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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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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The gross overrepresentation of Indigenous peoples in prison populations suggests that sentencing may be a discriminatory process. Using findings from recent (1991–2011) multivariate statistical sentencing analyses from the United States, Canada, and Australia, we review the 3 key hypotheses advanced as plausible explanations for baseline sentencing discrepancies between Indigenous and non-Indigenous adult criminal defendants: (a) differential involvement, (b) negative discrimination, and (c) positive discrimination. Overall, the prior research shows strong support for the differential involvement thesis and some support for the discrimination theses (positive and negative). We argue that where discrimination is found, it 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 TERMS Indigenous offenders, sentencing, discrimination, differential involvement

INTRODUCTION

Indigenous Canadians, Americans, and Australians are all grossly overrepresented in their respective countries’ prison populations. Indigenous Canadians are imprisoned at a rate of 750 per 100,000 compared to 76 per
100,000 among non-Indigenous Canadians (Perreault, 2009). 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 per 100,000 among persons of other races/ethnicities (Minton, 2008). 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).

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 overrepresentation of Indigenous Americans in prisons and jails. This is in stark contrast to Australia and Canada, where the overrepresentation 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 current rates show, they have had little success (Jeffries & Bond, 2009; Vasey, 2003).

For example, in Australia the rate of Indigenous imprisonment has increased from around 1,200 per 100,000 in 1990 to nearly 1,900 per 100,000 in 2009 (Australian Bureau of Statistics, 2009; Australian Institute of Criminology, 2005). Similarly, in Canada, although the Canadian prison population is generally trending downward, the proportion of Indigenous to non-Indigenous Canadians incarcerated appears to have increased (Roberts & Melchers, 2003).

Sentencing decisions could provide some explanation for the continuing overrepresentation of Indigenous offenders in prisons as well as represent a point in the criminal justice system where the problem of overrepresentation 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 (for data from Australia, see Baker, 2001; Castle & Barnett, 2000; Loh & Ferrante, 2003; Cunneen, Collings, & Ralph, 2005).

The purpose of this article is to review 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 provide an overview of the patterns of findings within each country (i.e., the United States, Canada, and Australia), discuss the methodological features used, and report the effect of Indigenous status on the sentencing outcome of imprisonment.
SENTENCING DISPARITIES HYPOTHESES

Three key hypotheses explaining differences by Indigenous status in baseline court data can be identified in the 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 behaviors 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, Fitzgerald, & Hua, 2003). This hypothesis predicts that Indigenous and non-Indigenous offenders will receive similar sentences under like circumstances.

Negative Discrimination Hypothesis

Another hypothesis put forward to explain sentencing disparities is the negative discrimination hypothesis. 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 offense; community protection; and practical constraints presented by individual offenders, organizational resources, and political and community expectations (Johnson, 2006; Steffensmeier, Ulmer, & Kramer, 1998). Organizational 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 shorthand 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 (Johnson, 2006; Steffensmeier et al., 1998).

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 seriousness of the crime, 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 favorable sentencing outcomes for Indigenous offenders.

First, sentencing outcomes are known to be affected by offender constraints, such as the ability to do time (Johnson, 2003; Steffensmeier et al., 1998). In comparison to the non-Indigenous population, Indigenous people tend to experience higher levels of social and economic disadvantage and associated poverty, victimization, substance abuse and ill health, and inequities with roots in the historical contexts of colonization and governmental Indigenous policies. Potentially, therefore, Indigenous differences in offender constraints could mitigate sentence severity and lead to more lenient outcomes for Indigenous offenders. Indigenous status may also operate over and above traditional blameworthiness measures (e.g., health, victimization) to mitigate sentencing. Indigenous offenders could be perceived as less blameworthy than their non-Indigenous counterparts because of the historical legacy of colonization (Jeffries & Bond, 2009, 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 political and legislative events over the past 20 years have theoretically increased the potential for Indigenous status to reduce sentence severity.

In Australia, the Royal Commission into Aboriginal Deaths in Custody, established in 1987, has become a trigger for sensitizing Australian legislatures and courts to the marginalized 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. Although the Royal Commission found that the deaths resulted from extraordinarily high levels of Indigenous contact with the criminal justice system
as a whole, it also recognized that “the powers and decisions of sentencing courts present considerable opportunity for reducing the numbers of Aboriginal people in custody” (Royal Commission into Aboriginal Deaths in Custody, 1991, Chapter 2, recommendation 92). Following the report, all Australian governments publicly committed themselves to reducing Indigenous overrepresentation in prisons (Jeffries & Bond, 2009).

Developments in sentencing law also highlight the ways in which Indigenous status may mitigate sentencing outcomes. As noted by Anthony (2010), “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” (p. 1). In two Australian jurisdictions (the Australian Capital Territory and Queensland), sentencing legislation requires that consideration be given to the cultural background of defendants. Furthermore, recent precedent exists in case law for factors associated with offenders’ Indigenous status (e.g., associated disadvantage) and Indigeneity itself (e.g., the historical legacy of colonization) to mitigate sentencing (see discussion by Anthony, 2010; Edney, 2003; Edney & Bagaric, 2007). 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, recognizing Indigeneity in the sentencing process (Harris, 2006).

Similarly, there has been ongoing public and governmental concern about the overrepresentation 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 that more broadly created a set of guidelines for the sentencing of all offenders also made a specific provision recognizing 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 colonization, that may contribute to the Indigenous offender being before the court (as similarly recognized in Australian case law). These circumstances include racism, poverty, unemployment, poor education, limited opportunities, substance abuse, loneliness, and familial and community fragmentation (Pfefferle, 2008; Vasey, 2003; Welsh & Ogloff, 2008). In addition, judges are 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,
p. 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).

Therefore, one 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 marginalized status of Indigenous defendants connected to broader societal concerns regarding the plight of Indigenous peoples as a colonized group within the criminal justice system.

In contrast, there is likely to be 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 the prison population in the United States compared to African American and Latino/a offenders. For instance, in March 2011, the federal prison population was approximately 38.5% African American, 33.2% Latino/a, and 1.8% Native American (Federal Bureau of Prisons, 2011). Although not directly comparable, the most recent Australian data show that Indigenous Australians make up about a quarter of the prison population (Australian Bureau of Statistics, 2009). Second, many jurisdictions in the United States have introduced schemes that substantially minimize discretion in judicial sentencing. The result of the introduction of these schemes is to focus sentencing primarily on the type of offense and the length of the offender's criminal history, leaving very limited opportunities to consider mitigating circumstances.  

**RESEARCH ON RACE, ETHNICITY, AND SENTENCING DISPARITIES**

To date, research on sentencing disparities has been dominated by U.S. studies primarily concerned with investigating disparities between Whites and African Americans (race effects) and, more recently, between Whites and Latinos (ethnicity effects; Mitchell, 2005; Spohn, 2000). Overall, this research shows that offenders’ race and ethnicity often continue to have a direct negative effect on sentencing outcomes independent of other key sentencing variables (see reviews by Mitchell, 2005; Spohn, 2000). Although controlling for other relevant factors (especially the seriousness of current and past crimes) generally reduces the sentencing disparity between White 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 (Mitchell, 2005; Spohn, 2000; Steffensmeier & Demuth, 2006).
Furthermore, a growing body of U.S. research has found that the effect of race/ethnicity negatively interacts with other factors to influence sentencing outcomes (Doerner & Demuth, 2010; Miethe & Moore, 1986; Spohn, 2000; Spohn & Beichner, 2000; Spohn, Welch, & Gruhl, 1985; Steffensmeier & Demuth, 2006; Steffensmeier et al., 1998). Note that pleading not guilty, having a serious criminal history, and being younger and male have a greater aggravating effect on sentence severity for racial and ethnic minorities (Miethe & Moore, 1986; Spohn, 2000; Steffensmeier & Demuth, 2006; Steffensmeier et al., 1998).

Although there are many methodologically robust investigations of racial/ethnic disparity in the United States, over the past 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 in which (a) the sample consisted of adult offenders; (b) the decision to imprison, or length of imprisonment, was the dependent variable; (c) multivariate analysis techniques were used; and (d) the findings were reported in a journal or monograph. Searches were undertaken using the following databases and search engines: EBSCOhost, Informit, LexisNexis, ProQuest, Taylor & Francis Online, Web of Science, Wiley Online, and Google Scholar. Search terms included Indigenous sentencing, Aboriginal sentencing, Indian sentencing, and Native American sentencing. Using this method, we found a total 12 studies that fit within the outlined parameters. Table 1 summarizes these studies, including how their findings support the three classic hypotheses in the sentencing disparities research (see “Sentencing Disparities Hypotheses”).

Native American Criminal Defendants and the Imprisonment Decision

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

Alvarez 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 controls 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
TABLE 1  Summary of Multivariate Studies of Indigeneity and the Sentencing of Adult Offenders

<table>
<thead>
<tr>
<th>Study</th>
<th>Location</th>
<th>Sample Description</th>
<th>N</th>
<th>Type of Dependent Variable(s)</th>
<th>Model Includes</th>
<th>Hypothesis</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Current Offense/Prior History</td>
<td>Social Histories</td>
<td></td>
</tr>
<tr>
<td>United States</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alvarez &amp; Bachman (1996)</td>
<td>Arizona</td>
<td>Six types of felonies; inmates</td>
<td>14,289</td>
<td>Length (years)</td>
<td>Yes</td>
<td>Education only</td>
</tr>
<tr>
<td>Everett &amp; Wojtkiewicz (2002)</td>
<td>Federal courts</td>
<td>Petty offenses excluded, sentenced under guidelines</td>
<td>59,250</td>
<td>Length (1–4)</td>
<td>Yes</td>
<td>Education only</td>
</tr>
<tr>
<td>Munoz &amp; McMorris (2002)</td>
<td>Nebraska</td>
<td>Misdemeanors</td>
<td>8,955</td>
<td>In/out (0/1)</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Wilmot &amp; Delone (2010)</td>
<td>Minnesota</td>
<td>Felonies, sentenced under guidelines</td>
<td>10,796</td>
<td>In/out (0/1), Length (months)</td>
<td>In part^b</td>
<td>—^b</td>
</tr>
<tr>
<td>Canada</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Weinrath (2007)</td>
<td>Alberta</td>
<td>Drunk-driving offenses, males only</td>
<td>237</td>
<td>Length (days)</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Welsh &amp; Ogloff (2008)</td>
<td>Nationwide</td>
<td>Sentencing decisions available in a specified legal database</td>
<td>691</td>
<td>In/out (0/1)</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

(Continued on next page)
<table>
<thead>
<tr>
<th>Study</th>
<th>Location</th>
<th>Sample Description</th>
<th>N</th>
<th>Type of Dependent Variable(s)</th>
<th>Current Offense/Prior History</th>
<th>Social Histories</th>
<th>Differential Involvement&lt;sup&gt;a&lt;/sup&gt;</th>
<th>Negative Discrimination&lt;sup&gt;a&lt;/sup&gt;</th>
<th>Positive Discrimination&lt;sup&gt;a&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>New South Wales</td>
<td>Indictable and summary&lt;sup&gt;d&lt;/sup&gt;, not on remand, have legal representation and no prior prison sentence</td>
<td>93,130</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Snowball &amp; Weatherburn</td>
<td>New South Wales</td>
<td>Indictable and summary&lt;sup&gt;d&lt;/sup&gt;</td>
<td>30,424</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Jeffries &amp; Bond</td>
<td>South Australia</td>
<td>Indictable&lt;sup&gt;d&lt;/sup&gt;, matched pairs</td>
<td>254</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Bond &amp; Jeffries</td>
<td>Western Australia</td>
<td>Indictable&lt;sup&gt;d&lt;/sup&gt;, women only</td>
<td>2,789</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Bond &amp; Jeffries</td>
<td>Western Australia</td>
<td>Indictable&lt;sup&gt;d&lt;/sup&gt;</td>
<td>918</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Bond &amp; Jeffries</td>
<td>Queensland</td>
<td>Indictable and summary&lt;sup&gt;d&lt;/sup&gt;</td>
<td>1,179</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

<sup>a</sup>Only significant effects (at $p < .05$) are reported in this table. The sizes of significant effects of Indigenous status are not reported in the table, as the comparison group differs between jurisdictions. See the text for more details on each study. <sup>b</sup>Current offense or 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 is included in the model through the addition of variables for mitigated departure. Aggravated and mitigated departures are based on particular circumstances of the commission of the offense and the offender, although these are limited. <sup>c</sup>No significant bivariate difference in sentencing outcome found. <sup>d</sup>Summary offenses are generally considered minor, with sentencing penalties at the lowest end of the sentencing scale. Those charged with summary offenses are sentenced in the lower courts. Indictable offenses include the most serious types of crimes and attract the most serious statutory sentencing penalties. Those found guilty of indictable offenses are sentenced in the higher courts.
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 offenses. In other words, initial Native American/White differences in sentence length favoring Native American defendants for crimes of assault and sexual assault were explained by differential involvement in prior offending. However, even after past criminality was held 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 misdemeanor offenses from three U.S. counties. Their analysis showed that although the seriousness of the offense reduced the effect of Indigenous status on the sentence, Native American offenders were more likely than Whites to be sentenced to a jail term (almost 5 times more likely to receive a jail term compared to White defendants).

However, the findings of these two studies are limited because of a failure to include measures of factors known to have significant effects on sentencing decisions. In particular, Alvarez and Bachman (1996) used a rough measure of current offense seriousness (i.e., offense type), whereas Munoz and McMorris (2002) omitted prior criminal history from their study. Using less precise measures of the seriousness of the offense and not using a measure for criminal history can produce an overestimation of direct racial disparity (see, e.g., Mitchell, 2005). Furthermore, the lack of a prior criminal history measure is especially concerning given the significant impact of past criminality on sentencing outcomes (Albonetti, 1991; Ashworth, 1995; Bickle & Peterson, 1991; Hagan, 1975; Hesketh & Young, 1994; Pennington & Lloyd-Bostock, 1987; Rattner, 1996). Nonetheless, findings of direct a negative effect between Indigenous status and sentencing were also found in more rigorous U.S. research (see Everett & Wojtkiewicz, 2002; Wilmot & Delone, 2010).

In their analysis of 59,250 offenders sentenced in the U.S. Federal Court, Everett and Wojtkiewicz (2002) 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, seriousness of the current offense, plea, acceptance of responsibility) as well as court location, age, gender, and education, the researchers found that initial differences in sentence length remained only for offenders charged for violent offenses (an interaction effect; Everett & Wojtkiewicz, 2002). In other words, Native American offenders were more likely to receive significantly longer sentences for violent offenses but not for other offenses.

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, these researchers modeled five decision stages in the application of the guidelines: (a) length of confinement in prison assigned to defendants, (b) whether the pronounced prison sentence was executed or stayed, (c) length of confinement for executed sentences, (d) type of stay (execution/imposition) for stayed sentences, and (e) length of stay of execution. After taking account of criminal history, type of offense, guideline departures based on mitigating and aggravating circumstances, sex, and age, the researchers found that Native American defendants had significantly longer sentences of pronounced confinement to prison (1.64 more months of prison confinement than White defendants); were more likely to have an executed sentence (1.5 times more likely than White defendants); and, although small, were more likely to have a stay that recorded a felony conviction (1.99 times more likely than White defendants). These findings showed harsher treatment of Native American defendants. Native Americans did receive significantly shorter stays of execution (1.22 fewer months than White defendants), but this still meant a felony conviction (Wilmot & Delone, 2010).

Aboriginal Canadian Criminal Defendants and the Imprisonment Decision

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

Weinrath (2007) analyzed 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 control variables (i.e., current and past criminality) were introduced, this equality remained, with Indigenous status having no direct impact on the length of the 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 Aboriginal offenders in other age groups. Consistent with the positive discrimination hypothesis, Weinrath 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” (p. 24).

Finally, Welsh and Ogloff’s (2008) study examined the impact of 1996 reforms to the Canadian Criminal Code to include a specific Aboriginal provision (s.718.2[e]; see “Positive Discrimination Hypothesis”). Their sample
(n = 691) consisted of sentencing decisions made 76 months prior to and following the implementation of Section 718.2(e). The results were 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” (p. 503). However, a “significant interaction between pre-/post section 718.2(e) and Aboriginal status” suggested that Aboriginal Canadians were 3.24 times more likely to be imprisoned following the implementation of this section (p. 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 that, although 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 (p. 497). Thus, the sample is unlikely to be representative of sentencing more generally because of missing elements in the sampling frame. Second, to identify cases, the researchers searched the database using a number of keywords (e.g., Aboriginal, First Nations). 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 included an extensive array of sentencing determinants in their multivariate analyses. In addition to controls for seriousness of the current offense and prior criminality, Welsh and Ogloff included court processing factors (e.g., plea, pretrial custody), social background variables (e.g., health, disadvantaged background), offenders’ rehabilitative efforts, and details of the offense context (e.g., number of victims, use of a weapon). What is surprising is that age and sex, two factors that are known to substantially impact sentencing, were not included (Daly & Bordt, 1995; Steffensmeier et al., 1998; Wu & Spohn, 2009).

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 common in Australia (see Bond & Jeffries, 2010, 2011a, 2011b; Jeffries & Bond, 2009; Snowball & Weatherburn, 2006, 2007). Furthermore, Australian sentencing scholars have generally included a wider range of
sentencing determinants 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) made 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, having no past prison sentence, and not on remand for another offense) 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 a large range of factors, including current and past offending, plea, age, and gender, were controlled. Their results suggested 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 preexisting 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 who had previously been 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: (a) the more serious and more frequent nature of their current and past offending and (b) their more frequent breach of non-custodial sanctions (Snowball & Weatherburn, 2007). However, a “residual effect of race on sentencing” that increased the probability of imprisonment for the median case by less than 1% was found for Indigenous versus non-Indigenous defendants. This result suggested that “racial bias may influence the sentencing process even if its effects are only small” (p. 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 was suggestive of negative discrimination.

Of particular interest, Snowball and Weatherburn (2007) 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
Speculated that “judicial officers, like many in the broader community, are very concerned about Indigenous overrepresentation in prison [community and political constraints]” (p. 286), resulting in more positive outcomes for Indigenous offenders than similarly situated non-Indigenous offenders.

Using higher court data (i.e., data from district and supreme courts) 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 behavior and histories over a 9-year period (1996–2005; \( n = 2,789 \)). After age and current and past offending were controlled, baseline differences that showed that Indigenous women were more likely than non-Indigenous women to be imprisoned reversed direction. The findings suggested that over the 9-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. In other words, the results suggested that there was a trend toward leniency in the sentencing of Indigenous women that might reflect “a degree of judicial cognisance . . . around the special circumstances of Indigenous women,” at least in Western Australian higher courts (p. 76).

Bond and Jeffries’ (2011b) 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 demographic characteristics, plea, remand, and current and past criminality were controlled, 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 suggested some support for the negative discrimination thesis.

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

To date, three statistical studies have been able to include the most comprehensive set of control variables regardless of national jurisdiction (see Bond & Jeffries, 2011a, 2011b; Jeffries & Bond, 2009).
In South Australia, Jeffries and Bond (2009) analyzed 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 offense commission (e.g., the presence of co-offenders, evidence of premeditation), the court process (e.g., remand, plea), and 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) hypothesized 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 “Positive Discrimination Hypothesis”). Indigenous offenders may be perceived as less blameworthy than their non-Indigenous counterparts, possibly because of Australia’s legacy of colonization, the associated Indigenous social and economic marginalization, and the potential exacerbating consequences of imprisonment (Jeffries & Bond, 2009).

In contrast, the results of Jeffries and Bond’s (2009) multivariate analysis showed that when sentence length was decided, Indigenous offenders were sentenced to longer periods of imprisonment than non-Indigenous offenders when they appeared before the court under like circumstances (Indigenous status increased the imprisonment length by 1.21 compared to non-Indigenous status). In this case, a direct relationship was found between Indigenous status and sentencing disadvantaged Indigenous offenders (Jeffries & Bond, 2009). The opposite direction for sentence length may be an artifact of 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 prioritized (Jeffries & Bond, 2009).

In Queensland’s and Western Australia’s higher courts (i.e., district and supreme courts; Bond & Jeffries, 2011a, 2011b), parity was found in the decision to imprison Indigenous and non-Indigenous offenders 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., the presence of co-offenders, evidence of premeditation), the court process (e.g., remand, plea), and culpability/blameworthiness factors (e.g., substance abuse, health status). These results showed support for the differential involvement hypothesis.
Finally, although Bond and Jeffries (2011a) 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 of a prison sentence (were 1.93 times more likely to be sentenced) than non-Indigenous females after other sentencing factors were adjusted. Consistent with the U.S. race/ethnicity research, this finding suggested that minority males may receive harsher sentencing outcomes than other groups (e.g., Steffensmeier & Demuth, 2006; Steffensmeier et al., 1998).

SUMMARY AND CONCLUSION

Although we cannot easily compare effect sizes, as different comparison groups were 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), either sentencing outcomes for Indigenous and non-Indigenous offenders achieve parity or the gap is considerably reduced (in at least at one sentencing decision point, nine studies from the total 12). In circumstances in which disparity remains, there is evidence to suggest that Indigenous defendants are at times treated more leniently than their non-Indigenous counterparts (in at least one sentencing stage, six studies from the total 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 found evidence of negative discrimination (direct or interactive) disadvantaging Indigenous defendants (eight studies from the total 12).

This review only considered studies published in the past 20 years that used multivariate analysis techniques, which allow for the 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., controlling for disparities in earlier decisions in the criminal justice process). Although this limits the generalizability of the findings to disparity at other stages, these studies still provide an assessment of disparities in the sentencing of Indigenous offenders (Alvarez & Bachman, 1996).

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 offense, defendants’ social history). Thus, the contradictory nature of these findings is most likely
explained by better measures of criminal history, seriousness of the current crime (including the circumstances of the 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 vs. length of imprisonment term), court level (i.e., lower or higher), and country/jurisdiction (e.g., Western vs. South Australia, Canada vs. the United States) are just as important in understanding the mixed results for 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 in the United States, where the disadvantaged position of African Americans is of central concern, the marginalized position of Indigenous peoples has been of particular political and social significance in Canada and Australia.

In these countries, either sentencing courts are directed by legislation to take Indigeneity into account as a mitigating factor in sentencing (e.g., Canada) and/or judges are cognizant of the role sentencing could play in reducing Indigenous overincarceration and associated disadvantage. For example, in a recent qualitative analysis of judicial sentencing remarks in South Australia, Jeffries and Bond (2010) 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” (p. 234). Within these differing contexts, it is perhaps not surprising to find that the U.S. sentencing research is more suggestive of negative discrimination, whereas findings of equality and/or leniency emerge from Indigenous sentencing studies in Canada and Australia.

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

NOTES

1. Rates could only be found for select Canadian jurisdictions, namely New Brunswick, Nova Scotia, Newfoundland, Labrador, Ontario, Saskatchewan, and Alberta, as well as federal prisons.

2. Sentencing data by Indigenous status are not readily available in published form in the United States and Canada.

3. We recognize 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 databases and 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 is recorded as a felony or misdemeanor (Wilmot & Delone, 2010).

6. In Australia, the type of offense with which a person is charged determines the level of court in which he or she will be tried and sentenced. Offenses are classified as summary (nonindictable) and indictable. A number of indictable offenses can be dealt with summarily unless the prosecuting authority elects otherwise. Summary offenses are generally considered minor because the sentencing penalties attached to them are at the lowest end of the sentencing scale. Those charged with summary offenses are sentenced in what are generically referred to as the lower courts (e.g., local courts, magistrates courts, and courts of petty session). Indictable offenses include the most serious types of crimes as defined in sentencing legislation and attract the most serious statutory sentencing penalties. Those found guilty of indictable offenses are sentenced in the higher courts, a term that incorporates both intermediate courts (i.e., district courts) and higher courts (i.e., supreme courts). Not all Australian jurisdictions have an intermediate court; some have only a higher court. In jurisdictions with both an intermediate and higher court, the intermediate court has broad jurisdiction to deal with indictable offenses, whereas the higher court deals with the most serious offenses. In those jurisdictions without an intermediate court, the higher court deals with all indictable offenses (Findlay, Odgers, & Yeo, 2009).

7. Offenders were closely matched by seriousness of the current sentenced offense, number of sentenced offenses, number of prior criminal convictions, court type, and plea.

8. Note that because of the presence of multiple dependent variables (e.g., decision to imprison, length of imprisonment), many studies found support for more than one hypothesis.

REFERENCES


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