

Indigenous Status and Sentencing: Tentative Theoretical Explanations for Disparity

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Abstract

This paper briefly summarises¹ findings from a South Australian study that examined whether Judges' decisions to sentence offenders to imprisonment differed between Indigenous and non-Indigenous offenders when they appeared before the court under similar circumstances. Results showed that Indigenous offenders were less likely than their non-Indigenous counterparts to be sentenced to a term of imprisonment when appearing before the court under seemingly similar circumstances. Focal concerns (attribution) perspectives are used to explore these findings.

Introduction

Understanding the processes by which Indigenous peoples are sentenced and why they appear to be sentenced differently than their non-Indigenous counterparts is crucial, given that Australian governments are seeking to reduce Indigenous over-representation in our prisons. However, there is currently a dearth of empirical and theoretical work in Australia on the relationship between Indigenous status and sentencing (see Snowball and Weatherburn, 2006 & 2007).

The following paper summarises findings from a South Australian study that examined whether imprisonment sentencing decision differed between Indigenous and non-Indigenous offenders when they appeared before the court under similar circumstances. Possible theoretical explanations for the research findings are explored.

Indigeneity and Sentencing – A Possible Theoretical Explanation

In the United States, theory on sentencing and race/ethnicity is well developed. The focal concerns (attribution) approach has emerged in recent times as the most popular explanation

for the racial/ethnic disparity that is often found in sentencing outcomes. The focal concerns approach looks at the micro-social context of the court to illuminate how Judges make decisions about sentencing. This approach has identified three focal concerns which appear to drive Judges' sentencing decisions: 1) offender blameworthiness and harm caused by the offence, 2) community protection, and 3) practical constraints and consequences (Steffensmeier, et.al., 1998: 766-767; Johnson, 2006).

The first focal concern (blameworthiness) is associated with offender culpability and the degree of harm caused by the crime committed. Philosophically speaking, this first focal concern is driven by the sentencing aim of retribution. It is punishment-focussed and requires that the seriousness of an offence be replied to by the imposition of a punishment proportional to the criminal harm caused (Steffensmeier, et.al., 1998: 766-767). In Australia, as in most Western nations, offence seriousness is typically codified in law using statutory offence classifications and prescribed sentencing penalties. In addition, other factors may impact on Judges' perceptions of crime seriousness including for example, being convicted of multiple offences, committing an offence in the presence of co-offenders, and whether the offence occurred in public or private.

Besides offence severity, other variables that may influence Judges' perceptions of blameworthiness or offender culpability include the role played by the offender, level of criminal premeditation and criminal history. Other factors may mitigate offender blameworthiness. For example, personal histories of abuse and victimisation, and poor health may change judicial assessments of the offender's level of culpability.

Although the second focal concern of community protection draws on attributes similar to the focal concern of blameworthiness and harm, it is conceptually distinct because it is driven by the sentencing philosophies of incapacitation and deterrence (Steffensmeier, et.al., 1998: 766-767). The ultimate aim of both incapacitation and deterrence is community protection in the short and long term. Sentencing Judges make predictions about the risk offenders pose to the community based on factors such as current crime seriousness, criminal history and remand outcomes. Additionally, offender characteristics such as familial situation, employment status, and drug abuse may be considered.

The final focal concern of sentencing is practical constraints presented by both individual offenders and organisational resources (Steffensmeier, et.al., 1998: 767-768; Johnson, 2006: 266). One key organisational constraint is the need to ensure a regular case flow through the court and the principle way to avoid 'back logs' in sentencing is to induce guilty pleas (Steffensmeier, et.al., 1998: 767-768; Johnson, 2003: 454). Other organisational constraints include sentencing with restricted information under time constraints, which raises the possibility that Judges may have insufficient time to properly consider cases before them (Mackenzie, 2005: 28).

Researchers drawing on attribution perspectives argue that these above constraints can lead to a judicial reliance on 'perceptual shorthand' to decide sentences. This 'shorthand' can result in stereotypical attributions being made about particular types of offenders based on characteristics like race/ethnicity (Steffensmeier, et.al., 1998: 768; Johnson, 2006: 267). If Indigenous status carries with it criminal stereotypes, as it does in Australia, then Judges may subconsciously rely on that status characteristic as an indicator of blameworthiness (first focal

concern) and dangerousness (second focal concern). The attribution of increased threat and criminality to Indigenous offenders could produce sentencing differentials.

In addition to organisational constraints, sentencing decisions are also affected by offender constraints including: an offender's ability to 'do time', health conditions, special needs, and the disruption of familial ties (Steffensmeier, et.al., 1998: 767-768; Johnson, 2003: 454-455). Finally, community and political constraints may influence Judges, with politics and community expectations playing a role in their sentencing decisions (Steffensmeier, et.al., 1998: 767).

Whilst organisational constraints may lead Judges to rely on racial attributions that could potentially increase sentence severity for Indigenous peoples, constraints inherent in Indigeneity itself could potentially act as a mitigating factor to reduce sentencing. Indeed, the Royal Commission (1991, Chapter 22, Recommendation 92) argued that "the powers and decisions of sentencing courts present considerable opportunity for reducing the numbers of Aboriginal people in custody". Implicit here is the idea that Indigeneity could mitigate sentencing outcomes. It was subsequently recommended that for Indigenous peoples, imprisonment should be used as a sentence of last resort.

A powerful case can be made for Indigeneity, and the social, economic and historical dimensions underpinning it, to mitigate sentence severity (Edney and Bagaric, 2007). Indigenous Australians are disadvantaged in comparison to non-Indigenous Australians by all social and economic indicators (Commonwealth of Australia, 2007). This current situation resonates from this country's colonial past and the devastating impact of colonisation on Indigenous society (Cunneen, 2001; Commonwealth of Australia, 1997).

Contact with the criminal justice system further exacerbates Indigenous disadvantage and marginalisation. For example, at the individual level, imprisonment can diminish individual employment prospects, and increase the likelihood of homelessness, associated poverty, as well as mental and physical ill health (Edney, 2001; Krieg, 2006). Prison in itself may be a more difficult individual experience for Indigenous inmates. Incarceration for wrongdoing is fundamentally a ‘white’ form of punishment meted out by a ‘white’ court within a ‘white’ system of justice. The negative impacts of incarceration extend further to Indigenous families and communities, compounding the process of fragmentation that began with colonisation.

In recent years, a number of Australian jurisdictions have developed alternative ways of sentencing Indigenous peoples. For example, Indigenous and circle sentencing courts acknowledge and seek to address the differential needs of Indigenous defendants. These courts theoretically recognise Indigeneity in the sentencing process and developed in part as a response to the Royal Commission (Harris, 2004). In case law, recent precedent exists for factors associated with Indigenous status (e.g. associated disadvantage) and Indigeneity itself (e.g. historical legacy of colonisation) to mitigate sentencing (Edney and Bagaric, 2007). Furthermore, in the wake of the Royal Commission, governments throughout Australia are theoretically committed to responding to the problem of Indigenous over-representation. The political expectation is that rates of Indigenous over-representation will be lowered and the judiciary (as illustrated through Indigenous courts and sentencing precedence) is clearly attuned to the power that sentencing could play in meeting such expectations.

Using the focal concerns approach, more serious outcomes for Indigenous offenders are possible because negative racial attributions could be used by Judges when sentencing

Indigenous offenders. Nonetheless, allowance is also made for the mitigating influence of race/ethnicity (and other social factors) in sentencing decision making. In the context of Australia, the potential for Indigeneity to reduce sentence severity is theoretically strong. In response to The Royal Commission, State and Territory governments are publicly committed to reducing Indigenous over-representation, there is a certain level of community awareness and perhaps concern about the treatment of Indigenous peoples in the criminal justice system, and precedence for Indigeneity to mitigate sentence already exists. We might therefore expect to find that, when being sentenced under similar circumstances, Indigenous offenders might be sentenced more leniently than their non-Indigenous counterparts.

Methods

The fieldwork for this study was conducted in South Australia using a matched sample of 254 offenders (or 127 Indigenous/non-Indigenous pairs) sentenced in District and Supreme Courts in 2005 and 2006. First, non-Indigenous offenders were matched with Indigenous offenders by principal offence (the most serious offence convicted/found guilty)², based on the Australian Standard Offence Codes and National Offence Index (NOI). After being matched by principal offence, Indigenous offenders with more than one non-Indigenous match were then matched with non-Indigenous offenders who were similar on number of current convictions (convicted of one offence or more than one offence), number of prior convictions (as close in actual number as possible), court and plea. Thus a 1:1 Indigenous to non-Indigenous ratio was obtained.

The dependent variable examined was the decision to imprison (or not) for the principal offence. Independent (predictor) variables were grouped into four main categories of measures: offenders' social history and criminal history; current case characteristics; court

processing factors; culpability and blameworthiness (see Table 1 for further description of the study variables).

[INSERT TABLE 1 ABOUT HERE]

Results

Descriptive statistics by Indigenous status for the variables used in the analysis are shown in Table 2.

[INSERT TABLE 2 ABOUT HERE]

Using logistic models that statistically adjust for any possible differences in dependent variables by Indigeneity it was found that Indigenous offenders were less likely than their non-Indigenous counterparts to be sentenced to a term of imprisonment when fronting the court under similar statistical circumstances (see Table 3 for details of the logistic results). Indigeneity, in this case, appeared to be mitigating sentence severity, at least at this initial sentencing stage.

[INSERT TABLE 3 ABOUT HERE]

Discussion and Possible Theoretical Explanations

The lower likelihood of Indigenous offenders receiving a prison sentence in this case may in part be explained by the approach of South Australian Judges in sentencing Indigenous offenders. Generally speaking, the South Australian judiciary could be considered

progressive when it comes to sentencing Indigenous peoples. For example, South Australia was the first jurisdiction to establish what have since been referred to as the new Indigenous courts (Marchetti and Daly, 2004). Whilst all offenders in this research were sentenced in the Higher Courts, it is possible that a 'culture of concern' regarding Indigenous peoples permeates across the South Australian judiciary. Accordingly, South Australian Higher Court Judges may be treating Indigeneity as a mitigating factor.

More lenient sentencing responses suggest a level of judicial cognisance around pre-existing societal power imbalances between Indigenous and non-Indigenous people, and the potential for courts to further perpetuate these disparities if judicial power is used ineffectually. The South Australian judiciary could be recognising that social, economic, political and historical differences between Indigenous and non-Indigenous Australians exist usually to the benefit of the later, and that, under these unequal circumstances, equitable (rather than equal) treatment is possibly a more 'just' response.

In other words, Judges sentencing in South Australia could be influenced by the social constraints inherent in Indigeneity itself. Judges seem to be making allowances for the mitigating influence of Indigeneity in sentencing - the special circumstances of Indigenous offenders. This is perhaps not surprising, given political expectations of the criminal justice system after the Royal Commission and the potential role of sentencing in reducing Indigenous over-representation. As argued by the focal concerns perspective, when making sentencing decisions, Judges are sensitive to political (and for that matter community) expectations.

The attributions within the focal concerns perspective cannot explain why Indigenous offenders are less likely than non-Indigenous offenders to be sentenced to prison. Imprisonment would have been more likely for Indigenous offenders if Judges in South Australia utilised negative ethnic/racial attributions as indicators of blameworthiness and/or dangerousness to make imprisonment sentencing decisions. Instead, we speculate that the imprisonment sentencing decision was affected by the special needs of Indigenous offenders, as well as political and community concern about their treatment. It is unlikely that negative ethnic/racial attributions will be employed in a context where Judges are possibly sensitive toward Indigenous offenders' special needs (including the negative consequences of imprisonment), and constrained by post-Royal Commission political and community expectations.

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Table 1. Description of Study Variables

Variables	Description
<i>Independent Variables</i>	
<u>Offender Characteristics</u>	
Indigenous Status	0=non-Indigenous, 1=Indigenous
Sex	0=male, 1=female
Age	In years
Employment Status	0= not in paid employment, 1=in paid employment
Overall Familial Situation	0=no familial ties, 1=minimal familial ties, 2, moderate familial ties, 3=moderate to strong familial ties, 4=strong familial ties (combined measure of familial situation including whether or not offenders had children, primary childcare responsibilities, partners (i.e. boyfriend/girlfriend, defacto, husband/wife) and lived with family.
<u>Criminal History and Case Characteristics</u>	
Seriousness of Criminal History	Sum of standardised z scores for number of prior criminal convictions, number of prior criminal convictions in the same offence category as the current offence, number of prior imprisonment terms
Seriousness of Principal Offence	National Offence Index (NOI). Developed by the Australian Bureau of Statistics, the NOI ranks all offence classifications contained within the Australian Standard Offence Classification System in order of seriousness from 1-147 with 1 being the most serious and 147 being the least serious.
Offender's role	0=secondary, 1=primary/equal
Co-Offenders	0=acted alone, 1=acted with others
Offence location	0=public, 1=private
Premeditation	0=no, 1=yes
<u>Court Process Variables</u>	
Plea of not guilty	0=guilty, 1=not guilty
Number of conviction counts	0=1 to 2 counts, 1=more than 2 counts
Most serious remand outcome	0=bail, 1=custody
<u>Culpability/Blameworthiness Variables</u>	
Health	0=no health problems identified, 1=poor mental and/or physical health identified
Substance abuse	0=no problems with substance abuse identified, 1=under the influence of substances at the time of offence and/or has a general problem with substance abuse
Negative life experiences	0=no victimisation identified, 1=victimised in childhood and/or adulthood identified
<i>Dependent variables</i>	
Imprisonment sentencing decision	0=not imprisoned, 1=imprisoned

Table 2. Indigenous Differences in Offender, Criminal History and Case Characteristics, Court Process Factors, and Sentencing Outcomes (South Australia, 2005-2006, N=254)

	Total	Indigenous	Non-Indigenous	Sig. ^a
	Mean (S.D.) ^b	Mean (S.D.)	Mean (S.D.)	
<i>Offender Characteristics</i>				
Indigenous	0.50	—	—	—
Female	0.11	0.21	0.02	p<0.0001
Age (in years)	31.48 (9.70)	29.09 (7.66)	33.87 (10.89)	p<0.0001
In paid employment	0.29	0.19	0.39	p<0.001
Overall familial situation	1.80 (1.37)	1.85 (1.32)	1.75 (1.43)	
<i>Criminal History and Case Characteristics</i>				
Seriousness of criminal history (unstandardised score) ^c	64.69 (58.25)	70.25 (60.84)	59.13 (55.22)	p<0.1
Seriousness of principal offence ^c	43.03 (24.51)	43.38 (25.11)	42.68 (23.98)	
Primary/equal offender role	0.89	0.87	0.91	
Co-offenders present	0.40	0.43	0.36	
Occurred in private	0.57	0.56	0.58	
Evidence of premeditation	0.19	0.17	0.21	
<i>Court Process Factors</i>				
Pled not guilty/no plea	0.34	0.31	0.38	
More than 2 conviction counts	0.45	0.45	0.46	
On remand	0.60	0.69	0.50	p<0.01
<i>Culpability/Blameworthiness Variables</i>				
Physical/mental health	0.59	0.53	0.65	p<0.01
Substance abuse	0.82	0.83	0.80	
Negative life experiences	0.51	0.57	0.45	p<0.01
<i>Decision to imprison</i>				
Number of cases	254	127	127	

Table 3. Logistic Results of Decision to Imprison on Offender, Case and Court Processing Characteristics (South Australia, 2005-2006, N=254)

	Model 1 Offender social history		Model 2 Criminal history and case characteristics		Model 3 Court processing factors		Model 4 Culpability factors	
	b (SE) ^a	exp(b)	b (SE)	exp(b)	b (SE)	exp(b)	b (SE)	exp(b)
Indigenous	-0.404 (0.282)	0.668	-0.562* (0.270)	0.570	-0.698* (0.306)	0.497	-0.722* (0.306)	0.486
Sex	0.134 (0.453)	1.144	0.619 (0.441)	1.858	0.698 (0.475)	2.010	0.529 (0.511)	1.697
Age (in logged years)	-0.385 (1.087)	0.680	-1.692 (1.198)	0.184	-0.879 (1.214)	0.415	0.698 (1.341)	2.011
Employment status	-0.753* (0.317)	0.471	-0.503 (0.354)	0.604	-0.407 (0.410)	0.666	-0.180 (0.430)	0.835
Overall Familial situation	0.071 (0.091)	1.073	0.066 (0.101)	1.068	0.089 (0.109)	1.093	0.037 (0.121)	1.037
Seriousness of Criminal History (in standardised units)			0.229** (0.074)	1.257	0.201* (0.079)	1.223	0.168* (0.080)	1.183
Seriousness of Principle Offence			-0.017* (0.007)	0.983	-0.019* (0.008)	0.981	-0.014* (0.007)	0.986
Offender's role			-0.117 (0.470)	0.889	-0.31 (0.544)	0.677	-0.519 (0.577)	0.595
Co-offenders			-0.262 (0.319)	0.769	-0.257 (0.355)	0.773	-0.273 (0.362)	0.761
Offence location			0.084 (0.314)	1.088	0.176 (0.322)	1.193	0.095 (0.334)	1.100
Premeditation			0.713 (0.470)	2.040	0.634 (0.454)	1.884	0.785# (0.433)	2.192
Plea (not guilty/none)					0.513 (0.332)	1.670	0.529 (0.336)	1.698
Number of conviction counts					0.690* (0.304)	1.995	0.507 (0.326)	1.660
Most serious remand outcome					1.058*** (0.302)	2.881	1.047** (0.324)	2.848
Health							-0.407 (0.383)	0.666
Substance abuse							0.368 (0.467)	1.445
Negative life experiences							1.089** (0.327)	2.970
Intercept	1.221 (1.609)		3.928* (1.892)		1.900 (1.958)		-0.954 (2.288)	
$\Delta \chi^2$ (d.f.)	—		22.26(6)**		24.15(3)***		11.81(3)**	
AIC (d.f.)	348.17(6)		337.13(12)		318.47(15)		313.36(18)	

p ≤ 0.10; * p ≤ 0.05; ** p ≤ 0.01; *** p ≤ 0.001

¹ See Jeffries and Bond (2008) for a more comprehensive account of this research.

² The principal offence is the offence that received the highest sentencing penalty (ranked from 1-10 with 1 being imprisonment and 10 being no penalty, see OCSAR, 2004: 188 for a description). If two offences received the same penalty, the offence with the highest statutory penalty attached is recorded as the principal offence. If the charges are the same, the first charge is recorded as the principal offence (see OCSAR, 2004).