the broader Indigenous community. Between 1997 and 2001, every state and territory government in Australia issued a formal apology to the ‘stolen generations’, with a national apology delivered in 2008. The focal concerns perspective would anticipate that these kinds of practical concerns and consequences would sensitize judicial decision-making.

Directions for Future Research

Narrative analyses of sentencing remarks can assist in understanding how judges use information about offenders and their circumstances to justify their sentencing decisions. However, we recognize that these are public documents of justifications which may not truly reflect the decision-making processes of judges and as such, we cannot fully explain judicial sentencing. For example, judges in this study did not explicitly refer to broader social and political contexts concerning the treatment of Indigenous people (i.e. over-representation, and the stolen generations) meaning that we could only hypothesize about their impact on judicial decision-making. Thus, interviews with judges are vital to improving our understanding about how judges use and interpret information about offenders, their cases and backgrounds within broader social and political contexts.^{vi}

Moreover, research examining the relationship between defendants’ Indigenous status and sentencing remains limited, with the majority of work being undertaken in Australia. Sentencing researchers have tended to stay within national silos with few attempts to systematically compare the treatment of criminal defendants across country boundaries. As colonised peoples, there is a conceptual similarity across

Indigenous groups in the United States, Australia and other countries like New Zealand and Canada that would allow sentencing scholars to compare experiences in a way that may not be possible with other racial or ethnic groups. Comparative Indigenous sentencing research could therefore provide a unique opportunity to further our understanding of how varying social, political and legal contexts matter in the sentencing process.

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ⁱ There are few studies of the impact of Indigenous status and sentencing in North America, the most recent being Munoz and McMorris (2002) which examined the sentencing of Native Americans for misdemeanour offences. In contrast, the examination of the sentencing of Indigenous offenders has been more extensive in Australia (most recently see e.g. Snowball and Weatherburn 2006, 2007; Jeffries and Bond 2009; Bond and Jeffries 2011).

ⁱⁱ The use of a matched-pair design has been previously used by sentencing disparities researchers (see Daly 1994; Jeffries and Bond 2009, 2010; Jeffries, Fletcher and Newbold 2003).

ⁱⁱⁱ In the context of current involvement in dysfunctional intimate relationships, we did not find social control type arguments within the judicial narratives: arguably, the type of informal social control needed to reduce the re-offending risk does not exist in dysfunctional familial contexts of this type. Recall that non-Indigenous women were more likely positioned in terms of dysfunctional intimate relationships.

^{iv} Compared with the non-Indigenous population, Indigenous Australians are more rural—only 31 percent live in major cities, compared with 68 percent of all Australians (Jeffries and Newbold 2010).

^v The Indigenous rate of imprisonment in Western Australia is 3,329 per 100,000 compared with a non-Indigenous rate of 163 per 100,000 (Australian Bureau of Statistics 2009: 54). In contrast, in the United States where rates of imprisonment are the highest in the western world, Native Americans are incarcerated at a rate of 942 per 100,000 compared to 761 persons of any other race/ethnicity per 100,000 (Minton 2008: 2).

^{vi} Unfortunately, unlike perhaps in the United States, the Australian judiciary is reluctant to engage with researchers, particularly around issues of sentencing disparities. To date, we have had little success in accessing judges to participate in formal semi-structure interviews or questionnaires on Indigeneity and sentencing. However, informal discussions with individual judges (including those serving in Western Australia) suggest anecdotally that there is on-going judicial concern and thus sensitivity about the ‘plight’ of Indigenous defendants within the criminal justice system.