

Sentencing Indigenous and Non-Indigenous Women in Western Australia's Higher Courts: A Summary of the Main Findings of a Narrative Study

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Introduction

Despite criticisms about its continuing relevance (e.g. Belknap, 2001; Curran, 1983), the chivalry hypothesis remains a key hypothesis in research on gender and criminal justice outcomes (e.g. Franklin and Fearn, 2008; Griffin and Woolredge, 2006; Hartley, Kwak, Park and Lee, 2011; Turner and Johnson, 2006). The chivalry hypothesis is generally traced back to Otto Pollak (1950) who argued that female offenders were likely to receive preferential treatment in the criminal justice system, due to the dominance of male decision-makers socialized to extend protection and chivalry to women and girls (Tjaden and Tjaden, 1981).

The universality of chivalry was later challenged by arguments that preferential treatment was only afforded to certain 'types' of women: whether or not women were afforded leniency depended on their fulfillment of gender role expectations (Herzog and Oreg, 2008, 49). Often called the 'evil woman' hypothesis, this perspective made benefit of chivalry conditional on the how female offenders were positioned within societal expectations of gender, and not just their crimes (Herzog and Oreg, 2008). These gendered expectations were based on an ideal of 'womanhood' which was white and middle class. This presents a problem for female defendants of racial/ethnic minority and Indigenous backgrounds, as they automatically fail to meet such expectations. Thus, Indigenous women and those from other racial/ethnic minority groups may not be extended preferential sentencing treatment, because they fail to behave in ways perceived as "deserving of protection" (Steffensmeier and Demuth, 2006).

However, current statistical research seems to provide little support for "evil woman" thesis, and the argument that leniency typically bypasses 'women of color'. Rather than findings of harsher sentencing outcomes, recent North American statistical studies show that 'woman of color' and white woman are treated equally (Steffensmeier and Deumth, 2006); while in Australia, sentencing leniency appears to be extended to Indigenous women (Bond and Jeffries, 2010). This counter-finding has resulted in calls for qualitative explorations of gender disparity to better understand these statistical findings (Steffensmeier and Demuth, 2006; Jeffries and Bond, 2009).

Thus, in this paper, we report the main findings of a larger study which investigates the impact of Indigenous status on higher court sentencing outcomes for female offenders in Western Australia, using a narrative analysis of judicial sentencing remarks.

Theoretical framework

Australian and North American sentencing researchers have been, particularly in racial/ethnic disparities research¹, relying increasingly on the focal concerns framework to explain judicial decision making. The focal concerns perspective looks toward the micro-social context of the court to understand how judges make decisions about sentencing. This approach argues that judges' sentencing decisions are driven by judicial assessments around three key focal concerns: blameworthiness, community protection and the practical constraints/consequences of sentencing decisions (Steffensmeier, Ulmer and Kramer, 1998).

¹ Although ironically, the focal concerns approach made an early appearance in a study of the impact of gender on imprisonment outcomes (Steffensmeier, Kramer and Steifel, 1993).

The first focal concern, *blameworthiness*, is associated with offender culpability and the amount of harm caused by their crime. It is punishment-focused and requires that the seriousness of an offence be balanced by the imposition of a punishment proportional to the criminal harm caused (Steffensmeier, Ulmer and Kramer, 1998). The second focal concern of *community protection* (or risk) requires the imposition of a sentence that protects the public through incapacitation of offenders that pose a risk to the community. The third, and final, concern—*practical constraints and consequences*—highlights the range of practical concerns that courts take into account in making sentencing decisions, including: organisational constraints (e.g. the need to ensure a regular case flow through the court); offender level constraints (i.e. the capacity of an offender to 'do time'); the social costs of sentencing the offender; and community or political expectations that may impact the court's general societal standing (Steffensmeier, Ulmer and Kramer, 1998).

The Current Research

Using the focal concerns perspective to guide our analyses, the current research extends past statistical research on gender and race-ethnicity-Indigeneity through a narrative exploration of Western Australian higher court sentencing transcripts. We rely on a matched-pair sample (n= 41) (drawn from the larger stratified sample see Bond and Jeffries, 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 matched pairs (n=41), Indigenous women were imprisoned less often than non-Indigenous females. Overall, 12 non-Indigenous women were imprisoned compared with only six Indigenous women. Because each Indigenous/non-Indigenous pair were matched on offence type, conviction counts and criminal history (and sometimes plea), this finding suggests that any differences between the non-Indigenous-Indigenous pairs are due to reasons other than their current and past offending behaviours. In four cases, both the non-Indigenous woman and her Indigenous counterpart received a sentence of imprisonment. However, in eight cases, the non-Indigenous woman was sentenced to imprisonment when her Indigenous match was not. There were only two instances of an Indigenous woman being imprisoned when her non-Indigenous match received a non-custodial outcome.

We present the main findings of a narrative analysis that examines how Indigeneity and gender are expressed in the sentencing transcripts for all 41 pairs. We organise our findings around the three focal concerns of blameworthiness, community protection and practical concerns.

Blameworthiness

When making sentencing decisions, judges make assessments of offender blameworthiness (Steffensmeier, Ulmer and Kramer, 1998). In our sample, these appraisals were based on offence contexts, such as crime seriousness and the offenders' roles in the commission of the offence. Personal histories of familial trauma (e.g. domestic violence, childhood sexual abuse), poor mental health, and substance abuse were also noted. Each of these factors were seen in the sentencing transcripts of both Indigenous and non-Indigenous women, but differences by Indigenous status were found in the narratives around personal histories.

Offence Seriousness

All the sentencing transcripts contained detailed accounts of the crimes for which the defendants had been convicted and were now being sentenced. We considered whether Indigenous status impacted judicial narratives about the seriousness of defendants' current and past criminality, but no general differences were found.

Personal Histories of Familial Trauma, Mental Health and Substance Abuse

In contrast to Indigenous women, the precursors of non-Indigenous offending were more frequently positioned within discourses of mental instability (n=18 vs. n=7), substance abuse (n=31 vs. 26), familial trauma (including domestic violence) (n=28 vs. 19) and also coercion (n=15 vs. 8) (often at the hands of their domestically violent partners). However, greater trauma, chronic substance abuse and poorer mental health did not necessarily appear to mitigate blameworthiness. While noted to be a contributing factor in female offending, overall the judicial discourses constructed these factors as demanding, rather than disavowing responsibility.

Instead of denying individual agency, judicial narratives revealed an expectation that female defendants would 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 violent intimate 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). In general, women who did this were perceived positively in the judicial sentencing remarks.

On the other hand, judicial attributions of increased blameworthiness were seen in the transcripts of women who failed to 'get themselves more organised'. 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 the rehabilitative opportunities provided to them.

Remorse

In contrast to offenders who fail to express remorse, judicial perceptions of culpability may be more positive in cases where offenders express regret for their crimes. Comments about an offenders' feelings of compunction were more frequent in Indigenous (n=13) than non-Indigenous transcripts (n=8). Further, the failure of the defendant to express remorse was noted in seven of the non-Indigenous transcripts, but only one Indigenous transcript. Overall, and unsurprisingly, the judicial narratives noted remorsefulness as a mitigating factor, and the lack of expressions of remorsefulness was perceived negatively.

Community Protection/Risk

Sentencing judges make predictions about the risk offenders pose to the community, based on factors such as current crime seriousness and criminal history (Steffensmeier, Ulmer and Kramer, 1998). Offender characteristics such as familial situation, employment status, and drug abuse may also be considered (Jeffries, Fletcher and Newbold, 2003). In the sample of sentencing transcripts, judicial assessments of risk were associated with criminal history, familial ties, employment, and criminal antecedents (i.e. familial trauma, mental health and substance abuse): factors that were also reflected in judicial concerns about blameworthiness. However, in our sample, we found that crime seriousness was typically positioned against blameworthiness (and not risk) in the sentencing transcripts. Finally, community ties also emerged as linked to lower risk to the community, by providing a source of informal social control. However, this was only found in the sentencing narratives of the Indigenous female

offenders. In this section, we briefly highlight the discourses around substance abuse, criminal history, employment, familial ties and community ties.

Substance Abuse

In the prior section on blameworthiness, non-Indigenous defendants were shown to be more frequently identified as drug dependent and unwilling to address their addiction. Logically, if drug dependence is identified as a reason for a person's criminality then the likelihood or risk of re-offending will remain high so long as their drug addiction continues. Our exploration of the sentencing transcripts supported this assumption, but there was no evidence that was seen differently Indigenous status. 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. In contrast, only three non-Indigenous women were noted to be at a high risk of re-offending and again, all three were also battling substance dependency.

Criminal History

Compared to defendants with minimal criminal histories, defendants with a long track record of offending were typically perceived as posing a greater re-offending risk. Few differences emerged in the frequency of judicial references to past offending behavior by Indigenous status.

Employment

Employment participation may mitigate sentencing outcomes, because it may exert a degree of informal social control over an offender's life and thus might reduce the possibility of re-offending (Jeffries, Fletcher and Newbold, 2003). In the sentencing transcripts, women who were either employed or committed to finding employment generally had positive judicial assessments. 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 (discussed later), they were also expressed in ways that denoted social control. 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.

Overall, the presence of strong 'healthy' familial ties were noted with similarly frequency in the Indigenous (n=29) and non-Indigenous (n= 30) sentencing transcripts. Further, there were no clear differences in the narratives around familial bonds by Indigenous status.

Community Ties

Unlike in the sentencing transcripts of non-Indigenous woman, the bonds between Indigenous female offenders and their communities were sometimes raised in the transcripts (n=7). In five cases, these bonds were described positively and as worthy of supporting. A typical comment in these cases is: "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." Thus, maintaining community support and bonds 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 with regard to re-offending, was also noted in two Indigenous transcripts.

Practical Constraints and Consequences

The focal concern of practical constraints and consequences recognises the influence of organisational and offender level constraints and costs of sentencing outcomes. In our sample of sentencing transcripts, this focal concern was predominately expressed through the notion of social cost to defendants' children and communities.

Child care

Judicial concern about the detrimental impact of imprisonment on female defendants' children was common in the sentencing transcripts. The social cost of removing women from their children via imprisonment was frequently noted in the transcripts as an "independent sentencing consideration": for "the sake of the children", mothers often avoided incarceration.

In our sample, 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 to the non-Indigenous women, 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 scripts, in some of non-Indigenous sentencing narratives, imprisoning the mother was seen as in the best interests of the child: prison was constructed as an environment in which these women could address their offending antecedents (e.g. drug dependency) more effectively, and in turn, improve their parenting.

Social Cost to the Community

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

Summary

Past research has argued that, in contrast to white females, 'woman of color' are likely to receive harsher sentences because they pose a challenge dominant ideals femininity (i.e. white, middle-class 'womanhood') (Steffensmier and Demuth, 2006). However, findings from recent statistical sentencing studies have found that incarceration is equally likely for Black and Latino women (Spohn and Beichner, 2000; Steffensmeier and Demuth, 2006; Freiburger and Hillinski, 2009). Further, previous statistical analyses suggest that imprisonment may be less likely for Indigenous women (Bond and Jeffries, 2010).

The current research relied on qualitative methods to compare Indigenous and non-Indigenous female sentencing outcomes and narratives. We found that Indigenous women were less likely than their non-Indigenous counterparts to be sentenced to a term of imprisonment. Consistent with the focal concerns approach, differences in sentencing stories by Indigenous status showed that the lower likelihood of incarceration for the Indigenous women could be linked to judicial discourses of: (1) less blameworthiness, threat and risk; and/or (2) higher social costs attached to imprisonment.

Overall, in our thematic analysis of the sentencing transcripts, we found that judicial narratives of blameworthiness and risk based on assessments of mental health, familial trauma and substance abuse differed between Indigenous and non-Indigenous women. Employment participation and community ties (factors associated with risk reduction), as well as expressions of remorse (a factor that 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).

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