

Challenges to concepts from the chivalry thesis: Judiciary sentence practices on Indigenous women and white women defendants processed in Queensland's Supreme Courts and District Courts

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While the chivalry thesis is a dated method to interpret lenient treatment for women defendants, its concepts of gender and racial bias continue to be debated. In particular how the construction of femininity, generally embedded social beliefs about women's role in society impact treatment. While judges are governed by legal training and sentencing guidelines, I argue that their attitudes about Indigenous women and white women (which are based on socially structured personal experiences) impact the sentence treatment of women. Further, given that Indigenous women and white women have similar troubled life histories, I especially argue that their offending circumstances are the crucial factor influencing judges.

The present paper links concepts from the chivalry thesis to examine the role that gender has on sentence remarks made by judges and council during sentence court matters in Queensland's Supreme Courts and District Courts. This paper uses the focal concerns perspective as a framework for the sentencing discourse analysis of understanding whether women, and what types of women, are treated leniently. Findings challenge the chivalry thesis that lenient treatment excludes Indigenous women and white women whose serious offending cases are processed at the Supreme Courts and District Courts.

Keywords: judiciary attitudes; women; chivalry thesis; feminist criminology; Indigenous

Introduction

A court has regard to many factors when determining the sentence for an offence (Ashworth 2010). Aggravating and mitigating factors are especially crucial when assessing the culpability of a defendant. These influence sentencing with aggravating factors warranting a higher penalty while mitigating factors warrant a lower penalty for the same offence. The present paper links concepts from the chivalry thesis with courtroom observations to examine the role that gender has on sentence remarks made by judges and submissions from council during sentence court matters in the Supreme Courts and District Courts. In particular I focus on the mitigating factors identified and the impact that these have on the sentence outcome of Indigenous and white women defendants. This paper uses the focal concerns perspective (Steffensmeier et al 1998),

which is used to explain sentencing disparities based on race, as a framework for the sentencing discourse analysis of understanding whether women, and what types of women, are treated leniently in the criminal justice system. According to the focal concerns perspective, judge's sentencing decisions reflect three key focal concerns. The first focal concern, blameworthiness, refers to judges' assessment of the offenders' culpability and the extent of harm that the crime caused. Second is community protection, or risk, whereby judges evaluate the risk that offenders pose to the community. The third focal concern is practical constraints and consequences, which involves judges weighing the practical issues before imposing sanctions including social costs of punishment and community and political outlooks which may impact the courts' societal standing. My findings challenge the chivalry thesis, which suggests women are afforded leniency within the criminal justice system. While judges are governed by legal training and sentencing guidelines, I argue that their attitudes about Indigenous women and white women (which are based on socially structured personal experiences) impact the sentence treatment of Indigenous women and white women. In particular, because Indigenous women and white women in the higher courts have similar troubled life histories, I argue that their offending circumstances are the crucial factor influencing judges. My findings do not suggest any race-based differences in sentencing treatment. While judges impose sentences in accordance to the order for offending involvement, their use of discretion and judiciary powers benefits both Indigenous women and white women defendants.

The focus of this paper is on serious offending including possession and trafficking of illicit drugs, violent offences involving acts intended to cause injury and assault, and fraud because these are the most common offences for women defendants that come before the Supreme Courts and District courts (ABS 2013). These offenses are also some of the main causes that both Indigenous and white women go to prison (ABS 2013; 2007).

The paper starts by laying the theoretical groundwork with a discussion on the social construction of gender. This is followed by observations where I witnessed things happening to women regardless of their race, alongside other things that were specific to Indigenous women and things exclusive to white women defendants. Remarks by offence are presented to illustrate how offending circumstances are justified by legal practitioners as shown in Table I. Based on the chivalry thesis which maintains that women secure lenient treatment across the criminal justice system because of gendered explanations (Pollak 1950), I link concepts including level of offending, socioeconomic status, and gender stereotypes to its applicability to Indigenous and white women defendants. The purpose of linking concepts from the chivalry thesis to Indigenous women and white women is to analyse whether judges treat one group of women more leniently over the other based on race.

Social Construction of Gender

The construction of gender is created by socially expected norms and behaviours that are based on a person's genitalia (Lorber 1994). While gendered roles change, traditionally for men these are imposed roles of masculinity like possessing a dominant and protective demeanour. Whereas for women, standards of femininity include roles within the home as wives and caregivers to children and behaving in passive and subordinate manners. Particularly for women involved in criminal activity, based on concepts from the chivalry thesis, gendered roles of femininity are perpetuated and reinforced in the criminal justice system by legal practitioners:

“One of the outstanding concomitants of the existing inequality between the sexes is chivalry and the general protective attitude of man toward woman. This attitude exists on the part of the male victim of crime as well as on the part of the officers of the law, who are still largely male in our society. Men hate to accuse women and thus indirectly to send them to their punishment,

police officers dislike to arrest them, district attorneys to prosecute them, judges and juries to find them guilty, and so on” (Pollak 1950: 151).

This notion of chivalrous treatment for women starts with the belief that women possess traits of weakness, passiveness, inferiority, naivety, and obedience toward a patriarchal society where their roles are that of mother, daughter, and wife (Pollak 1950). It is then carried on by beliefs that women need to be safeguarded and watched over, so therefore protection is symbolised and reinforced through lenient treatment. Although the chivalry thesis is criticised for being an outdated principle based on socially expected gendered explanations and ideologies that women are of inferior status (Heidenson 1985), its main feature, that women are afforded leniency within the criminal justice system, continues to be a predominant explanation for the different treatment in sentencing outcomes based on gender. Thus, criteria about the chivalry thesis particularly relevant to this paper is that leniency is not guaranteed for all women because their race and ethnicity, lower socioeconomic status, and poor demeanour could single them out.

Methodology

I carried out qualitative observations in courtrooms to analyse how gender is constructed in this environment, and the role, if any, that the demeanour and behaviour of Indigenous women and white women in a courtroom has on their sentence treatment. Detailed field notes were taken following each observation and field notebooks were analysed through thematic coding.

I observed a total of 68 cases between July 2014 and July 2015. The observations took place in the District Courts and Supreme Courts from Townsville and Cairns in North Queensland. Observations were carried out during sentence matters as this is when sentence remarks and submissions are made. Other matters observed involved applications, mentions, jury selections, and trials to further analyse how femininity is constructed for Indigenous and white women appearing throughout court matters.

In this paper, I present qualitative details in the form of tables as illustrated in Table I showing information about the submissions from council and summary remarks from judges during sentence matters. I then match mitigating factors with remarks to interpret the way in which offending circumstances are justified by legal practitioners and to analyse the different ways femininity is constructed. These comparisons are based on my interpretations from courtroom observations. This includes my interpretations about how the offending circumstances are used to justify mitigating factors.

Common Experiences for Women Defendants

Courtroom observations reveal that regardless of race, women defendants whose cases are processed in District Courts and Supreme Courts share similarities related to their life histories. Table I shows that characteristics including primary care for dependent children, poor mental health and substance abuse are mitigating factors collectively used by council and judges when discussing the offending circumstances of Indigenous women and white women defendants. The most common attributions to poor mental health used to describe women’s offending circumstances include breakdown of marriage, financial issues, re-victimization from domestic violence, housing instability, and childhood victimization especially sexual abuse. The circumstances around the abuse of illicit drugs are mentioned as a response to alleviate stress, depression, and anxiety from similar connected experiences of re-victimization from relationships, loss of a child, and childhood trauma. Another characteristic shared by Indigenous women and white women defendants concerns their troubled upbringing which involves childhood victimization witnessing domestic violence, drug use, and poor mental health. Thus, Indigeneity is not necessarily treated differently in the cases that I observed. However, there was a difference related to women’s substance abuse; Indigenous women engage in alcohol abuse while white women consume illicit drugs like

cannabis and methamphetamines. This does not have an impact on the sentences they receive, however, as a whole, similar mitigating factors are used by council so that the punishment is tailored to each women’s individual complex lives, “your honour, I ask that you structure the sentence so deterrence is met....that suits background, particular to client’s background” (council representing an Indigenous woman convicted of assault). Further, women defendants, regardless of race, share similar life histories; this is consistent with the literature concerning the pathways and characteristics of women’s offending (Bartels 2010; Corston 2007).

Table I: Offending circumstances about Indigenous women and white women convicted on violent, drug, and fraud offences at the District Courts and Supreme Courts

Mitigating factors	Violent	Drugs	Fraud
The physical and mental health of the defendant leading up to the offence	“My client is a deeply troubled alcoholic” (Council’s submissions)	“Consumed cannabis to relieve anxiety and stress... report from counselling shows that her daughter overdosed at 25 and this impacted her life” (Council’s submissions)	“You were also impaired by your health and the attendant pressures to that (i.e. meets criteria for medical diagnosis, was discharged, has medical certificate)” (Judge’s sentence remarks)
	“Spike in seriousness of offences due to drug use... drug addiction is the ultimate factor, detriment” (Council’s submissions)	“Diagnosed with anxiety, takes prescription medication...from the psychologists’ report she was suffering from depression, anxiety, and stress” (Council submissions)	
	“Anxiety, physically poor health” (Judge’s sentence remarks)	“Never touched substances prior to meeting husband. She eventually became addicted to ice. This helped her cope with the stress of marriage” (Council’s submissions)	
The misfortunes of the defendant leading up to the offence	“Incredible abuse and violence, disgusting and degrading way he treated you” (Judge’s sentence remarks)	“I particularly take into account that you’ve had a difficult life” (Judge’s sentence remarks)	“These (i.e. offending) were acts of desperation” (Council’s submissions)
	“They (children) confirm he was very violent toward you and the children, he was very alcoholic. He made serious threats to kill you” (Judge’s sentence remarks)	“You’ve had a lifetime background which probably made you vulnerable to your offending” (Judge’s sentence remarks)	
	“Sad background” (Judge’s sentence remarks)	“Your personal circumstances are more compelling, how you became involved in your offending” (Judge’s sentence remarks)	

Mitigating factors	Violent	Drugs	Fraud
Dependents	“Has a young child from a previous relationship” (Council’s submissions)	“Defendant has two children from previous relationships and three more with current husband” (Council’s submissions)	“She is a mother, has a daughter” (Council’s submissions)
	“Became a mother at 14, is the single caregiver. Then had the second birth of a son at 19” (Council’s submissions)	“No financial support for kids once divorce occurred” (Council’s submissions)	“Has young children ages 7 and 10” (Council’s submissions)
Offending based on need rather than greed	“Homelessness is certainly an issue with my client” (Council’s submissions)	“Grew cannabis to meet financial needs” (Council’s submissions)	“Found yourself under significant financial pressure” (Judge’s sentence remarks)

Another experience shared by women regardless of race involves the way judges verbally approach women. Court procedures are explained by some judges in lay language as an attempt to have a dialogue and involve the defendant in court processes. For example in one case involving an Indigenous woman convicted of burglary, a detailed explanation was provided to her case as her sentence date was postponed. The judge asked her, “Do you understand what is going to happen?”, after having explained to the defendant that she was going back to custody and returning to court for her upcoming sentence date. In another case involving a white woman, the judge explained, “if you engage in any crime during the next 12 months you will be in breach of your sentence and will be fined five hundred dollars”. Contrary to public beliefs that judges are out of touch with ordinary people (Mackenzie et al 2012; Hutton 2005), as well as Indigenous peoples’ communities and general way of life (Coe 1980), my observations show that while, when addressing other legal practitioners judges speak in legal language foreign to audience members, jury members, and defendants, some judges address defendants in lay language specifically so that defendants are aware of their own case procedures and outcomes.

Racial Differences in the Courts

My observations show racial differences for women defendants appearing in court. Observations specifically about Indigenous women involve their place of residence. Indigenous women are far more likely than white women to reside in remote locations like Palm Island, Weipa, Thursday Island, and Cooktown and could have their court matters processed via teleconference. Another difference is that the legal assistance for Indigenous women is from Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd which is generally made up from white legal practitioners. Consistent with government statistics (ABS 2013), my observations show that Indigenous women mostly come before the District Courts and Supreme Courts for violent offences involving acts intended to cause injury and assault. White women also appear for violent offences but are more likely to appear in the higher courts for fraud and drug offences involving possession of a dangerous drug and drug trafficking. Possible causes for these differential offenses include Indigenous women’s alcohol dependence and involvement in confrontations that escalate to physical force and white women’s abuse of illicit drugs and acting in a lesser role to a male partner’s drug trafficking activity.

The total number of women’s cases that I observed is relative to women’s contact with the higher courts. Only two per cent of women’s cases are dealt with at the Supreme Courts and

District Courts (ABS 2013). I observed that 12 cases involved white women compared to 7 cases about Indigenous women. While Indigenous women are overrepresented based on population proportions (ABS 2012), there are still more white women going through the court system.

One particular observation about white women convicted of drug and fraud offences is that they have employment skills, often in administrative and assistant jobs. This is unusual, given that much of the research on characteristics of women offenders reports their general lack of skills, unemployment, and low education attainment (Corston 2007). A further observation about white women convicted of drug trafficking offences is that they are usually assisting, or guided by, men. The women that I observed in the higher courts that appear for drug trafficking offences are led by men:

“She is acting as husband’s assistant in a sense”

(Judge’s remarks about white woman defendant convicted on trafficking methamphetamine and cannabis. She was directly involved in 221 sales to pay off husbands drug debt, argued as ‘street level’ by her legal team. Received a custody sentence with a shift from parole to suspended sentence.)

“was foolishly advised....by a man (into growing cannabis for commercial purposes)”

(Council submissions about white woman defendant convicted on production of cannabis. A small scale production, unsophisticated operation of 867 grams of cannabis. Received a fine.)

The remarks above by legal practitioners are consistent with the literature on judicial attitudes that women can be coerced, predominantly by a male partner, into taking part but that they tend to have a lesser role in the criminal offense (Gelsthorpe & Loucks 1997). This is also relative to the social construction of femininity where women act in submissive roles and men in dominant figures.

Chivalry thesis applicability

My observations challenge concepts from the chivalry thesis that favourable treatment is limited to non-serious offending, upper social class, and femininity. All cases about Indigenous and white women defendants that I witnessed are deemed as serious ‘indictable’ because their criminal activity involving armed robbery and fraud is processed in the District Courts while drug and violent offences are handled in the Supreme Courts. Both groups of women defendants generally meet criteria for low income status as evidence by their being on CentreLink benefits. I witnessed only two women currently employed, both white women. Regardless, there were no obvious differences in the sentences women received or in their treatment by the judges.

Based on the chivalry thesis, favourable treatment is handed to women defendants with families like those who have children and are married. Again, however, my research shows that women’s marital status has no impact on their sentence treatment. With the exception of one white women defendant whose husband was in the audience for support, I witnessed both Indigenous women and white women generally either unmarried, with children from different partners, or raising children as a single parent. My observations then show that the relationship status of women defendants processed in the District Courts and Supreme Courts does not impact upon how judges sentence Indigenous women and white women.

Dress attire and body language are other factors that I witnessed to also be irrelevant to sentence treatment. Indigenous women generally wore t-shirts, shorts, and thongs while white women tend to appear in collared blouses, cardigans, and closed toe shoes, but again there were no obvious differences in how these women were treated. Thus, despite my expectations, demeanour and appearance have no impact on the way women are sentenced.

Crying is other behaviour that I observed that also does not influence sentence treatment. Research about judicial attitudes indicates that women tend to cry during court matters and that this could lower their penalty based on representations of remorseful behaviour (Gelsthorpe & Loucks 1997). While I witnessed white women defendants appearing teary-eyed throughout court processes, they did not receive a lower penalty based on this behaviour or favourable treatment over Indigenous women. Although crying is associated to femininity (Furia 2010), my observations show that this behaviour has no impact in how judges sentence women.

This study provides a glimpse into the under-researched area of courtroom observations about Indigenous women and white women defendants processed in the District Courts and Supreme Courts. Concepts from the chivalry thesis including level of offending, socioeconomic status, and gender stereotypes were linked to its applicability to Indigenous women and white women. I was surprised by my findings especially given the historical facts detailing disparities in treatment across criminal justice systems between white women and ethnic and Black women (Heidensohn 1985; Chesney-Lind 1978). While I expected differential treatment because research shows Indigenous people being treated more harshly (Snowball & Weatherburn 2007), other research supports the positive discrimination hypothesis where disparities in sentencing favour Indigenous women (Bond & Jeffries 2010). I found no patterns in how judges sentence women – not based on race, nor crime, nor social constructs of gender like women's appearance and relationship status. While judges' attitudes about Indigenous women and white women may influence their sentence decision-making process, my courtroom observations findings show that they are "governed more by their legal training and legal socialization than by their socially structured personal experiences" (Steffensmeir & Hebert 1999: 1187).

My observations challenge concepts from the chivalry thesis that favourable treatment is based on race, low level or 'traditionally' female offending, and femininity. Race did not disadvantage Indigenous women, and white women were also not treated more lenient over their Indigenous women counterpart. Despite different offending patterns, neither group of women was treated more favourably based on race; there were no race-based differences in the way judges sentenced. Further, most women that I witnessed were either unmarried, with children from different partners, or raising children as a single parent and their relationship status did not impact how judges sentence Indigenous women and white women. Instead, I argue that the offending circumstances of Indigenous women and white women are the crucial factor influencing judges' sentence practices.

The study provides insight about the pathways and characteristics for women involved in crime as well as the racial differences for Indigenous women and white women defendants processed in the Supreme Courts and District Courts. This study highlights the necessity for more research examining the offending circumstances of women given that some characteristics are shared between Indigenous women and white women. Thus, it is imperative to "understand the ways in which the social construction of gender shapes both the incidence of law breaking and the response of the criminal justice system to it" (White & Habibi 2005). One way to analyse how the courts respond toward women involved in crime is through qualitative research that analyses judges' attitudes about women as well as how and why the intersections of race and gender influence their sentence practices.

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