

Discourse of 'Dysfunction': Sentencing Narratives and the Construction of Indigenous Offending

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Abstract

Using a narrative analysis of judges sentencing remarks in South Australian higher courts, we explore whether broader discourses of 'dysfunction' 'disorganisation', 'deprivation' and 'pathology' impact understandings of Indigenous offending and subsequent constructions of Indigenous defendants in the sentencing process.

Introduction

To date, research on Indigeneity and sentencing in Australia has been primarily concerned with establishing whether or not there is a statistically significant difference in sentencing outcomes between Indigenous and non-Indigenous defendants. Results of this research suggest that Indigenous defendants are *not* generally sentenced more harshly than non-Indigenous defendants (Snowball and Weatherburn 2006, 2007; Jeffries and Bond 2009, 2010; Bond and Jeffries 2010; Bond et al 2011). These findings are in stark contrast to research in the United States, where similar studies have generally shown that defendants from racial/ethnic minority groups are sentenced more harshly than their 'white' counterparts.

Over the last decade, the dominant approach to explaining statistical findings of sentencing disparity has been the focal concerns perspective, which argues, in part, that due to lack of information, workloads and time constraints, judges rely on 'perceptual shorthand' (or stereotypes) linked to race/ethnicity. However, this perspective has been applied uncritically, with limited consideration of how these stereotypes 'normalise' defendants of different racial and ethnic backgrounds as 'problematic'. In contrast, earlier explanations of sentencing disparities were grounded in the conflict tradition, which explicitly recognised the role of power in the control of 'problematic' groups.

In this paper, we revisit how focal concerns and conflict perspectives may help in understanding the construction of narratives about Indigenous defendants, their offences and histories in the judicial justification of sentences in Australian courts.

Explaining Sentencing Disparity

Until the mid 1990s, researchers drew on a conflict argument to explain persistent statistical evidence of racial/ethnic sentencing disparity in the United States. From the conflict perspective, differential sentencing was explained by the more rigorous application of the law to ethnic/racial minorities, as defendants belonging to those groups are a 'perceptual threat' to the dominant power group (i.e. 'whites') (Peterson and Hagan 1984:67). Using a very broad conflict argument, sentencing researchers hypothesised that authority groups will continuously strive to maintain and expand their control over

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societal resources by labelling the activity of opposing groups as threatening and therefore needing to be controlled. From this perspective, the focus is on the control over and repression of ethnic/racial minority groups.

The explanatory power of the conflict perspective within Australian statistical investigations of sentencing disparity has not been fully explored. This is because researchers have found either leniency favouring Indigenous defendants or near equality in outcomes (see Snowball and Weatherburn 2007; Jeffries and Bond 2009, 2010; Bond et al 2011). For example, in their quantitative analyses of sentencing outcomes by Indigenous status in South Australia's higher courts, Jeffries and Bond (2009) suggest that their finding of leniency in the sentencing outcomes of Indigenous versus non-Indigenous defendants points to a level of judicial cognisance around pre-existing societal power imbalances between these two groups and the potential for courts to further perpetuate these disparities if judicial power is used ineffectually. In other words, the courts are somehow recognising in some way the broader social structural oppression of Indigenous people. What is not further explored is how (and why) courts in Australia may not be responding to some perceived 'racial threat'.

While conflict theorists take a broad macro-social view of criminal justice processing, more recently the explanatory focus has shifted to the micro-social context of the court. The focal concerns approach (which also borrows from research on attributions to explain ethnic/racial disparity in sentencing) argues that sentencing decisions are driven by three 'focal' concerns: blameworthiness, community protection and the practical constraints/consequences of sentencing decisions.

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 et al 1998:766-7). The second focal concern, community protection, requires the imposition of a sentence that protects the public through incapacitation of offenders that pose a risk to the community. The third concern, practical constraints and consequences, comes into play in deciding what penalty to impose because courts have to take into account a host of practical concerns, 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 et al 1998:766-7).

As noted previously by Jeffries and Bond (2009), the crux of the focal concerns approach is that courts lack comprehensive and reliable information that would enable judges to make assessments of these concerns. As a result, judges rely on stereotypes or 'perceptual shorthand' linked to offender characteristics, particularly race/ethnicity. In the United States, statistical findings of disparity against racial/ethnic minority groups has led sentencing scholars to conclude that these statuses are associated with criminal stereotypes, which result in a subconscious judicial reliance on that status characteristic as an indicator of blameworthiness (first focal concern) and dangerousness (second focal concern) (Steffensmeier et al 1998). It is the attribution of increased threat and criminality to ethnic/racial minorities that produces sentencing differentials, rather than some broader macro-level power structure operating to keep minority groups in a subordinate societal position because of the threat they pose to the Anglo power group. This is an important theoretical distinction between conflict and focal concerns perspectives (Everett and Wojtkiewicz 2002:193-4). However, using offender stereotypes to make sentencing decisions is in itself evidence of asymmetrical power relations, providing an example of how macro-level power relationships are 'played out' in micro-level social contexts (i.e. the sentencing court) (Ulmer and Johnson 2004:144-5).

Australian sentencing researchers appear somewhat sceptical of the negative stereotyping argument advanced by the focal concerns perspective. Statistical findings that Indigenous defendants are not sentenced more harshly than non-Indigenous people seem to suggest that negative attributions either do not exist or may operate quite differently in the Australian context. For example, Snowball and Weatherburn (2007:286) argue that 'in light' of their research findings,

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Indigenous status is unlikely to invoke the same criminal stereotype as race (i.e. African American status) does in the United States and thus, judges are not subconsciously drawing on Indigenous status as a negative indicator of offender blameworthiness and dangerousness. Similarly, Jeffries and Bond (2009:67) suggest that it seems unlikely, given their finding of Indigenous sentencing leniency, that South Australian judges are 'drawing negative ethnic/racial stereotypes, as attribution theorists suggest'.

Yet, the third focal concern of practical constraints and consequences suggests that the judiciary is unlikely to act in isolation from broader social and political contexts. Perceptions of Indigenous peoples as 'deviant' pervade Australia's colonial history and continue today. For instance, the Royal Commission into Aboriginal Deaths in Custody reported that, 'Aboriginal communities are seen as troublesome, untrustworthy and given to criminal conduct' (cited in Cunneen 2001:91). Further, discourses of Indigenous 'dysfunction', 'disintegration' and 'pathology' are frequently used in Australian government, populist and sometimes even academic environments to explain high rates of Indigenous offending. Such negative discourses are evident in the numerous government-commissioned taskforce/inquiry reports published to investigate the 'continuing problem' of crime/violence in Indigenous families/communities (see Mullighan 2008; Northern Territory Government 2007; New South Wales Attorney General's Department 2006; State of Victoria 2003; Gordon et al 2002; State of Queensland 1999).

More specifically, Indigenous families/communities are described as relatively disorganised, disintegrated and pathological because they are lacking in clear norms, values and social cohesion (see, for example, State of Queensland 1999: xxxiv). This relative lack of solidarity, cohesion or integration is critical to explaining higher rates of Indigenous crime (especially violent offending) and related substance abuse (see, for example, Northern Territory Government 2007:12, 18, 57, 226). The 'problematic' contexts in which Aboriginal people live makes them susceptible to crime because they are surrounded by a preponderance of definitions favourable to offending and thus highly likely to be socialised into crime (see, for example, State of Queensland 1999: xv; Webb 2004; New South Wales Attorney General's Department 2006:60; Northern Territory Government 2007:199).

For a conflict or critical criminologist, such discourses of Indigenous offending are arguably of concern. Indigenous people are being constructed as the 'problem' that needs to be understood and responded to by the state: they are being relegated to the position of the 'other' via discourses of 'dysfunction'. Arguably, such representations reflect the interests and values of the dominant 'white' populace and function to maintain Indigenous marginalisation. Thus, the image of crime is depoliticised by normalising the unequal political and social structures of society created through colonisation. In this context, the Indigenous 'problem' can now legitimately be addressed through 'white' intervention, not structural change (Webb 2004:165, 261).

The Current Research

Using a qualitative analysis of judicial sentencing remarks, we explore whether broader discourses of 'dysfunction' are used in public judicial narratives to contextualise Indigenous offending and thus construct images of Indigenous defendants. The sentencing remarks used are drawn from a more expansive statistical and narrative analysis undertaken by the authors (see Jeffries and Bond 2009, 2010), who utilised a matched sample of 254 criminal offenders sentenced in South Australia's higher courts in 2005 and 2006. Non-Indigenous and Indigenous offenders were first matched by current offence seriousness and then as closely as possible by number of current and prior convictions, sentencing court and plea. From the original matched sample, transcripts of judges' sentencing remarks were located for 220 offenders. The sentencing remarks are verbatim transcriptions of the comments made by the judge at the time of sentencing and were thematically coded. As previously noted, social, political and sometimes even academic discourse frequently situates Indigenous crime within contexts of 'dysfunction'. These broader narratives regarding the problematic nature of the 'Indigenous other' were evident in the sentencing transcripts via narratives pertaining to familial and community life.

Indigenous Familial Dysfunction

In contrast to the non-Indigenous populace, Indigenous family life is frequently construed by governments and the community as being somewhat 'dysfunctional'. Similarly, in the sentencing narratives Indigenous offending was more likely attributed to extreme familial trauma and dysfunction. Thus, broader perceptions of Indigenous families appear to be also reflected in the micro-level context of the sentencing court.

In 65 per cent of sentencing remarks for Indigenous offenders (compared to 48 per cent of non-Indigenous transcripts), their criminality was situated within the experience of familial traumas in childhood and/or adulthood. Compared to non-Indigenous defendants, descriptions of Indigenous offenders' childhood trauma were more likely to be characterised by extreme levels of abuse, neglect, parental alcohol consumption, premature death of family members, removal into foster care and exposure to offending among family members. The following two descriptions are typical:

You experienced a traumatic childhood, including domestic violence between your parents, severe physical discipline from your father, significant teasing and physical violence against you by your brothers and sisters, forcible removal from your family unit and placement into foster care ... Your parents both suffered from alcoholism. They were unhappily married due to your father's domestic violence and alcoholism, and they separated when you were ten years of age. After their separation, you lived with your mother for a short time, then your maternal grandmother for some months before returning to your mother's care. However, you were removed from your mother by Welfare Services and placed in State care because of your mother's alcoholism ... of all the numerous traumatic events you experienced during your childhood, your forcible removal from your mother was the most distressing. You frequently absconded from your foster placements because you wanted to return to live with your mother ... However, you did not know how to travel to [there], and you commenced living on the streets. (Indigenous offender)

You have had a lifelong history of trauma and abuse, early family breakdown, interrupted schooling ... Unfortunately, that picture where aboriginal children are raised in homes of domestic violence and alcohol abuse, is not uncommon for offenders who come before the court in your circumstances. In your case, you have also been the victim of sexual abuse, both from an uncle and brother ... Of great significance in your background is that when you were about 12 years of age your mother committed suicide. You have suffered depression and grief since that time. At times it has required you to be hospitalised ... you are the victim of a gravely dysfunctional family system and that you were left to fend for yourself; an impossible task in your situation ... It is plain that you have had a tragic life. I take into account the hardships you have suffered. (Indigenous offender)

In contrast to Indigenous defendants, non-Indigenous offenders' traumatic childhood experiences were presented in language that was somewhat less emotional. Consider the following two examples:

You have a troubled background. You had traumatic early years in your life. (Non-Indigenous offender)

You never knew your biological parents. You were placed in foster care at the age of six months. You were later adopted by your foster-mother. (Non-Indigenous offender)

Similar to childhood familial situations, Indigenous experiences of familial relationships during adulthood were more often described as scarred by dysfunction and trauma, portrayed as more tumultuous, with high levels of domestic violence, substance abuse and death of loved ones. For example:

You developed a relationship with a person, who was 20 years your senior. A friend of yours had had children with him. You moved in with this person and you looked after his children. This person unfortunately introduced you to methamphetamine. At the age of 16, you became pregnant. At the time of giving birth to that child, you found out that this person was sleeping with another woman. After the birth of your son, this person became increasingly violent

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towards you. You left him and you entered a women's shelter. You sought advice from child welfare services who said that, if you returned to this man, your son would be taken away from you. You returned to this person and your son was removed from you. Your son now resides with your grandmother. Your use of methamphetamine escalated after your son was taken from you ... Your second child, a boy, was born in 2006 and he, too, was removed from your care after only ten days. He is also cared for by your grandmother. After your son was taken from you, you continued to abuse illegal drugs ... you discovered that your ex-partner was having an affair and you accepted that your relationship was over. This offence occurred against the background of the breakdown of this abusive relationship. (Indigenous offender)

While non-Indigenous offenders also experienced familial issues during adulthood, narratives were less extensive and described less accumulation of trauma and victimisation than for Indigenous defendants (compare the examples above and below). For non-Indigenous defendants, relationship breakdowns were the most frequently highlighted adult familial trauma contributing to the offending behaviour. For example:

When your wife formed an association with a man named Bob, it became clear that you never came to terms with losing her. The medical certificate makes that clear. I accept that it is sometimes difficult in the long term to adjust to the end of what has been a meaningful relationship. I accept further that that is what underlies this offending. (Non-Indigenous offender)

Indigenous Community Dysfunction

As is the case with Indigenous family life, discourses around the 'problematic' nature of Indigenous communities are common. In Australia, the 'disorganised', 'disintegrated' and 'pathological' nature of Indigenous community life is frequently posited as an explanation for high rates of supposed crime. As sentencing does not occur in a social or political vacuum, not unsurprisingly we only found narratives of community dysfunction in sentencing transcripts for Indigenous defendants. Sentencing narratives often described Indigenous communities as being in a constant state of 'disorder' and 'ravaged' by substance abuse, violence and limited life opportunities. Offending behaviour was subsequently viewed as the inevitable outcome of this high level of community 'disorder'. Under such circumstances, the narratives showed Indigenous defendants as having few choices other than offending. The following two examples demonstrate this:

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

Your Aboriginality is a relevant factor. As your counsel observed, your background is deep-rooted in a culture which is ravaged by drug and alcohol problems and which is significantly over-represented in the criminal justice system. I will backdate the sentence. (Indigenous offender)

Discussion and Conclusion

Results of statistical sentencing studies in Australia have produced sparse evidence of Indigenous defendants being sentenced more harshly than their non-Indigenous counterparts, but our narrative analysis of judges' sentencing remarks suggests that broader negative social discourses around Indigenous offending are still reflected in judicial justifications of sentencing. In the sentencing narratives, the underlying causes of Indigenous offending mirrored broader social, political, populist

and criminological discourses (i.e. social disorganisation, anomie and social learning theory). Compared with the narratives of non-Indigenous defendants, the narratives of Indigenous offending were more heavily grounded in discourses of 'dysfunction', both of Indigenous families and Indigenous communities. Although stories of trauma and dysfunction were seen in the non-Indigenous narratives, the narratives of Indigenous offenders described such an accumulation and scale of dysfunction that Indigenous family and community life becomes problematic and criminogenic. As we have argued previously (Jeffries and Bond 2010), Indigenous sentencing leniency and/or equality are a likely short-term outcome of such sentencing discourse.

Thus, negative criminal stereotyping (of the focal concerns approach) might not just result in 'shorthand cues' of increased blameworthiness and risk for racial/ethnic minority defendants, but might also be linked to perceptions of increased 'dysfunction' and reduced blameworthiness. Although the result may be sentencing leniency or parity, these constructions of narratives of dysfunction and pathology continue to minimise the agency of Indigenous offenders, and justify a protectionist stance by the state. Thus, research on Indigenous sentencing disparity challenges the typical view of the impact of negative criminal stereotyping on sentencing outcomes.

It is here that a conflict perspective provides explanatory power: constructing Indigenous defendants in these terms within micro-level social contexts, like courtrooms, reflects and reinforces the marginalised status of Indigenous peoples as the 'problematic other' in Australian society. Discourses of dysfunction and pathology present Indigenous people as the 'problem', and in doing so arguably contribute to maintaining deeply embedded stereotypes, which are often used to draw attention away from responsibilities of the coloniser, shift blame to the colonised and further aggravate the colonisation process (Webb 2004).

However, the irony for judges, and researchers alike, is that by recognising the problems and experiences within Indigenous communities and their consequences for Indigenous defendants, we also continue to contribute to larger social discourses that maintain a marginalised paternalistic stance towards Indigenous people.

References

- Bond C and Jeffries S (2010) 'Sentencing Indigenous and Non-Indigenous Women in Western Australia's Higher Courts', *Psychology, Psychiatry and the Law*, vol 17 no 1, 70–8
- Bond C, Jeffries S and Weatherburn D (2011). 'How Much Time? Indigenous Status and the Sentenced Imprisonment Term Decision in New South Wales', *Australian and New Zealand Journal of Criminology*, forthcoming
- Cunneen C (2001) *Conflict, Politics and Crime: Aboriginal Communities and the Police*, Allen and Unwin, Sydney
- Everett R S and Wojtkiewicz R A (2002) 'Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing', *Journal of Quantitative Criminology*, vol 18 no 2, 189–211
- Gordon S, Hallahan K and Henry D (2002) *Putting the Picture Together, Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*, West Australian Government, Perth
- Jeffries S and Bond C (2009) 'Does Indigeneity Matter?: Sentencing Indigenous Offenders in South Australia's Higher Courts', *Australian and New Zealand Journal of Criminology*, vol 42 no 1, 47–71
- Jeffries S and Bond C (2010) 'Narratives of Mitigation: Sentencing Indigenous Criminal Defendants in South Australia's Higher Courts', *Journal of Sociology*, pre-published 1 June 2010, DOI: 10.1177/144078331065584
- Mullighan E P (2008) *Children on Anangu Pitjantjatjara Yankunytjatjara (APY) Lands: Commission of Inquiry a Report into Sexual Abuse*, South Australian Government, Adelaide

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- New South Wales Attorney General's Department (2006) *Breaking the Silence, Creating the Future: Addressing Child Sexual Assault in Aboriginal Communities in NSW / NSW Aboriginal Child Sexual Assault Taskforce*, New South Wales Attorney General's Department, Sydney
- Northern Territory Government (2007) *Ampe Akelyernemane Meke Mekarle, 'Little Children are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, Northern Territory Government, Darwin
- Peterson R D and Hagan J (1984) 'Conceptions of Race: Towards an Account of Anomalous Findings of Sentencing Research', *American Sociological Review*, vol. 49, 56-70
- Snowball L and Weatherburn D (2006) 'Indigenous Over-Representation in Prison: The Role of Offender Characteristics', *Contemporary Issues in Crime and Justice*, New South Wales Bureau of Crime Statistics and Research, Sydney, 99
- Snowball L and Weatherburn D (2007) 'Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?', *Australian and New Journal of Criminology*, vol 40 no 3, 272-90
- State of Queensland (1999) *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*, Queensland Government, Brisbane
- State of Victoria (2003) *Victorian Indigenous Family Violence Task Force: Final Report*, Victorian Government, Melbourne
- Steffensmeier D and Demuth S (2000) 'Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?', *American Sociological Review*, vol 65 no 5, 705-29
- Steffensmeier D, Ulmer J and Kramer J (1998) 'The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male', *Criminology*, vol 36 no 3, 763-97
- Ulmer J T and Johnson B (2004) 'Sentencing in Context: A Multilevel Analysis', *Criminology*, vol 42 no 1, 137-77
- Webb R (2004) *Maori Crime: Possibilities and Limits of an Indigenous Criminology*, Doctor of Philosophy Thesis, University of Auckland