The Impact of Indigenous Status on Adult Sentencing: A Review of the Statistical Research Literature from the United States, Canada and Australia

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Abstract

The gross over-representation of Indigenous peoples in prison populations suggests sentencing may be a discriminatory process. Using findings from recent (1991 to 2011) multivariate statistical sentencing analyses from the United States, Canada and Australia, this paper reviews the three key hypotheses advanced as plausible explanations for baseline sentencing discrepancies between Indigenous and non-Indigenous adult criminal defendants: (1) differential involvement; (2) negative discrimination; and (3) positive discrimination. Overall, this prior research shows strong support for the differential involvement thesis, and some support for the discrimination theses (positive and negative). Where discrimination is found, we argue that this may be explained by the lack of a more complete set of control variables in researchers' multivariate models and/or differing political and social contexts.

Key words

Indigenous offenders, sentencing, discrimination, differential involvement.

Introduction

Indigenous Canadians, Americans and Australians are all grossly over-represented in their respective country's prison populations. Indigenous Canadians are imprisoned at a rate of 750 per 100,000, compared with a non-Indigenous rate of 76 per 100,000[1] (Perreault, 2009, pp. 23). 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, pp. 2). Rates of Indigenous imprisonment in Australia are markedly higher than in Canada and the United States. In 2009, Indigenous Australians were incarcerated at a rate of 1,891 per 100,000, 14 times higher than the non-Indigenous rate of 136 per 100,000 (Australian Bureau of Statistics, 2009, pp. 47).

A vast amount of academic, government and policy attention in the United States has been given to the high incarceration rates of African and Latino/a American offenders, but little attention has been paid to the over-representation of Indigenous Americans in prisons and jails. This is in stark contrast to Australia and Canada where the over-representation of Indigenous peoples in penal institutions has been the subject of numerous studies, reports and commentaries concerned with finding solutions to the problem. Governments within these two countries have come under increasing pressure to reduce the number and proportion of Indigenous prison inmates, but as shown by current rates, with little success (Vasey, 2003, pp. 74; Jeffries & Bond, 2009, pp. 47).

For example, in Australia the rate of Indigenous imprisonment has increased since 1990, from around 1,200 per 100,000 to nearly 1,900 in 2009 (Australian Bureau of

Statistics, 2009, pp. 47; Australian Institute of Criminology, 2005, pp. 90). Similarly in Canada, while the Canadian prison population is generally trending downwards, the proportion of Indigenous to non-Indigenous Canadians incarcerated appears to have widened (Roberts & Melchers, 2003).

Sentencing decisions could provide some explanation for the continuing over-representation of Indigenous offenders in prisons, as well as a point in criminal justice system where the problem of over-representation might be directly addressed. Where available, court data on sentencing outcomes show initial baseline differences between Indigenous and non-Indigenous defendants, with Indigenous offenders more likely to be sentenced to prison (see in Australia, Baker, 2001; Castle & Barnett, 2000; Loh & Ferrante, 2003; Cunneen, et al., 2005).[2]

The purpose of this paper is to review the three key sentencing disparity hypotheses and broadly assess the empirical support provided by recent multivariate sentencing analyses of Indigeneity and sentencing. Our review is not a meta-analysis, in part because statistical studies are relatively sparse. Instead, we overview the patterns of findings within each country (i.e. United States, Canada and Australia), discuss the methodological features employed and report the effect of Indigenous status on the sentencing outcome of imprisonment.

Sentencing Disparities Hypotheses

Three key hypotheses to explain differences by Indigenous status in baseline court data can be identified in sentencing disparities research. These are: differential involvement; negative discrimination; and positive discrimination.

Differential involvement hypothesis

According to the differential involvement hypothesis, existing differences in other relevant factors between Indigenous and non-Indigenous offenders may mediate the relationship between Indigenous status and sentence outcomes. For example, disparate sentences may simply be a response to differences in the offending behaviours of Indigenous and non-Indigenous offenders. In other words, the relationship between minority group status and sentencing is indirect, resulting from other variables differentially associated with Indigenous status. Thus, there is no direct discrimination in the sentencing of Indigenous defendants because Indigeneity plays little or no direct role, once other crucial sentencing factors are controlled (Weatherburn, et al., 2003, pp. 1). This hypothesis predicts that Indigenous and non-Indigenous offenders will receive similar sentences under like circumstances.

Negative discrimination hypothesis

The second hypothesis put forward to explain sentencing disparities is negative discrimination. Under the negative discrimination thesis, an offender's Indigenous status is likely, on average, to result in harsher sentencing outcomes. This argument relies on the concept of "threat" to explain more severe outcomes for minority group offenders. Originally, researchers drew on the conflict school of criminological thought, arguing that discrimination in sentencing should be expected because minority groups are seen as constituting the greatest "threat" to the dominant power group, and thus, the law will be more rigorously applied to them (e.g. Peterson & Hagan, 1984).

More recently, studies on sentencing disparity have focused on the theoretical frameworks of “focal concerns”. This perspective suggests that sentencing decisions are guided by a number of focal concerns, namely offender blameworthiness and harm caused by the offence, community protection, and practical constraints presented by individual offenders, organisational resources, political and community expectations (Steffensmeier, et al., 1998, pp. 766-767; Johnson, 2006). Organisational constraints may amplify perceptions of greater blameworthiness, danger and risk by pressuring judges to make decisions with limited information and time. These conditions may lead to judicial reliance, in making sentencing determinations, on ‘perceptual shorthands’ based on potentially stereotypical attributions linked to defendant characteristics, such as race or ethnic status. As a result, attributions of increased threat and criminality may be made toward minority group offenders (Steffensmeier, et al., 1998; Johnson, 2006).

Under the negative discrimination hypothesis, the impact of Indigenous status may be direct or interactive. A direct effect would mean that Indigenous offenders are sentenced more harshly than non-Indigenous offenders and that these differences cannot be attributed to differences in crime seriousness, prior criminal record, or other relevant factors (Pratt, 1998). The Indigenous status of offenders may also interact with other variables to influence the sentencing decision. In other words, different sentencing determinants may be weighted differently by Indigenous status.

Positive discrimination hypothesis

The final hypothesis—positive discrimination—suggests that Indigenous status might mitigate sentencing outcomes, either directly or in interaction with other sentencing

factors. There are at least two reasons, flowing from the focal concerns perspective, for expecting more favourable sentencing outcomes for Indigenous offenders.

First, sentencing outcomes are known to be affected by offender constraints, such as the ability to 'do time' (Steffensmeier, et al., 1998; Johnson, 2003). In comparison to the non-Indigenous population, Indigenous people tend to experience higher levels of social and economic disadvantage and associated poverty, victimisation, substance abuse and ill health, inequities with roots in the historical contexts of colonisation and governmental Indigenous policies. Potentially therefore, Indigenous differences in offender constraints could mitigate sentence severity and lead to more lenient outcomes for them. Indigenous status may also operate over and above traditional blameworthy measures (e.g. health, victimisation) to mitigate sentencing. Indigenous offenders could be perceived as less blameworthy than their non-Indigenous counterparts because of the historical legacy of colonisation (Jeffries & Bond, 2009; Jeffries & Bond, 2010).

Second, community and political constraints may influence judges to mitigate sentence severity for minority group offenders (Steffensmeier, et al., 1998). In Australia and Canada there have been political and legislative events over the last 20 years that make the potential for Indigenous status to reduce sentence severity theoretically strong.

In Australia, one key event, the Royal Commission into Aboriginal Deaths in Custody established in 1987, has become a trigger for sensitising Australian legislatures and courts to the marginalised position of Indigenous Australians. The Royal Commission

was set up in response to growing public concern about the number of deaths of Indigenous Australians in prison custody. While the Royal Commission found that the deaths resulted from extraordinary high levels of Indigenous contact with the criminal justice system as a whole, the Commission also recognised that "the powers and decisions of sentencing courts present considerable opportunity for reducing the numbers of Aboriginal people in custody (1991, Chapter 2, recommendation 92). Following the report, all Australian governments publicly committed themselves to reducing Indigenous over-representation (Jeffries & Bond, 2009).

Developments in sentencing law also highlight the ways in which Indigenous status may mitigate sentencing outcomes. As noted by Anthony (2010, pp. 1), "when sentencing Indigenous offenders, courts in Australia … do their work in the knowledge that the rates of Indigenous imprisonment are much higher than the rates for the community as a whole". In two Australian jurisdictions (Australian Capital Territory, Queensland), sentencing legislation requires consideration be given to the cultural background of defendants. Further, recent precedent exists in case law for factors associated with offenders' Indigenous status (e.g. associated disadvantage) and Indigeneity itself (e.g. historical legacy of colonisation) to mitigate sentencing (see discussion by Edney, 2003; Edney & Bagaric, 2007, pp. 246; Anthony, 2010). In addition, a number of Australian jurisdictions have developed alternative ways of sentencing Indigenous offenders. For example, Indigenous and circle sentencing courts acknowledge and seek to address the differential needs of Indigenous defendants, recognising Indigeneity in the sentencing process (Harris, 2006).

Similarly, there has been on-going public and governmental concern about the over-representation of Indigenous people in Canadian prisons (Pfefferle, 2008). Once again, sentencing has been viewed as a possible source of the problem and a crucial point at which Indigenous imprisonment rates could be reduced (Pfefferle, 2008; Vasey, 2003; Welsh & Ogloff, 2008). In 1996, parliamentary reforms to the Canadian Criminal Code, which more broadly created a set of guidelines for the sentencing of all offenders, also made a specific provision recognising the unique circumstances of Indigenous defendants: "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders" (s.718.2(e))

The subsequent interpretation of section 718 by the Supreme Court of Canada directed sentencing judges to take into account the unique systemic and background factors, rooted in the historical legacy of colonisation, which may contribute to the Indigenous offender being before the court (as similarly recognised in Australian case law). These circumstances include: racism, poverty, unemployment, poor education, limited opportunities, substance abuse, loneliness, familial and community fragmentation (Pfefferle, 2008; Vasey, 2003; Welsh & Ogloff, 2008). In addition, judges were directed to consider the "type of sentence that is appropriate given the offender's specific aboriginal heritage or connection to an aboriginal community" (Ives, 2004, pp. 120). In making this determination, judicial consideration must be given to traditional aboriginal sentencing practices, such as restorative justice and the use of community-based sanctions (Ives, 2004, pp. 120).

Therefore, we might expect to find evidence of Indigenous sentencing leniency (i.e. positive discrimination). At least in the Australia and Canadian contexts, there is likely to be judicial recognition of the marginalised status of Indigenous defendants, connected to broader societal concerns regarding the 'plight' of Indigenous peoples as a colonised group within the criminal justice system.

In contrast, there is likely a lower probability of finding positive sentencing discrimination operating in the context of the United States. Although there are a number of possible reasons for this, two are particularly important to sentencing. First, Native Americans constitute a small proportion of prison population in the United States, compared to African-American and Latino/a offenders. For instance, as at March 2011, the federal prison population consisted of approximately 38.5% African-American, 33.2% Latino/a, and 1.8% Native American (Federal Bureau of Prisons, 2011). Although not directly comparable, most recent Australian data show that Indigenous Australians comprise about a quarter of the prison population (Australian Bureau of Statistics, 2009). Second, many jurisdictions in the United States have introduced schemes that substantially minimise judicial sentencing discretion. The result of the introduction of these schemes is to focus sentencing primarily on the type of offence and length of criminal history, with very limited opportunities to consider circumstances of mitigation.[3]

Race, Ethnicity and Sentencing Disparities Research

To date, research on sentencing disparities has been dominated by United States studies primarily concerned with investigating disparities between whites and African Americans (race effects), and more recently, between whites and Latinos (ethnicity

effects) (Spohn, 2000; Mitchell, 2005). Overall, this research shows that offenders' race and ethnicity often continues to have a direct negative effect on sentencing outcomes, independent of other key sentencing variables (see reviews by Spohn, 2000 and Mitchell, 2005). Although controlling for other relevant factors (especially current and past crime seriousness) generally reduces sentencing disparity between 'whites' and 'black'/Latino defendants, the differences between offenders of different racial/ethnic groups do not *always* dissipate completely. The general conclusion is that minority group offenders receive harsher sentencing outcomes (at least for the decision to imprison), a difference that cannot be completely explained by differences in past and current offending, or other important factors (Spohn, 2000; Mitchell, 2005; Steffensmeier & Demuth, 2006).

Further, a growing body of United States research has found that the effect of race/ethnicity negatively interacts with other factors to influence sentencing outcomes (Spohn, Welch & Gruhl, 1985; Miethe & Moore, 1986; Steffensmeier, et al., 1998; Spohn, 2000; Spohn & Beichner, 2000; Steffensmeier & Demuth, 2006; Doerner & Demuth, 2010). Notably pleading not guilty, having a serious criminal history, and being younger and male are found to have a greater aggravating effect on sentence severity for racial and ethnic minorities (Miethe & Moore, 1986; Spohn, 2000; Steffensmeier, et al., 1998; Steffensmeier & Demuth, 2006).

While methodologically robust investigations of racial/ethnic disparity in the United States are prolific, over the last 20 years, research on the impact of Indigenous status on sentencing has been sparser. The parameters of our review were statistical studies undertaken between 1991 and 2011 in the United States, Canada and Australia where:

(1) the sample consisted of adult offenders; (2) the decision to imprison, or length of imprisonment, was the dependent variable; (3) multivariate analysis techniques were used; (4) the findings were reported in a journal or monograph. Searches were undertaken using the following databases/search engines: EBSCOhost, Informit, LexisNexis, Proquest, Taylor&Francis Online, WebofScience, WileyOnline, GoogleScholar. Search terms included: Indigenous sentencing, Aboriginal sentencing, Indian sentencing, Native American Sentencing. Using this method, a total 12 studies were found to fit within the outlined parameters.[4] Table 1 summarises these studies, including how their findings support the three classic hypotheses in sentencing disparities research (see above).

[INSERT TABLE 1]

Native American Criminal Defendants and the Imprisonment Decision

Our searches only revealed four studies published between 1991 and 2011 using multivariate statistical techniques to examine the impact of Indigenous status on the decision to imprison in United States' jurisdictions (see, Alavarez & Bachman, 1996; Munoz & McMorris, 2002; Everett & Wojtkiewicz, 2002; Wilmot & Delone, 2010). As a body of research, these studies find some support for the differential involvement hypothesis, with the effect of Indigenous status on sentence severity being reduced after controlling for other important sentencing variables. Nonetheless, discrimination (positive and negative) has been found.

Alavarez and Bachman's (1996) analysis of disparities in imprisonment terms received by Native Americans and white Americans (n=14, 289) indicated support for

both the negative and positive discrimination hypotheses. At the baseline level (i.e. before control were introduced), Native Americans received shorter sentences of imprisonment for assault, sexual assault and homicide, equal sentences for larceny and longer sentences for burglary. Once sex, prior record and education were controlled, Native American offenders continued to receive significantly shorter sentences for homicide (7.8 fewer years compared to “Caucasian” defendants) and longer sentences for burglary (4.9 more years compared to “Caucasian” defendants). No significant differences were found in sentence length by Indigenous status for the other offences. In other words, initial Native American/white differences in sentence length favouring Native American defendants for crimes of assault and sexual assault were explained by differential involvement in prior offending. However, even after holding past criminality constant, there was continuing disparity by Indigenous status both negative (in the case of burglary) and positive (in the case of homicide).

Munoz and McMorris (2002) examined the relationship between Indigenous status and the imprisonment sentencing decision in a sample (n=8,955) of misdemeanours offences from three U.S. counties. Their analysis showed that although offence seriousness reduced the effect of Indigenous status on sentence, Native American offenders were more likely to be sentenced to a jail terms (almost 5 times more likely to receive a jail term compared to white defendants).

However, the findings of the above two studies are limited due to a failure to include measures of factors known to have significant effects on sentencing decisions. In particular, Alavarez & Bachman (1996) used a rough measure of current offence seriousness (i.e. offence type), while Munoz and McMorris (2002) omitted prior criminal history in their study. Less precise measures of offence seriousness and

absence of a measure for criminal history can produce an over-estimation of direct racial disparity (see for example Mitchell, 2005). Further, the lack of a prior criminal history measure is especially concerning given the significant impact of past criminality on sentencing outcomes (Hagan, 1975; Pennington & Lloyd-Bostock, 1987; Albonetti, 1991; Bickle & Peterson, 1991; Hesketh & Young, 1994, pp. 49-52; Ashworth, 1995, pp. 131-164; Rattner, 1996). Nonetheless, findings of direct a negative effect between Indigenous status and sentencing are also found in more rigorous United States research (see Everett and Wojtkiewicz, 2002; Wilmot & Delone, 2010).

In their analysis of 59,250 offenders sentenced in the United States Federal Court, Everett and Wojtkiewicz (2002, pp. 207) found that Native American offenders were initially 23% more likely than white offenders to receive longer sentences. After adjusting for legally relevant variables (such as criminal history, current offence seriousness, plea, acceptance of responsibility) as well as court location, age, gender and education, initial differences in sentence length remained only for offenders charged for violent offences (an interaction effect) (Everett & Wojtkiewicz, 2002, pp. 205-206). In other words, Native American offenders were more likely to receive significantly longer sentences for violent offences, but not for other offences.

Similarly, Wilmot and Delone (2010) found overall evidence of negative discrimination in the sentencing of Native Americans under Minnesota's sentencing guidelines. Using data on 10,796 felony defendants in 2001, this study modelled five decision stages in the application of the guidelines: (1) length of confinement in prison assigned to defendants; (2) whether the pronounced prison sentence was

executed or stayed; (3) length of confinement for executed sentences; (4) the type of stay (execution/imposition) for stayed sentences; (5) length of stay of execution.[5] After taking account of criminal history, type of offence, guideline departures based on mitigating and aggravating circumstances, sex and age, Native American defendants were found to have significantly longer sentences of pronounced confinement to prison (1.64 more months of prison confinement than white defendants), more likely to have an executed sentence (1.5 times more likely than white defendants), and, although small, more likely to have a stay which records a felony conviction (1.99 times more likely than white defendants). These findings show harsher treatment of Native American defendants. However, Native Americans do receive significantly shorter stay of execution of 1.22 fewer months compared to white defendants, (but this still means a felony conviction: Wilmot and Delone, 2010, p.171).

Aboriginal Canadian Criminal Defendants and the Imprisonment Decision

We located two Indigenous Canadian sentencing disparities studies published over the last 20 years that had utilised multivariate statistical techniques (see Weinrath, 2007; Welsh & Ogloff, 2008). These studies find some support for both the differential involvement and positive discrimination hypotheses.

Weinrath (2007, pp. 23-24) analysed sentence length for 237 male drunk drivers sentenced to custody in Alberta (Canada). Initial results showed no significant differences in the probability of being incarcerated by Indigenous status. After introducing control variables (i.e. current and past criminality) equality remained with Indigenous status having no direct impact on the length of imprisonment term. However, a positive interactive effect was found, Aboriginal offenders aged 20-29

received shorter sentences than any other group—a conditional mean of 95 days vs. 162 days for younger white defendants, the harshest conditional mean sentence)—but this leniency was not extended to other Aboriginal age groups. Consistent with the positive discrimination hypothesis, Weinrath (2007, pp. 24) argued that the judiciary might perceive younger Aboriginal offenders as being less blameworthy than their non-Aboriginal counterparts because of offender constraints, such as their "often low socioeconomic status and perceived difficulties managing their drinking".

Finally, Welsh and Ogloff's (2008) study examined the impact of 1996 reforms to the Canadian Criminal Code to include specific Aboriginal provision (s.718.2(e); see earlier discussion). Their sample (n= 691) consisted of sentencing decisions made 76 months prior to and following the implementation of section 718.2(e). Results are suggestive of sentencing equality between Aboriginal and non-Aboriginal Canadians. There were no significant bivariate differences in the likelihood of Aboriginal and non-Aboriginal defendants receiving a custodial disposition. Once other sentencing factors were introduced into the model, this did not change: "Aboriginal status did not significantly distinguish between offenders who received a custodial or non-custodial sentence" (Welsh & Ogloff, 2008, pp. 503). However, a "significant interaction between pre-/post section 718.2(e) and Aboriginal status" suggests that Aboriginal Canadians were 3.24 times more likely to be imprisoned following the implementation of this section (Welsh & Ogloff, 2008, pp. 506).

However, the sample used by Welsh and Ogloff (2008) raises two particular problems that limit their research findings. First, the sample of cases was drawn from an electronic legal database which, while noted to be "extensive", did not contain

information on all criminal sentencing decisions, with “less serious cases decided on busy court dockets where sentences are imposed with little or no reasons” missing (Welsh & Ogloff, 2008, pp. 497). Thus, the sample is unlikely to be representative of sentencing more generally due to missing elements in the sampling frame. Second, to identify cases, the researchers searched the database using a number of key words (e.g. ‘Aboriginal’, ‘First Nations’ etc). If the defendants’ Indigenous status was not mentioned in the sentencing transcripts, the case would have been excluded from the Aboriginal sample and possibly included in the non-Aboriginal sample.

In spite of the problems with their sample, Welsh and Ogloff’s (2008) methodological approach is (within the context of prior sentencing research in the United States and Canada) particularly powerful because they include an extensive array of sentencing determinants in their multivariate analyses. In addition to controls for current offence seriousness and prior criminality, Welsh and Ogloff (2008, pp. 504) also include: court processing factors (e.g. plea, pre-trial custody), social background variables (e.g. health, disadvantage background), offenders’ rehabilitative efforts, details of the offence context (e.g. number of victims, use of weapon). Surprisingly, age and sex, two factors that are known to substantially impact sentencing, were not included (Daly & Bordt, 1995; Wu & Spohn, 2009; Steffensmeier, et al., 1998).

Indigenous Australian Criminal Defendants and the Imprisonment Decision

Compared to the United States and Canada the use of multivariate statistical techniques to explore the impact of Indigenous status on sentencing has been more prolific in Australia (see Snowball & Weatherburn 2006, 2007; Jeffries & Bond, 2009; Bond & Jeffries, 2010; Bond & Jeffries, 2011a, Bond & Jeffries, 2011b).

Furthermore, Australian sentencing scholars have generally included a wider range of sentencing determinates in their analyses. Overall, this body of Australian research suggests that there is strong support that differential involvement explains much of the initial baseline differences between the sentencing outcomes for Indigenous and non-Indigenous offenders. Yet, there remains some evidence that differences in current offending and past criminality do not fully explain differences in all jurisdictions and types of courts.

Snowball and Weatherburn (2006, 2007) provide the first attempt in Australia to systematically investigate, using multivariate statistical techniques, the direct impact of Indigenous status on adult sentencing. Using a sample of adult offenders (having legal representation, no past prison sentence, and not on remand for another offence) sentenced in New South Wales' courts (n=93,130), Snowball and Weatherburn (2006) found no significant difference between Indigenous and non-Indigenous offenders in the likelihood of imprisonment, after controlling for a large range of factors including current and past offending, plea, age and gender. Their results suggest that Indigenous status plays little or no independent role in the sentencing process, once other relevant sentencing factors are controlled. Thus, any initial differences between Indigenous and non-Indigenous offenders in the likelihood of imprisonment can be attributable to pre-existing differences in offending and past criminal histories, supporting the differential involvement hypothesis.

In their 2007 study, Snowball and Weatherburn addressed some of the limitations of their earlier sample, by including offenders previously imprisoned and who appeared without legal representation (n=30,424). Results were again generally supportive of

the differential involvement thesis, showing that the higher rate at which Indigenous offenders in New South Wales were sent to prison could be explained in the most part by two particular variables: the more serious and more frequent nature of their current and past offending; and their more frequent breach of noncustodial sanctions (Snowball & Weatherburn, 2007). However, a “residual effect of race on sentencing” increasing probability of imprisonment for the median case by less than 1 percent was found for Indigenous versus non-Indigenous defendants. This result suggests that “racial bias may influence the sentencing process even if its effects are only small” (Snowball & Weatherburn, 2007, pp. 286). Snowball and Weatherburn’s more methodologically sound 2007 research therefore uncovered a small yet direct relationship between Indigenous status and sentencing. Indigenous offenders were slightly more likely than their non-Indigenous equivalents to be incarcerated. This result is suggestive of negative discrimination.

Of particular interest, Snowball and Weatherburn (2007, pp. 286) also found that Indigenous status had a positive interactive effect with prior criminal history. With all other factors being equal, criminal history aggravated sentence severity more substantially for non-Indigenous defendants. Consistent with a focal concerns understanding of sentencing, Snowball and Weatherburn (2007, pp. 286) speculated that “judicial officers, like many in the broader community, are very concerned about Indigenous over-representation in prison [community and political constraints]”, resulting in a more positive outcomes for Indigenous offenders than similarly-situated non-Indigenous offenders.

Using higher court data (i.e. District and Supreme Courts)[6] from Western Australia, Bond and Jeffries (2010) examined whether Indigenous women were more likely than non-Indigenous women to receive a sentence of imprisonment for comparable offending behaviour and histories over a nine year period (1996 to 2005) (n=2,789). After controlling for age, current and past offending, baseline differences, showing that Indigenous women were more likely to be imprisoned than non-Indigenous women, reversed direction. Findings suggested that over the ten-year period, Indigenous women were on average 0.70 times less likely than their non-Indigenous counterparts to receive a prison sentence when being sentenced under similar circumstances to non-Indigenous females. In other words, the results suggested that there was a trend towards leniency in the sentencing of Indigenous women, which might reflect "a degree of judicial cognisance ... around the special circumstances of Indigenous women", at least in Western Australian higher courts (Bond & Jeffries 2010, pp. 7).

Bond and Jeffries' (2011a) analysis of Indigenous status and sentencing in Queensland's Magistrates Courts (i.e. lower courts) found evidence to support both the negative discrimination and differential involvement hypotheses. Initial baseline differences between Indigenous and non-Indigenous defendants in their sample (n=970) suggested that the former were more likely to be imprisoned. After controlling for demographic characteristics, plea, remand, current and past criminality, this sentencing difference by Indigenous status dissipated. Nonetheless, a direct negative relationship was still found: Indigenous offenders remained significantly (2.08 times) more likely than non-Indigenous offenders to be sentenced to prison. This result suggests some support for the negative discrimination thesis.

Like much international research, these Australian studies do not include important information about the context of the commission of the offences (e.g. presence of co-offenders, evidence of premeditation), and other mitigating and aggravating circumstances (e.g. substance abuse, health, familial situation, employment status, past victimisation experiences) that judges may consider in making their decisions. Furthermore, remand (i.e. pre-trial release) status an especially strong predictor of sentencing was missing from the New South Wales and Western Australian studies discussed above. The inclusion of remand, contextual factors and other mitigating and aggravating variables might explain findings of discrimination.

To date, there are three statistical studies that have been able to include the most comprehensive set of control variables, regardless of national jurisdiction (see Jeffries & Bond, 2009; Bond & Jeffries, 2011a, 2011b).

In South Australia, Jeffries and Bond (2009) analysed a matched sample[7] (n=254) of Indigenous and non-Indigenous adults sentenced in the higher courts (i.e. District and Supreme Courts). The study found that Indigenous offenders were less likely than their non-Indigenous defendants to be sentenced to imprisonment, independent of other factors including: social characteristics (e.g. age, gender, familial situation, employment status), current and past criminality, the context of offence commission (e.g. presence of co-offenders, evidence of premeditation), court process (e.g. remand [i.e. pre-trial release], plea), culpability/blameworthiness factors (e.g. substance abuse, health status). Indigenous status, in this sample, had a direct yet positive impact on the decision to imprison (0.49 less likely compared to non-Indigenous

defendants). In other words, support for the positive discrimination hypothesis was found. Jeffries and Bond (2009) hypothesised that, consistent with the focal concerns perspective, judges sentencing in South Australia could be influenced by constraints inherent in Indigenous status itself, as well as the political context in the decade after the Royal Commission into Aboriginal Deaths in Custody (see earlier discussion). Indigenous offenders may be perceived as less blameworthy than their non-Indigenous counterparts, possibly due to Australia's legacy of colonisation, associated Indigenous social and economic marginalisation and the potential exacerbating consequences of imprisonment (Jeffries & Bond, 2009).

In contrast, when sentence length was decided, results of Jeffries and Bond's (2009) multivariate analysis showed that, compared to non-Indigenous offenders, Indigenous offenders were sentenced to longer periods of imprisonment when they appeared before the court under like circumstances (Indigenous status, compared to non-Indigenous, increased the imprisonment length by 1.21). In this case, a direct relationship between Indigenous status and sentencing disadvantaged Indigenous offenders was found (Jeffries & Bond, 2009). The opposite direction for sentence length may be an artefact of the earlier lenience at the initial sentencing stage (Jeffries & Bond, 2009). Perhaps judges in South Australia felt, after giving Indigenous offenders numerous 'chances' by diverting them from custody, that retribution, incapacitation and deterrence needed to be prioritised (Jeffries & Bond, 2009).

In Queensland's and Western Australia's higher courts (i.e. District and Supreme Courts) (Bond & Jeffries, 2011a, 2011b), parity between Indigenous and non-Indigenous in the decision to imprison was found, after the introduction of controls

for social characteristics (e.g. age, gender, familial situation, employment status), current and past criminality, the context of offence commission (e.g. presence of co-offenders, evidence of premeditation), court process (e.g. remand, plea), culpability/blameworthiness factors (e.g. substance abuse, health status). These results show support for the differential involvement hypothesis.

Finally, while Bond and Jeffries (2011b) found overall parity in the likelihood of imprisonment for Indigenous and non-Indigenous defendants in their Western Australian study, they also discovered evidence of negative interaction effects. Specifically, Indigenous males had significantly higher odds (1.93 times more likely) of a prison sentence than non-Indigenous females, after adjusting for other sentencing factors. Consistent with the United States race/ethnicity research, this finding suggests that minority males may receive harsher sentencing outcomes than other groups (e.g. Steffensmeier et al., 1998; Steffensmeier & Demuth, 2006).

Summary/Conclusion

Although we cannot easily compare effect sizes as different comparison groups are used, this review of the research on Indigenous sentencing disparities does show that the empirical evidence is somewhat mixed. Overall, strong support for the differential involvement hypothesis is evident from the multivariate statistical studies that have explored Indigenous sentencing disparities. Once crucial sentencing factors are held constant (especially, current and past offending), sentencing outcomes for Indigenous and non-Indigenous offenders either achieve parity or the gap is considerably reduced (in at least at one sentencing decision point, 9 studies from n=12).[8] In circumstances where disparity remains, there is evidence to suggest that, Indigenous defendants are

at times treated leniently in comparison with their non-Indigenous counterparts (in at least one sentencing stage, 6 studies from n=12). Research thus provides some support for the positive discrimination hypothesis, with results showing that Indigeneity can reduce sentence severity either directly or in interaction with other sentencing factors. However, a number of studies have found evidence of negative discrimination (direct or interactive) disadvantaging Indigenous defendants (n=8 from n=12 studies).

This review only considered studies in the last 20 years which used multivariate analysis techniques, which allow for simultaneous estimation and control of factors. However, none of the reviewed studies were able to take account of a classic problem in sentencing research: sample selection bias (i.e. control for disparities in earlier decisions in the criminal justice process). Although this limits the generalizability of their findings to disparity at other stages, these studies still provide an assessment of disparities in the sentencing of Indigenous offenders (Alvarez & Bachman, 1996, pp. 554).

Despite this methodological limitation, the key issue impacting the quality of these studies is the measurement of key variables (such as criminal history), and the lack of measures around mitigating and aggravating circumstances (e.g. the context of the commission of the offence, defendants' social history). Thus, the contradictory nature of these findings is most likely explained by better measures of criminal history, current crime seriousness (including the circumstances of offender's offending) and social background, as can be seen in some of the more recent Australian research.

Improved measures clearly, at least, reduce the likelihood of findings of negative discrimination.

However, the type of decision (i.e. initial decision to imprison versus length of imprisonment term), court level (i.e. lower or higher) and country/jurisdiction (e.g. Western versus South Australia, Canada versus the United States etc) are just as important in understanding the mixed results about the existence of Indigenous sentencing disparities. For example, in line with the focal concerns perspective of sentencing, the research to date suggests that political and social contexts surrounding Indigenous peoples are likely to influence sentencing. Unlike the United States where the disadvantaged position of African Americans is of central concern, the marginalised position of Indigenous peoples has been of particular political and social significance in Canada and Australia.

In these countries, sentencing courts are either directed by legislation to take Indigeneity into account as a mitigating factor in sentencing (e.g. Canada) and/or judges are cognisant of the role sentencing could play in reducing Indigenous over-incarceration and associated disadvantage. For example, in a recent qualitative analysis of judicial sentencing remarks in South Australia, Jeffries and Bond (2010, pp. 234) found that South Australian "judges demonstrated awareness in their remarks of the differences between Indigenous and non-Indigenous Australians and the possible role sentencing could play in exacerbating Indigenous marginalisation." Within these differing contexts, it is perhaps not surprising to find the United States sentencing research is more suggestive of negative discrimination while findings of

equality and or/leniency emerges from Indigenous sentencing studies in Canada and Australia.

This review highlights that the relationship between Indigeneity and sentencing remains under-explored with only minimal explorations of this area having been undertaken in the last 20 years. We make two particular suggestions for furthering our understanding of this important issue. First, we call for more research into the area of Indigenous sentencing but suggest that future statistical studies should ideally incorporate measures of offence context, and circumstances of mitigation and aggravation. As the recent work shows our ability to control for these circumstances of cases and defendants have important consequences for our findings. In particular, we need to explore how Indigenous-linked factors (to adapt a term from gender disparities research, see Raeder, 1993; Daly & Bordt, 1995; Steffensmeier et al. 1993) shape perceptions of blame and risk. Second, our understanding of how Indigeneity matters also requires us to consider how their cases are constructed and framed qualitatively. For instance, narrative analyses of judicial sentencing remarks and pre-sentencing reports would help us to understand how cultural and social inequalities shape the judicial decision-making process.

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Table 1: Summary of Multivariate Studies of Indigeneity and the Sentencing of Adult Offenders

Study	Location	Sample	N	Type of dependent variable(s)	Model includes:				
					Current offence/ prior history	Social histories	Differential involvement[a]	Negative discrimination[n]	Positive discrimination[n]
United States									
Alvarez & Bachman (1996)	Arizona	Six types of felonies; inmates	14,289	Length (yrs)	Yes	Education only	Yes	Yes	Yes
Everett & Wojtkiewicz (2002)	Federal courts	Petty offences excluded, sentenced under guidelines	59,250	Length (1-4)	Yes	Education only	Yes	Yes	No
Munoz & McMorris (2002)	Nebraska	Misdemeanors	8,955	In/out (0/1)	No prior history	No	Yes	Yes	No
Wilmot & DeLone (2010)	Minnesota	Felonies, sentenced under guidelines	10,796	In/out (0/1), Length (mths)	---[b]	In part[b]	---[b]	Yes	Yes
Canada									
Weinrath (2007)	Alberta	Drunk driving offences, males only	237	Length (days)	Yes	No	---[c]	No	Yes
Welsch & Ogloff (2008)	Nationwide	Sentencing decisions available in a specified legal database	691	In/out (0/1)	Yes	Yes	---[c]	No	No
Australia									
Snowball & Weatherburn (2006)	New South Wales	Indictable & summary,[d] not on remand, have legal representation and no prior prison sentence	93,130	In/out (0/1)	Yes	No	Yes	No	No
Snowball & Weatherburn (2007)	New South Wales	Indictable & summary[d]	30,424	In/out (0/1)	Yes	No	Yes	Yes	Yes
Jeffries & Bond (2009)	South Australia	Indictable,[d] matched pairs	254	In/out (0/1), Length (mths)	Yes	Yes	Yes	Yes	Yes
Bond & Jeffries (2010)	Western Australia	Indictable,[d] women only	2,789	In/out (0/1)	Yes	No	Yes	No	Yes
Bond & Jeffries (2011a)	Queensland	Indictable & summary[d]	1,179 &970	In/out (0/1)	Yes	Yes (indictable only)	Yes	Yes (summary only)	No
Bond & Jeffries (2011b)	Western Australia	Indictable[d]	918	In/out (0/1)	Yes	Yes	Yes	Yes	No

Notes:

[a] Only significant effects (at $p<0.05$) are reported in this table. The sizes of significant effect of Indigenous status are not reported in the table, as the comparison group differs between jurisdictions. See text for fuller details on each study.

[b] Current offence and prior history are part of the measurement of the sentencing outcome under the guidelines. Thus, independent measures of these variables are not included in the models, and in turn, the differential involvement hypothesis cannot be directly tested. Some offender social history information has been included in the model, through the addition of variables measuring aggravated and mitigated departures from the guidelines. Aggravated and mitigated departures are based on particular circumstances of the commission of the offence and the offender, although these are limited.

[c] No significant bivariate difference in sentencing outcome found.
[d] Summary offences are generally considered minor with sentencing penalties at the lowest end of the sentencing scale. Those charged with summary offences are sentenced in what are generically referred to as the lower courts. Indictable offences incorporate the most serious types of crimes and attract the most serious statutory sentencing penalties. Those found guilty of indictable offences will be sentenced in the higher courts.

[1] Rates could only be found for selected Canadian jurisdictions, namely: New Brunswick, Nova Scotia, Newfoundland, Labrador, Ontario, Sasskatchewan, Alberta as well as federal prisons.
[2] Sentencing data by Indigenous status is not readily available in published form in the United States and Canada.
[3] We recognise that in practice, this may make departures from the sentencing guidelines, as well as prosecutorial decisions particularly important sites for examining the impact of race and ethnicity.
[4] Originally, we included New Zealand in our search. However, no published research papers were reported in journals or monographs indexed in the database/search engines used.
[5] Stay means that the sentence of prison confinement is served in jail and/or in the community on probation; the type of stay relates to whether the conviction will be recorded as a felony or misdemeanor (Wilmot and Delone, 2010, pp.162, 169).
[6] In Australia, the type of offence with which a person is charged determines the level of court in which they will be tried and sentenced. Offences are classified as summary (non-indictable) and indictable. A number of indictable offences can be dealt with summarily unless the prosecuting authority elects otherwise. Summary offences are generally considered minor 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 the lower courts (e.g. Local Courts, Magistrates Courts, and Courts of Petty Session). Indictable offences incorporate the most serious types of crimes as defined in sentencing legislation and attract the most serious statutory sentencing penalties. Those found guilty of indictable offences will be sentenced in the higher courts (a term which incorporates both intermediate (i.e. District) and higher courts (i.e. Supreme Courts). Not all Australian jurisdictions have an intermediate court; some only have a higher court. In jurisdictions with both an intermediate and higher court, the intermediate court has broad jurisdiction to deal with indictable offences while the higher court deals with the most serious offences. In those jurisdictions without an intermediate court, the higher court deals with all indictable offences (Findlay, Odgers and Yeo, 2009, p. 179).
[7] Offenders were closely matched by seriousness of current sentenced offence, number of sentenced offences, number of prior criminal convictions, court type and plea.
[8] Note that due to multiple dependent variables (e.g. decision to imprison, length of imprisonment), many studies find support for more than one hypothesis.