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Published

2012

Conference Title

The Australian Sociological Association Conference Proceedings, 2011: Local Lives/Global Networks

Version

Version of Record (VoR)

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Indigeneity and the Decision to Impose a Fine in Queensland's Magistrates Courts

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Abstract

Most Australian research on Indigenous sentencing disparities has focused on incarceration decision making. We therefore know little about the impact of Indigenous status on non-custodial sentencing outcomes. Using data from Queensland's lower courts, we statistically explore this gap in our understanding of the treatment of Indigenous offenders by considering whether or not Indigenous status impacts the judicial decision to impose a fine. Results suggest that when sentenced under similar circumstances, Indigenous defendants are more likely to be fined than non-Indigenous defendants. We suggest that this may be the result of limited non-custodial sentencing options in non-urban locations.

Keywords: sentencing; fines; Indigenous offenders; courts

Word count: 3,007 (excluding title page and abstract)

Introduction

In 1991, the Royal Commission into Aboriginal Deaths in Custody reported that around 40 per cent of Indigenous prison receptions were the result of fine default. Official data showed that the proportion of Indigenous people entering prison for fine default was twice as high as the proportion of non-Indigenous people (Cunneen, 1993: 126). While more recent publically available data on incarceration for fine default is rare, contemporary commentators continue to express unease about the differential impact of fining and fine default on Indigenous people (e.g. Spiers-Williams and Gilbert, 2011; Commonwealth of Australia, 2011; Blagg et al., 2005; Queensland Government, 1998). The relative disadvantage (e.g. inability to pay) experienced by Indigenous persons, combined with cultural difference and language barriers, disproportionately increases the likelihood of fine default by Indigenous defendants, which in turn, culminates in a series of events that eventually lead to imprisonment (e.g. imposition of a community based order on a fine defaulter which if breached can result in a prison sentence) (see most recently, Spiers-Williams and Gilbert, 2011; Commonwealth of Australia, 2011: 230-232). In other words, as argued by Cunneen (1993: 126), for many Indigenous persons, the imposition of a fine becomes the equivalent of imprisonment.

However, the issue of fine default possibly leading to incarceration is not the sole negative effect of fine imposition. Research suggests that fining causes other hardships for Indigenous people such as: financial stress; loss of mobility (e.g. via loss of drivers licence); emotional distress; and social exclusion and secondary offending (e.g. committing other crimes to make fine repayments) (Spiers-Williams and Gilbert, 2011; Beranger et al., 2010: 3).

As argued by Cunneen (1993:126), the on-going problems associated with fine default for Indigenous people—including the suggestion that there continues to be a high proportion of

Indigenous people in prison for non-payment—raises questions about judicial decision making around fine imposition. Indeed, these questions were recognised at the time of the Royal Commission, as Commissioner Muirhead recommended the introduction of legislation placing a “statutory duty upon sentencers to consider a defendant’s means to pay in assessing the appropriate monetary penalty” (cited in Cunneen, 1993:126).

Since the Royal Commission, judicial officers may be sensitive to the unique needs (e.g. economic disadvantage, differential impact of fine default) of Indigenous defendants when deciding whether to impose a fine. Recent Australian sentencing research suggests that this may be the case in the decision to imprison Indigenous defendants: for example, in South and Western Australian higher courts, studies have shown that Indigenous defendants are less likely to receive a prison sentence than non-Indigenous defendants under similar statistical circumstances (e.g. for similar crimes, with similar criminal histories) (Jeffries and Bond, 2009; Bond and Jeffries, 2010). Jeffries and Bond (2009) argued that findings of Indigenous sentencing leniency might reflect post-Royal Commission judicial awareness around the unique circumstances of, and differential impacts of incarceration on, Indigenous defendants.

Yet to date, there have been no comprehensive analyses of judicial decision making regarding fine imposition in Australia. In this paper, we address this gap by reporting results from an exploratory statistical analysis of the relationship between Indigeneity and the decision to fine in Queensland’s Magistrates Courts. These analyses are based on a broader examination of Indigeneity and sentencing in this jurisdiction (see Bond et al., 2011).

Factors Impacting Fine Imposition

In Queensland, courts have a broad sentencing discretion, with the ability to consider a wide range of circumstances, such as: the offender's character, age, and intellectual capacity; the offender's prior offending record; the nature of the offence and harm caused; the likelihood of rehabilitation; evidence of remorse; as well as, for Indigenous offenders, submissions from community justice groups (s.9(2) *Penalties and Sentences Act 1992(Qld)*). Sentencing legislation also provides that in determining fine amount and its payment method, courts must consider "(a) the financial circumstances of the offender; and (b) the nature of the burden that payment of the fine will be on the offender" (s.48(1)). However, the ability of the sentencing court to impose a fine is not vitiated by any lack of information about an offender's financial circumstances (see s.48(2)).

Prior studies confirm that offence seriousness, criminal history, evidence of remorse (such as through pleading guilty) and age all influence sentencing outcomes. Additionally, research shows that factors outside those directly specified in sentencing legislation may also have a significant effect on sentencing decisions, such as an offenders' sex. (See for example Albonetti, 1991; Daly and Bordt, 1995; Jeffries, 2002a, 2002b; Rattner, 1996; Wu and Spohn, 2009).

In this study, we address the question of whether Indigeneity has a direct effect on the decision to impose a fine in Queensland's Magistrates Courts for adult defendants, after adjusting for other sentencing factors.

Study Sample, Measures and Descriptive Information

We use case-level data from Queensland’s Department of Justice and Attorney General. These data provide information on sex, Indigenous status, age at the time of sentencing, offence seriousness, final plea, and sentence type. However, other important information—namely, remand status and criminal history—were not available. We therefore selected a random sample of 1,000 cases stratified equally by sex and Indigenous status to allow for collecting information on criminal history and remand from other sources. Criminal history information was gathered from Queensland Police Service files and remand information from the administrative database of the Queensland Magistrates Court Branch. Our analyses are restricted to cases with non-custodial sentencing outcomes. Thus, after missing data (about 5.1%), our final sample consists of 889 cases.

Measures

The *dependent variable* in this study is the decision to impose a fine. We use a dichotomous measure of a fine imposition, comparing those who received a fine (coded as 1) to those who received any other non-custodial sentencing outcome (coded as 0). We collected information on two groups of *independent variables*.

Offender characteristics

Indigenous status (coded as 1) is self-reported in Queensland. Those recorded as “unknown” or “refused” were dropped from the analysis. All other offenders were treated as “non-Indigenous” (coded as 0). We also control for sex (1=female; 0=male) and age at sentencing (in years).

Case and Offence Characteristics

This set of independent variables included: prior criminal history, seriousness of principal offence, conviction counts, plea and bail/remand. Criminal history was measured as a standardised additive index of number of prior convictions, number of prior convictions in the same offence category as the current sentenced offence, and number of prior terms of imprisonment in the jurisdiction of Queensland. The seriousness of the principal offenceⁱ was measured using the 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 to 155 with 1 being the most serious and 155 being the least serious. We then reverse coded the score to make the analyses more readable, so that higher scores indicated more serious offences. The presence of multiple conviction counts (1=multiple counts present; 0=no multiple counts) was used as an additional measure of offence seriousness. Type of plea (1=guilty plea) and offender's last known remand status (1=bail) were also included. Remand status was coded from last known status recorded in the adult court database before the date of the sentencing hearing.

Findings

To explore the direct effect of Indigenous status on fine imposition, our analysis is presented in two stages. First, we examine the baseline differences between Indigenous and non-Indigenous defendants. Second, we report the results of a logistic regression model of the direct effect of Indigenous status on the decision to fine, adjusting for other offender, offence and case characteristics.

Baseline Differences by Indigenous Status

There were few statistically significant differences in the offender and case characteristics of Indigenous and non-Indigenous adult defendants (see Table 1). Compared to non-Indigenous defendants, Indigenous defendants had higher mean criminal history scores and were less likely to plead guilty. There was also a statistically significant difference in the proportion of Indigenous (66.4%) and non-Indigenous (51.9%) adult defendants who were sentenced to a fine in Queensland's Magistrates Courts (see Table 1).

[INSERT TABLE 1 ABOUT HERE]

Impact of Indigenous Status on Fine Disposition

Logistic regression analysis was used to estimate the separate direct impact of Indigenous status on fine imposition (dependent variable) while controlling for other key sentencing factors (independent variables). The logistic regression results are reported as odds ratios. An odds ratio of 1 indicates that the imposition of a fine is equally likely for both groups (Indigenous and non-Indigenous defendants). An odds ratio of >1 means that a fine is more likely in the first group, while an odds ratio of <1 indicates that it is less likely.

Table 2 summarises the logistic regression results of the decision to impose a fine in Queensland's Magistrates Courts. Our analysis shows that the initial significant base-line difference between Indigenous and non-Indigenous defendants (i.e. the former are more likely to be fined than the latter) remains after adjusting for the other key sentencing determinates. In other words, when sentenced under statistically similar circumstances, Indigenous defendants are about 1.6 times more likely to be sentenced to a fine compared to other non-custodial outcomes, than non-Indigenous defendants.ⁱⁱ

[INSERT TABLE 2 ABOUT HERE]

Summary and a Tentative Conclusion

This paper provides empirical evidence of a direct effect between Indigenous status and fine imposition for adult offenders convicted in Queensland's Magistrates Courts: Indigenous offenders were more likely to receive a fine, rather than other non-custodial outcomes, than non-Indigenous offenders in similar statistical circumstances. However, there is an important caveat on this finding. Although we were able to collect information on key mitigating and aggravating factors (e.g. the seriousness of current and past criminality), we were not able to include measures of other factors that may have influenced the fine imposition decision.

For example, and perhaps somewhat significantly for fine imposition, we were unable to collect information on offenders' socio-economic status. As noted previously, Queensland's *Penalties and Sentences Act 1992* requires the consideration of financial circumstances (where practicable and available) when fining offenders (ss. 48(1) & 48(2)), although this factor may be more relevant in determining the fine amount than the initial fine imposition decision (see 48(1)). In New South Wales, a recent survey of 79 magistrates suggests that financial circumstances are often used to decide fine imposition (McFarlane and Poletti, 2007). However, despite this judicial acknowledgment about establishing the capacity of a defendant to pay, information on offenders' financial situation was often lacking. Only around half of the magistrates in the sample reported asking offenders about any outstanding fines. (This is perhaps unsurprising given that magistrates are required to make sentencing determinations under acute time pressure.) Further, approximately 53% of the surveyed magistrates indicated that they would sometimes impose an alternative sentence when "faced

with an offender who could not afford to pay a fine” (McFarlane and Poletti, 2007: 46). Thus, while a measure for socioeconomic status may have strengthened our analysis, the impact of this variable on fine disposition within the context of lower court sentencing may have been negligible.

So how do we explain our finding that Indigenous defendants are more likely than non-Indigenous defendants to be fined? Previous research on the decision to imprison suggested that in the post-Royal Commission environment, judges may be highly sensitised to the unique circumstances of Indigenous offenders (see Jeffries and Bond 2009). In contrast, our findings suggest that similar judicial awareness around Indigenous offenders, fine defaulting and incarceration may not be operating, at least in the context of lower court sentencing. Interestingly, it might be an awareness of a different kind of constraint that might offer a possible explanation for the greater likelihood of Indigenous defendants to be fined.

McFarlane and Poletti (2007: 46) found in their study of magistrates that “a number of [New South Wales Magistrates] indicated that they imposed a fine only because of the lack of sentencing alternatives” especially “in rural and remote areas”. A recent inquiry by The New South Wales Legislative Council Standing Committee on Law and Justice (2006) into the availability of community-based sentencing options similarly found that some penalties (e.g. community service orders, supervised bonds) were less available outside urban areas.

Similar problems to those in New South Wales have been identified in Queensland. In contrast to urban areas, studies show that many community based sentencing options are less likely to be accessible in remote communities (see Cunneen et al, 2005; Bond et al., 2011). In their evaluation of the Queensland *Aboriginal and Torres Strait Islander Justice Agreement*,

Cunneen et.al. (2005: 107) found that Indigenous offenders are, “less represented in community corrections.” One reason for this is that there is no capacity to supervise community based sentencing orders in remote areas (Cunneen, et.al., 2005: 107-108; Cunneen, 2008: 142-153). This issue was also expressed by stakeholders in the consultation process that was part of the broader Queensland-based sentencing project (see earlier). During consultations with Indigenous criminal justice groups, judges/magistrates and police prosecutors, the limited availability of community-based sentencing options in remote and outer regional locations was frequently noted (see Bond et al., 2011).

Indigenous peoples are more likely than non-Indigenous persons to reside in remote and regional locations and there is evidence that over-representation in Indigenous contact with the criminal justice system is more pronounced in these geographical locations (Cunneen, 2008: 142-153; Australian Bureau of Statistics, 2007: 6, 2008: 1). This means that the lack of available or practical alternative sentencing options will differentially impact on Indigenous defendants (Cunneen, et al., 2005: 107-108; Cunneen, 2008: 142-153; Bond, et al., 2011). Consequently, our research suggests that constraints around the availability of other community based sentencing options in non-urban locations may have a significant impact on the sentencing of Indigenous offenders in Queensland’s lower courts.

Funding

This work is based on a project funded by the Department of the Premier and the Cabinet (Queensland). This paper does not reflect the views or policies of the Queensland Government.

Acknowledgements

We acknowledge our debt to all those in the Department of the Premier and the Cabinet (Queensland), Department of Justice and the Attorney-General (Queensland), Queensland Courts and the Queensland Police Service who supported and facilitated this project. We also appreciate the research assistance of Michael Cerruto, Denise Foster, Justine Hotten, Ashnil Murray, Mark Grosert and Angela Thistlethwaite.

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Table 1. Descriptive Statistics by Indigenous Status, Non-custodial sentencing outcomes (Magistrates Court, Queensland, 2006-2008)

Measures ^a	Total	Indigenous	Non-Indigenous	Sig. ^b
% Indigenous	49.27	---	---	
% female	50.62	52.74	48.56	n.s.
Mean age	30.32 (10.57)	30.04 (9.70)	30.60 (11.35)	n.s.
Mean prior criminal history index	-0.06 (0.92)	0.17 (1.14)	-0.28 (0.57)	p<0.001
Mean seriousness principal offence	44.33 (30.97)	44.54 (32.33)	44.12 (29.62)	n.s.
% with multiple conviction counts	8.44	7.53	9.31	n.s.
% with plea of guilt	81.89	76.03	87.58	p<0.001
% released on bail (last known)	28.91	26.71	31.04	n.s.
% received a fine	59.06	66.44	51.88	p<0.001
Number of cases	889	438	451	

p<0.10; * p<0.05; **p<0.01; ***p<0.001

Notes:

^a Means (with standard deviations in brackets) are reported for continuous variables. Percentages are reported for dichotomous variables.

^b Equality between the two groups was tested using t-tests for group means (continuous variables) and z-tests for group proportions (dichotomous variables).

Table 2. Likelihood of Receiving a Fine on Key Offender and Case Characteristics, Non-custodial sentencing outcomes (Magistrates Court, Queensland, 2006-2008)

	b	s.e.	O.R. ^a
Indigenous	0.478 ^{**}	0.155	1.609
Female	-0.325 [*]	0.152	0.722
Age	0.092 [*]	0.039	1.096
Age ^{2b}	-0.001 [#]	0.001	0.999
Prior criminal history index	0.068	0.107	1.071
Seriousness principal offence	-0.011 ^{***}	0.002	0.989
Multiple conviction counts	-0.041	0.262	0.960
Plea of guilt	-2.252 ^{***}	0.328	0.105 ^c
Released on bail (last known)	0.089	0.164	1.093
Constant	1.185 [#]	0.716	---
χ^2 (d.f.)	159.56(9) ^{***}		
Pseudo R ²	13.26		
% correctly classified	68.50		
Number of cases	889		

p<0.10; * p<0.05; **p<0.01; ***p<0.001

Notes:

^a Odds ratios reported.

^b Past research suggests that age may have a non-linear effect, so age squared has been included in the model (Steffensmeier et al., 1995).

ⁱ Using a definition derived from the SA Office of Crime Statistics and Research, principal offence refers to the offence that received the highest sentencing penalty, with prison being the highest. If two offences received the same penalty, the offence with the highest statutorily-defined penalty is the principal offence. If the charges are the same, the first charge is used.

ⁱⁱ There was only one result that was largely unexpected: pleading guilty significantly decreased the likelihood of a fine, compared to other non-custodial outcomes. Further investigation showed that the overwhelming majority of not guilty pleas occurred in cases which received a fine (only just over 3% of those who did not receive a fine plead not guilty). Thus, although highly speculative, this might suggest that defendants may not perceive much “sentencing discount” in pleading guilty for minor offences that are likely to receive a fine.