

12-2018

Judge Consistency in Criminal Sentencing

Emma Lindemeier
elindemeier@unomaha.edu

Paul Landow
University of Nebraska at Omaha, plandow@unomaha.edu

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Recommended Citation

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Judge Consistency Among Similar Offenders

Emma Lindemeier

University of Nebraska at Omaha

Abstract

The United States' Constitution provides certain protections for those accused of a crime, including proportionate punishment and the right to an attorney. There are sentencing guidelines in place, as well as appointed-counsel systems to ensure that everyone receives these protections when accused of a crime. Some research has shown that the type of counsel present at sentencing may affect the outcome of sentencing, although, the research on the topic is conflicting. Race is another variable that has been found to play into the role of sentencing, as well as gender and age. Other studies have suggested that the differences in sentencing may come from the judge's mood, their gender, or if they are given a food break. The current study looked at how the variables of race, gender, age, counsel type, crime, week, day of the week, and time affected sentencing. All the variables, aside from the variables of race, gender, and age, were found to have a significant effect on sentencing. These variables did not pass tests of homogeneity or normality, so their effects on sentencing cannot be considered conclusive. While this study cannot be considered conclusive, it continues the research on criminal sentencing outcomes.

Judge Consistency Among Similar Offenders

The Eighth Amendment provides that those convicted of a crime cannot be sentenced to disproportionate punishment in relation to the offense committed (U. S. Const. amend. VIII). In an attempt to ensure that sentences do not become excessive, many states and the federal government have adopted sentencing guidelines or ranges (Frase, 2005). Many of these sentencing guidelines or ranges are adopted at the state level, meaning that there can be variances between states in the adoption and use of these guidelines (Frase, 2005). These differences between states can make comparing and applying sentencing outcome studies difficult, because there can be differences in the way that states use sentencing guidelines. Aside from sentencing guidelines, there are several other factors to consider when studying criminal sentencing case outcomes.

One of these factors to consider is whether an attorney is used by the defendant and what type of representation they are receiving. While a defendant may appear without an attorney in court, they may also be represented in court by a private attorney or a court-appointed attorney. The Sixth Amendment provides that those accused of a crime are entitled, “to have the assistance of counsel for his defense,” (U. S. Const. amend. VI). However, that does not necessarily mean that everyone is entitled to a court-appointed attorney. Often times, the defendant must be facing the possibility of jail time and must be determined indigent before a judge will appoint counsel.

More than 80% of federal defendants in the United States are considered indigent and are appointed to an attorney (Primus, 2017). The Nebraska Minority Committee (2006) found that 77% of district court judges in Nebraska rated defendants as having a court-appointed attorney most of the time in capital felony cases. However, county court judges were much more spread out on how often court-appointed counsel represents defendants on misdemeanor charges

(Nebraska Minority Committee, 2006). On this question, the largest percentage (45%) of judges indicated that court-appointed counsel sometimes represented defendants on misdemeanor charges (Nebraska Minority Committee, 2006).

Throughout the United States, there are generally one of three systems in use for determining court-appointed attorneys (Spangenberg & Beeman, 1995). Public defender programs work by having an elected public defender and assistant public defenders that only work with indigent defendants (Spangenberg & Beeman, 1995). Some localities use an assigned-counsel system where private attorneys are appointed on a case-by-case basis and are then paid accordingly (Spangenberg & Beeman, 1995). Lastly, contract systems may be used when private attorneys, law firms, or nonprofits contract with the government to provide legal representation at a flat rate (Spangenberg & Beeman, 1995). Often times, a mix of these three systems is used in different counties across the country (Primus, 2017).

Defense Counsel Type

A study done in Nebraska found that indigent defense systems do not have the same access to resources as county attorneys (Nebraska Minority Committee, 2006). This makes it hard for attorneys to provide the best representation to their clients, as well as puts at a disadvantage when they cannot afford to hire an attorney or pay for other resources to prove their innocence. When county court and juvenile court judges were asked about their overall satisfaction with the representation of defendants by various forms of counsel, 35% of judges indicated that public defenders provided excellent representation (Nebraska Minority Committee, 2006). This was the highest percentage rating of excellence among all forms of representation (Nebraska Minority Committee, 2006). While judges' ratings provide some indication to the quality of representation, it does not explain how different counsel types may affect sentencing.

Some research has suggested that the type of defense counsel produces similar conviction rates (Cohen, 2014). Although, in some cases, defendants represented by private attorneys were found less likely to be sentenced to incarceration (Cohen, 2014). Research has also pointed to defendants with assigned counsels receiving the least favorable outcomes (Cohen, 2014). One study suggested that it might be beneficial at some stages in the justice process to have a public defender because of their working relationships with judges and prosecutors (Williams, 2002). However, another study suggested that having a private attorney is more beneficial at some stages (Hartley, Miller, & Spohn, 2010). The current research on the effect of defense counsel on sentencing clearly is conflicting and calls for more studies to be done on this topic to bring more clear answers. Because court-appointed attorneys represent much of those that are charged with a crime, it is crucial that case outcomes from these attorneys are studied.

Race of the Defendant

Another variable that may have an impact on sentencing is the race of the defendant. While African Americans and Hispanics are minorities in the United States, they are often overrepresented in the criminal justice system (Doerner & Demuth, 2009). One study found that there were small differences between African Americans and whites, with African Americans receiving harsher sentences (Mitchell, 2005). However, this study suggested that due to the small differences between races, discrimination in sentencing was not the primary factor in the overrepresentation of African Americans in U.S. correctional facilities (Mitchell, 2005). Some judges have been found to be hesitant to send white defendants to prisons in which the population was over 65% African American because they were afraid that the white defendants would be victimized (Steffensmeier, Ulmer, & Kramer, 1998). Mitchell (2005) made an interesting point, in that, the best predictor of future criminal behavior is prior criminal behavior.

Because of this, many offenders will reoffend and cycle through the criminal justice system, which is when small racial disadvantages can start to add up into something more substantial (Mitchell, 2005).

According to Doerner and Demuth (2009), Hispanic and African American defendants receive harsher sentences than white defendants. Another study found that, while race had a significant effect on sentencing, gender and age had larger impacts on sentencing outcomes (Steffensmeier, Ulmer, & Kramer, 1998). Race and ethnicity has been found to influence sentencing for male defendants but not female defendants (Steffensmeier & Demuth, 2006). Decision makers appear to make distinctions between the most serious white offenders and other white offenders (Steen, Engen, & Gainey, 2005). However, the same distinctions do not seem to be drawn among the most dangerous African American offenders and other African American offenders (Steen et al., 2005). This suggests that just being a non-white offender makes one threatening, thus deserving of punishment (Steen et al., 2005). A minority status may have the effect of producing less individualized sentences, making sentencing decisions more homogenous for African Americans and other minority groups (Steen et al., 2005). This means that minority groups are receiving similar sentences, independent of the facts of the case, whereas judges may consider the facts if it is a white offender.

Gender of the Defendant

Steffensmeier et al., (1998) found that the greatest significant effect on sentencing is gender. Males commit crimes at a higher rate than females (Heidensohn & Silvestri, 2002). Males also tend to commit more violent offenses and have a higher risk of recidivism than females (Heidensohn & Silvestri, 2002). Women are more likely to make the transition out of crime and remain crime free for longer periods of time than similarly situated men (Uggen &

Kruttschnitt, 1998). In Nebraska, there were 4,900 males that were incarcerated compared to almost 400 females (Nebraska Department of Correctional Services, 2018). While these numbers do not account for the overall number of defendants in Nebraska, it does indicate that there is a disparity between males and females in crime rates. Female defendants are more likely to receive less severe sentences according to one study (Nagel & Hagan, 1983). This study suggested that the most significant effects of gender are found at the sentencing stage for a defendant (Nagel & Hagan, 1983). Another study found that race differences were larger among men than women (Doerner & Demuth, 2009).

One study interviewed judges about gender disparities in sentencing and found that judges were concerned with the social costs to children of sending women to prison, as well as the demands that come with housing pregnant women or women with physical and mental health issues (Steffensmeier, Kramer, & Ulmer, 1995). Male defendants tend to be seen as more of a threat to society or not as rehabilitative as female defendants (Steffensmeier et al., 1998). When the offense type is considered, men are two times more likely than women to be incarcerated for property and drug crimes (Rodriguez, Curry, & Lee, 2006). However, when it came to violent offenses there were no differences between men and women (Rodriguez et al., 2006). Males received an average of 4.49 years longer than females in incarcerations regarding violent offenses (Rodriguez et al., 2006).

Age of the Defendant

Age is another variable that may influence criminal sentencing. Some might even argue that age is one of the easiest facts about crime to study (Allen et al., 1981). That is because of the widely studied association between age and crime. Crime rates often increase through adolescence, peak in early adulthood, and then decrease after that (Stolzenberg & D'Alessio,

2008). However, in Nebraska, the average age of an inmate is 38 years-old (Nebraska Department of Correctional Services, 2018). This does not account for all defendants because it only includes those in jail, so the average age of any defendant may be different, but there was no data on a national or state level that could be found. Younger defendants have been found to receive harsher sentences than older defendants (Doerner & Demuth, 2009). It also appears that younger Hispanic and African American defendants receive harsher sentences than white defendants (Doerner & Demuth, 2009). When gender is considered with age, harsher sentences are received by young, male defendants rather than female defendants (Doerner & Demuth, 2009). When age is combined with both race and gender, it appears that young, male, African American and Hispanic defendants receive the harshest sentences (Doerner & Demuth, 2009).

Another study found that older defendants are less likely to be sentenced to imprisonment than younger defendants (Steffensmeier, Kramer, & Ulmer, 1995). However, defendants under the age of 21 also receive some leniency in sentencing outcomes when compared with defendants in their mid-twenties (Steffensmeier et al., 1995). Sentencing severity tends to peak between the ages of 21 and 27 and gradually declines thereafter (Steffensmeier et al., 1995). When judges were interviewed about sentencing approaches, most judges tended to admit they were more lenient with younger defendants under the age of 21, as well as older individuals (Steffensmeier et al., 1995). Blameworthiness, practical considerations, and protection of the community seemed to guide the judges' sentencing decisions in this study (Steffensmeier et al., 1995). It was harder for judges to assign blame to someone who had not reached the legal age of 21, as well as older defendants, whose offenses were considered as due to provocation, economic hardship, or decreasing mental abilities (Steffensmeier et al., 1995). Practical considerations included the cost of housing offenders that are inclined to have physical and mental health issues

(Steffensmeier et al., 1995). Judges also did not perceive younger and older defendants as being a threat to society (Steffensmeier et al., 1995).

Judge Differences

Another factor to consider in criminal case outcomes, is the judge that is sentencing them. Some research points out that judges differ in their sentencing for similar offenders, even when sentencing guidelines are present (Anderson & Spohn, 2010). It has also been suggested that judges evaluate cases and offenders differently (Anderson & Spohn, 2010). This suggests that judges are accountable for case outcome variance across similar offenders. One study found that judges were considering how trustworthy a defendant looked when making decisions about sentencing (Wilson & Rule, 2015). Helms and Jacobs (2002) found that conservative ideologies in court environments may have an influence on decisions about punishment. This study also suggested that punishments were more severe in communities with higher violent crime rates (Helms & Jacobs, 2002). Some research contradicts the previous studies and points to individual differences that account for sentencing variances among judges (Johnson, 2006).

Some studies have indicated that the differences between judges may be due to different characteristics between judges. One study suggested that the gender of the judge may contribute to sentencing differences (Steffensmeier & Herbert, 1999). This study found that female judges are more likely to incarcerate defendants and to give longer lengths of incarceration than male judges (Steffensmeier & Herbert, 1999). It was also found that female judges are more likely to consider the defendant's attributes such as race, age, and gender when making decisions on sentencing (Steffensmeier & Herbert, 1999). African American judges have been found to be more likely to incarcerate defendants independent of the defendant's race (Steffensmeier & Britt,

2001). Some individual characteristics may play into sentencing decisions among judges, but more research is needed in how consistent judges are in their criminal sentencing.

However, there is not much research on whether judges are consistent in how similar offenders are sentenced. One study looked at the effects of taking a break and eating on how judges may choose to sentence someone (Danziger, Levav, & Avnaim-Pesso, 2011). This research pointed to the idea that judges may rule differently in cases with similar offenses if they are given a food break (Danziger et al., 2011). Another study found that in some cases, the mood of the judge was found to have an impact on how thoroughly information could be processed (Englich & Soder, 2009).

While conducting interviews with public defenders in Douglas and Lincoln counties of Nebraska, there was a reoccurring theme that most of these attorneys would like to see more research on case outcomes. This information could help attorneys in preparation for trials and sentencing, especially when it comes to determining if their client was given a fair sentence compared to other offenders of the same crime type. After reviewing relevant literature, the variables of crime, age, gender, race, week, time of day, day of the week, and type of counsel will be used as independent variables in the current study. The dependent variable will be the outcome at a defendant's sentencing. It is expected that all the independent variables will have an impact on how a defendant is sentenced. I also expected to find a correlation between crime and sentencing, especially since there are sentencing guidelines in place that hopefully will keep the judges consistent with one another.

Method

A random selection of 436 misdemeanors from 2017 were analyzed via public record files in Lincoln County, Nebraska. Originally, the study was also going to include felony cases,

however, these were thrown out for difficulty of finding demographic information. Lincoln County is located in the western end of Nebraska, with the county seat being in its largest city, North Platte. The county has an estimated population of 35,480 with an offense rate of 30.9 offenses per 1,000 people (Nebraska Crime Commission, 2016). Being a less populous county, this is a relatively comparable rate to some of the more populous counties in Nebraska. Douglas County, Nebraska's most populous county has a rate of 37 offenses per 1,000 people (Nebraska Crime Commission, 2016). The second most populous county, Lancaster County, has an offense rate of 33 offenses per 1,000 people (Nebraska Crime Commission, 2016). In contrast, the third largest county, Sarpy County, has a rate of 14 offenses per 1,000 people (Nebraska Crime Commission, 2016). Lincoln County had two county court judges in 2017, both of which were used in the study and cases were divided evenly between (R. Lindemeier, personal communication, August 1, 2018).

Lincoln County operates on a mix of systems for their appointed counsel. While there is a public defender that is elected every four years like in a public defender program, it operates more as a contract system where the elected public defender is considered part-time and is able to do private practice in addition to cases they are appointed on. The Lincoln County Public Defender's office holds five attorneys that can be appointed to indigent defendants. However, if a conflict of interest is found between a defendant and the public defender, the defendant will be appointed to alternate counsel, which is operating similar to an assigned-counsel system (R. Lindemeier, personal communication, August 1, 2018).

While analyzing each case, the judge, type of counsel, crime, gender, age, race, sentence, day of sentencing, and time of sentencing were noted. No personally identifiable information will be shared or was kept in the data collection process. All variables were coded into numeric

values and then entered into SPSS for analysis. For example, the judges were either coded as 1 or 2. The counsel types considered were coded as 1 through 4, accounting for those that did not have counsel, those that were appointed a private attorney, those that were appointed a public defender, and those that hired an attorney. The date was analyzed by the week, which were each assigned a number. Days of the week were analyzed as 1 through 7, with 1 being Sunday and 7 being Saturday. Time of the day was analyzed as 1 for the morning and 2 for the afternoon. Gender was noted as 1 for male and 2 for female. Race was analyzed as 1 for white, 2 for Hispanic, 3 for African American, 4 for Native American, and 5 for Asian.

Results

Sentence and crime were found to be positively correlated, $r(434) = .25, p < .01$. This means that as the severity of crime increased, so did the severity of the sentence. A chi-square test was completed to determine whether the judge had an effect on sentencing, which was not found to be significant. This means that judges were consistent with one another in their sentencings, meaning that either judge would give a similar sentence for similar offenders. The most common sentence was being fined, with 65% of individuals receiving a fine as their sentence. Other sentences included jail time of various lengths, probation, license revocation, or a combination of all these depending on the crime committed.

A two-way ANOVA test was conducted to find whether the independent variables played into sentencing. The time of sentencing was found to have a significant effect on sentencing, $F(2,309) = 6.30, p < .01$. The day of the week was found to have a significant effect on sentencing, $F(7,421) = 5.36, p < .01$. The week of sentencing was found to have a significant effect on sentencing, $F(72, 315) = 1.39, p < .05$. The type of counsel was found to have a significant effect on sentencing, $F(3, 425) = 28.26, p < .01$. Over half of the defendants were

sentenced without counsel at 62%, while 20% had a public defender with court-appointed counsel and hired attorneys accounting for the rest of defendants at 8% and 9%, respectively. The type of crime was found to have a significant effect on sentencing, $F(33,373) = 6.96, p < .01$. There was also an interaction between crime and judges that approached significance, $p < .10$. There were several different crimes that were encountered in the study, with the some of the most common being hunting and fishing violations, possession of marijuana, attempt class 4 felony, no proof of insure, drug paraphernalia, disturbing the peace, shoplifting, bad checks, driving under the influence, and driving under suspension. While many of these variables were found to have a significant effect, they did not pass tests of homogeneity or normality.

Race was not found to have a significant effect on sentencing, $F(4,394) = .16, p > .05$. Race was not diverse in this study as 77% of the study was composed of white individuals, with Hispanics composing about 9%, and African Americans, Native Americans, and Asian defendants making up the rest with smaller percentages. Age was also not found to have a significant impact on sentencing, $F(53, 335) = .96, p > .05$. The mean age of defendants was around 34 years-old, with a range from 18 years-old to 77 years-old. Gender did not have a significant impact on sentencing either, $F(1, 427) = .01, p > .05$. Males accounted for nearly three-quarters of the study, with females accounting for just one quarter. Since these variables were not found to have a significant impact on sentencing, this means that these variables did not play a role in how a defendant was sentenced.

Discussion

Crime and sentence were shown to be positively correlated, so that as the severity of crime increased, so did the severity of punishment. It was also found that there was no difference between judges, meaning either judge would have given a similar sentence. Aside

from the variables of race, gender and age, the data shows support for the hypothesis in finding that many of the independent variables had a significant effect on sentencing. However, because these variables did not pass tests of homogeneity and normality the data cannot be considered conclusive on how these variables affect sentencing. While the variables of crime, counsel type, week, day of the week, or time did not pass these tests, it still shows support for the hypothesis and supports literature on this topic.

It was surprising to find that race, gender, and age did not have impact on sentencing in this study. Considering that the literature often finds these as important variables, it was surprising to find that these variables did not have a significant impact when other variables did. However, this may be due to the lack of diversity in Lincoln County, Nebraska with 88% of its citizens being white (U.S. Census Bureau, 2017). This may have accounted for race not being found to have a significant impact on sentencing, as 77% of those included in the study were white, which does not allow for much data on other races.

I was surprised to find that most individuals pled without counsel. However, most of the time when they pled without counsel, they were pleading guilty to a ticket for a fine. While this is often a small offense, it would be interesting to see how one's socioeconomic status would affect this, because they may not be able to afford a fine. I also found it interesting that only 20% of defendants were appointed a public defender, and about another 10% were appointed a private attorney. Based on the information that 80% of defendants nationwide are considered indigent, I expected this percentage to be higher (Primus, 2017).

There were several limitations that may have had an impact on the results of this study. One of these limitations is that the study was unable to account for the cases that had been dismissed as these are not available to the public. This means that while some judges may have

decided to dismiss a case, it could not be considered for analysis because the case is not public record. Another limitation is that some information, such as the time of sentencing or the race of the defendant were not always available in each case. Another limitation was that there was not a wide variety of defendants due to the location of the study. However, one of the biggest limitations to the study was that the cases were selected completely at random. This made it difficult to compare similar offenders because there were so many different charges. Because there was a wide variety of charges, there was also a variety of sentencing, which may have played into the inability to confirm the hypothesis due to the lack of homogeneity and normality.

In the future, it would make the study stronger to include only certain types of crime and selecting based on just those types of crimes. If this had been done in the study, it may have made the data more conclusive in how the independent variables played into criminal sentencing. With this, a larger scale study with more diversity and judges would be helpful in contributing to the strength of the data and study. Something that might also add to the study would be interviewing judges, attorneys, or even the defendants about the cases. Judges could be interviewed about what may have been going on at the time of different sentencings, what they base their sentencing decisions on, or why they specifically chose a sentence for a certain defendant. Attorneys could be interviewed to see if there are any interesting facts to the case, as well as what they thought about the sentencing. Defendants could be interviewed on what they thought about their sentence, as well as the efficacy of their attorney in their case. Another interesting variable to study would be prior criminal history, as some research has shown that legal factors are the primary predictors of sentencing (Doerner & Demuth, 2009).

In conclusion, crime, counsel type, week, day of the week, and time were found to have a significant effect on criminal sentencing. Race, gender, and age were not found to have an

impact on sentencing, contrary to the previous literature. Because the data did not pass tests of homogeneity or normality, it is not conclusive. While I cannot tell the ideal conditions that should be present at one's sentencing for the best possible outcome, this study continues to lay the framework for criminal sentencing research.

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