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# Understanding Contextual Differences in American Indian Criminal Justice

**LARRY LONG, RICH BRAUNSTEIN, BRENDA MANNING, AND WILLIAM D. ANDERSON**

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## INTRODUCTION

In 1999, the Bureau of Justice Statistics (BJS) released a benchmark study about crime and victimization in the American Indian community.<sup>1</sup> The study examined five years (1992–97) of American Indian criminal justice concerns, with a particular focus on violent crime victimization and criminal activity. Although it is widely read and cited, this research may not have captured the full picture suggested by its name, “American Indians and Crime.”

According to the BJS report, approximately 150,000 American Indians are victimized each year, amounting to 1.4 percent of violent victimizations per year in the United States.<sup>2</sup> The 2000 census indicated that American Indians constitute 0.9 percent of the population, amounting to a 50 percent overrepresentation of crime victimization according to the BJS study. Further, the BJS research maintains that American Indians have a higher per capita rate of violent crime victimization than the other racial minorities studied. Although the study did not attempt to explain these disparities, the overrepresentation

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and comparative per capita victimization rates give cause for further, more comprehensive inquiry.

The BJS study found that 70 percent of all crimes against American Indians had non-Indian assailants. Within this percentage, the BJS report maintained that non-Indians committed 40 percent of homicides and 80 percent of sexual assaults in which the victims were Native Americans. A follow-up study in 2004 largely corroborated these initial victimization findings.<sup>3</sup> The 2004 study covered the ten-year period from 1992 to 2002 and found that a member of another race had committed 66 percent of all crimes against American Indian victims.

These findings, however, deviate from the experience and expectations of South Dakota's current attorney general who, in response to these BJS studies, began an effort to identify potential explanations for the gap between the BJS findings and his state-level observations as a county prosecutor and later as top administrator for South Dakota's law-enforcement agencies. The research presented here is a continuation of that effort.

Our concern for the reliability of the BJS reports was rooted in the experience of prosecutors in and around Indian country in South Dakota.<sup>4</sup> Plainly stated, this experience from South Dakota was inconsistent with the BJS findings. Additionally, the BJS reports deviate in important ways from academic literature describing violent crime victimization within and outside Indian country. Combined, these concerns created an overall sense among the authors that something was amiss in the findings of the BJS studies that necessitated further investigation. We suspected that, at best, the BJS studies might be generally accurate at the national level but too broad to reflect the reality of violent crime in the context of the Northern Plains in and around reservation communities where many American Indians live and work. At worst, we feared, the BJS studies are flawed and fuel misconceptions about American Indians and violence nationwide.

To investigate further, we began a detailed study of the state of South Dakota's criminal justice system focused on intentional homicide and forcible rape. These most violent crimes are well reported, investigated, and recorded, offering us considerable insight into their nature and impact. Our intent was to learn whether the BJS study could be generalized to fit the South Dakota context. Through this effort, we expect to gain a clearer understanding of the contributions of the BJS research to the area of American Indian criminal justice.

## RESEARCH FOUNDATIONS

Violent crimes can be either intraracial, that is, committed by a member of one race against a member of the same race, or interracial, that is, committed by a member of one race against a member of another race. A thorough review of the criminal justice literature in this area demonstrates that violent crimes are typically intraracial. The intraracial character of violent crime has been found to be the case generally, as well as in the more specific context of homicide cases.<sup>5</sup> This finding is at odds with the BJS observation that

somewhere between 66 percent and 70 percent of violent crimes committed against American Indians were perpetrated by non-Indians.<sup>6</sup>

The intraracial character of violent crime has been found to be the case generally, as well as in the more specific context of homicide cases.<sup>7</sup> In the area of American Indian research, one study of Arizona criminal justice observed that American Indians received harsher sentences than whites for property-related offenses because of the interracial character of these crimes, compared with the distinctly intraracial character of violent crime.<sup>8</sup> The Arizona study found more lenient sentences for American Indians than whites for violent offenses because of their tendency to be intraracial. Here conflict theorists suggest the more lenient treatment of minority group members convicted of intraracial violent crimes exists because majorities sanction minorities more severely in crimes where the majorities are the likely victims.<sup>9</sup> The perceived logic behind this behavior is that majorities are less threatened by violent crimes committed by minorities because of their intraracial character, and that they are more threatened by property crimes committed by minorities because of the interracial character of property crimes. This view is further supported by observations that whites received harsher sentences than minorities in cases of intraracial violent crime.<sup>10</sup> Moreover, in the general population, violent crimes most frequently occur between people who know each other. Victim-offender research has shown that strangers commit less than one-half of all violent crimes. In the case of homicide, 74 percent of all 2002 homicides in the general population involved victims and offenders who knew each other.<sup>11</sup>

These observations that violent crime tends to be intraracial and that the victims of violent crimes often know their offender, compel a critical review of the BJS findings on American Indian crime and, in particular, violent crime victimization. Of particular concern is whether the BJS findings fit the specific context of rural areas in and around Indian country throughout the United States, where American Indian reservations and the largely mixed Indian and non-Indian communities that border them exist. Researchers in the American Indian criminal justice subfield have focused on this type of contextual research for some time.<sup>12</sup> Donald Green's 1993 paper on the contextual nature of American Indian justice concerns makes a compelling argument against contemporary aggregate studies that ignore a range of contexts unique to American Indian communities.<sup>13</sup> Green's focus on the measurement error resulting from variations in American Indian identity provides valuable insight into problems associated with studying basic trends in national arrest data in this area. Green demonstrated that differences in self-identification of American Indian defendants produce different accounts of American Indian arrest trends. We suspect that this finding applies also to victimization trends. Ignoring this factor, specific to the American Indian context, harms the reliability of research findings in this area and, we suspect, in other studies of American Indian justice concerns. Without understanding context, Green and others believe, it is possible to mischaracterize important trends in criminal behavior.

The accurate identification and treatment of contextual variables is crucial to studies of crime and criminal justice systems' treatment of American

Indian defendants, which is necessary to combat the wrongly assumed monism of American Indian culture and the failure to capture variations in American Indian self-identification properly. For these reasons, and others, Green suggests that states might be the most appropriate unit of analysis.<sup>14</sup> National aggregate studies similar to the BJS efforts have difficulty managing these contextual factors, or less obvious factors generally, that need to be included in research design efforts to enhance the reliability and validity of studies. Our state-level experience strongly indicates that some of these factors have been left out of the BJS efforts to describe American Indian criminal justice in the two published reports that share the title “American Indians and Crime.”

### THE SOUTH DAKOTA EXPERIENCE

In examining the fit of the BJS studies in South Dakota, let us consider Bennett County, South Dakota. Bennett County was formerly part of the Pine Ridge Reservation but was removed from the reservation by Congress in 1975.<sup>15</sup> Nonetheless, a substantial amount of Indian country—about one-third of the county—remains mostly in the form of allotted lands, and thus, as “Indian country,” is subject to federal and tribal jurisdiction. Therefore, the county is divided into a checkerboard jurisdictional arrangement in which parcels of land that are subject to state jurisdiction (those areas that are not considered to be Indian country as a matter of federal law) are intermixed with parcels of land subject to federal and tribal jurisdiction (those that are Indian country as a matter of federal law). Bennett County is sandwiched between Shannon County and southern Jackson County, the heart of the Pine Ridge Reservation, and Todd County, the heart of the Rosebud Reservation.

From 1973 to 1990, American Indians comprised approximately 35 percent of the Bennett County population. In this seventeen-year period, seven murder cases occurred on lands subject to state jurisdiction, six of which were solved. In each solved case the perpetrator was an American Indian. In five of these six cases, the perpetrator was male. In four of the six cases the victim was Indian, but in all cases, the victim was in a family relationship with the perpetrator. The victims were two wives, a husband, an adoptive father, a brother-in-law, and a mother’s boyfriend. The adoptive father and the mother’s boyfriend were non-Indians.<sup>16</sup> Most of these cases were intra-racial, and in all cases the perpetrator and victim had some kind of prior relationship. A similar trend is anticipated within reservation boundaries under tribal/federal jurisdiction.

In short, the BJS findings are not in accordance with the experience from Bennett County. Moreover, the academic literature does not concur with the BJS findings, creating a *prima facie* case for further inquiry. A potential explanation for the gap between the BJS findings and the experience in the South Dakota case may be the difference between rural and urban victimization rates and crime behavior in general. We expect that American Indians who reside in and around Indian country live and socialize mainly with other tribal members and have less contact with non-Indians than American Indians

who live in urban areas. In contrast, American Indians in large urban areas constitute a small minority of the communities they live in. Given their small numbers in urban areas, American Indian interracial victimization rates tend to be higher than those experienced in African American, Asian, or Latino communities in such areas.<sup>17</sup> These gaps, however, are not expected to exist in rural settings. In the largely rural context of Indian country, American Indian violent victimization rates are likely to be opposite of what is found in urban settings. This is because American Indians constitute an overwhelming minority in urban areas, while in rural areas in and around reservation communities American Indians typically constitute a majority of all residents. This suggests that substantial differences are likely to exist between rural and urban victimization rates and also between the types of crime committed and their impact on American Indian communities. Moreover, in the particular context of the Northern Plains region, where economic development enhancements have not been realized with the same frequency or magnitude of some other American Indian communities throughout the country, the American Indian community is even more discrete. Its tribal members are culturally oriented toward the tribe and its own members, and, as such, we expect far less interracial violent crime in and around rural Indian country than was reported by the BJS research.

#### PROBLEMS WITH THE DATA

In furthering our understanding of the gaps between our expectations and the BJS publications on American Indian crime, we contacted BJS to talk with the authors of the 1999 and 2004 publications. Our main interest was to learn more about the methodology they used and some of the challenges they faced in their research. In these conversations we discovered that BJS ignored federal case data in the two reports on American Indian crime. Neither Steven Smith (coauthor of the 1999 report) nor Steven Perry (author of the 2004 report) could confirm the inclusion of any data from federal agencies responsible for the investigation or prosecution of crime, in some or all of the seventeen states where the federal government has jurisdiction over major crimes. Perry apparently learned of the nature of the research's methodological shortcomings from our initial phone call in the fall of 2006.<sup>18</sup>

The absence of federal data in these studies of American Indian crime seemed to us a serious error of omission.<sup>19</sup> It is not, however, the only design flaw we discovered. Much of the BJS research in these two reports relied on data from the National Crime Victimization Survey (NCVS) and not actual crime data. This is not the case in the area of homicide victimization, where the BJS research utilized Uniform Crime Reporting (UCR) data. However, the heavy reliance on such survey data is another serious concern given what we have learned from the many accounts in the criminology research suggesting that actual crime demographics and data reported from victimization surveys are not consistent.<sup>20</sup> In general, problems with the utilization of survey data to study crime trends include recall bias, under- and overreporting, and sampling error. Specific problems to the NCVS include "overreporting due

to victim's misinterpretation of events, . . . underreporting due to the embarrassment of reporting crimes to interviewers, . . . inability to record personal criminal activity of those interviewed, such as drug use or gambling, . . . sampling errors, which produce a group of respondents who do not represent the (population) as a whole, . . . [and] inadequate question format that invalidates responses."<sup>21</sup>

We understand that case data is also subject to underreporting. The use of case data does not, however, present many of the other problems raised by the use of victimization surveys. Nonetheless, we do not imply that victimization surveys lack any value in criminal justice research, and such a survey may be useful in researching crime that is traditionally underreported. We do believe, however, that a mixed method approach that takes into account a variety of information types and sources is significantly more reliable than an approach that relies exclusively on victimization surveys.

Finally, in our review of the BJS research, and shortly after acceptance of this article for publication, we became aware of the extremely low number of NCVS respondents who are American Indians living in Indian country. In a conversation with Jeff Sedgwick, acting assistant attorney general and director of BJS, it was determined that the NCVS data used by BJS included 45,939 respondent households. According to Sedgwick, 109 of the NCVS households were located in Indian country, but only 36 of these 109 households had at least one American Indian inhabitant. Thus, the surveys on which the BJS reports were based included only statistically insignificant data regarding American Indians in Indian country: less than one-tenth of one percent of the households included in the NCVS surveys were American Indian households in Indian country. It is clear from this fact alone that the BJS research does not make Indian country criminal justice a focus of its research, which is a point that must be understood by the many advocates who cite the BJS research in support of policy change inside of Indian country—and a point that invalidates the use of BJS research for that purpose.

The combined effect of the absence of federal data and almost exclusive reliance on victimization survey data compelled us to advance our own study of this area. What once was a limited concern for the generalizability of BJS findings in South Dakota Indian country developed into a much broader concern for reliability of the two BJS publications at issue here.

### THE CURRENT STUDY

In an effort to find just how far off BJS findings in the area of American Indian criminal justice were from our own expectations and experiences, we conducted a detailed single-state study from South Dakota. That research focused on the data BJS had access to from UCR, as well as state and federal data that BJS did not access in the publication of its 1999 and 2004 reports on American Indians and crime. The current research studied two types of violent crime, for which we were able to collect detailed state and federal case data to compare with the BJS data published in the two reports on American

Indian criminal justice. Intentional homicide data was collected for 1993 through 2002 and forcible rape data was collected for cases from 2000 to 2005. Our research was limited to these two crimes because they provided some of the most comprehensive data on violent crime available.<sup>22</sup>

We also had the benefit of a second, preexisting, state-level data set to test victimization trends.<sup>23</sup> Explanatory models were developed due to the data set's wide array of cases, victim, and defendant-level data. These explanatory models help us to look deeper into the factors that contribute to the differences in American Indian and white victimization trends in the state. However, this additional victimization data set did not include federal case data; therefore, analysis cannot be generalized to other areas of the state.

For our primary analysis, the focus on intentional homicide was undertaken to insulate the research from some of the problems we fear are associated with the BJS methodology. In particular, BJS research has relied, in part, on data from NCVS. The NCVS goes beyond police reports; it studies survey data from individuals who may or may not have reported crimes. Although helpful at times, crime surveys are susceptible to false reporting from respondents and generally do not produce reliable findings on victimization rates or offender race.<sup>24</sup> There were no concerns in overreporting murder or manslaughter because it is simply not possible for an individual to report falsely that they have been victims of these crimes. Further, homicide cases provide the most comprehensive and accurate data while providing a strong basis to compare trends observed in South Dakota against those observed in the BJS research.<sup>25</sup>

The inclusion of forcible rape data was important to expand the research beyond the single case of intentional homicide. Moreover, it allowed the research to address an exceedingly difficult problem in and around Indian country. Without regard to context, forcible rape is a violent crime. The careful study of this crime supports the broader interest in looking closely at all violent crimes. However, it has become increasingly obvious that jurisdictional complexity exacerbates the many problems American Indian victims of forcible rape experience in the pursuit of justice and healing. A recent *New York Times* article reported increasing frustration amongst American Indian women with the disproportionate victimization in crimes of sexual assault and, in general, with the lack of sufficient jurisdictional authority and commitment to prosecute these crimes—particularly when they occur within Indian country at the hands of non-Indians. An Amnesty International USA study of sexual violence against American Indian women in the United States reported that jurisdictional complexity and chronic underfunding of law-enforcement and Indian health services means justice is denied for American Indian women.<sup>28</sup>

Given these concerns, the current research seeks to add broader insight at the state level into trends in American Indian crime and victimization. Such insight is essential to the efforts in mitigating the destructive influence of violent crimes on individuals and communities. State prosecutors and policy makers must have access to complete statistics regarding crimes that occur within their own geographic boundaries. Data on crimes committed



in Indian country involving American Indian defendants and/or American Indian victims are not routinely reported to the South Dakota attorney general's office (SDAG) because these crimes are prosecuted by the federal government and not the state or tribal government.<sup>27</sup> Consequently, a comprehensive effort to collect accurate data on the full range of crimes that occurred within South Dakota was needed.

### SOUTH DAKOTA HOMICIDE STUDY

It is important to note that SDAG does not maintain data for crimes that occurred within tribal-federal jurisdiction in the state. According to the 2000 census, more than forty-two thousand of the state's self-identified sixty-two thousand American Indians live on and off American Indian reservation trust lands within the state's geographic boundaries.<sup>28</sup> It is unacceptable and inaccurate to exclude these extensive areas from the analysis.

The lack of data for Indian country within South Dakota was remedied by contacting the US attorney general's office in South Dakota to acquire records for those crimes prosecuted in Indian country. This allowed us to combine the state and federal data to deliver an accurate sense of crime in the state. These combined records were then compared with the BJS research to look more closely at the question of whether the BJS research work can be generalized.

The BJS studies claimed that a non-Indian murdered 42 percent of American Indian murder victims. According to the same BJS report, nonwhites murdered white victims a little more than 14 percent of the time, and nonblacks murdered black victims only 6 percent of the time.<sup>29</sup> Our research paints a different picture (see table 1). From the data maintained by SDAG, we observed that American Indians killed nearly 73 percent of American Indian victims of intentional homicide. From the federal data collected from the US attorney general's office, we observed that American Indians killed 97 percent of American Indian victims of intentional homicide. When we combined data sets, we found the intraracial homicide rate for American Indian victims within South Dakota was 92 percent. Roughly the same was found for white victims. Here the combined state and federal data produced a figure of 82 percent intraracial homicide in the state. From our analysis, we found that intentional homicide is predominantly intraracial in South Dakota, contrary to the BJS findings.

The rate at which American Indians were murdered in proportion to the size of their population is another area of strong distinction between the BJS findings and the current research.<sup>30</sup> The BJS studies reported that American Indian victims constituted 0.7 percent of murder victims nationwide, which is proportional to their population in the United States.<sup>31</sup> Our research found this number to be much higher. In the federal and state combined data set, American Indians made up 64 percent of intentional homicide victims in South Dakota, despite representing only 8.3 percent of the state's population (see table 2). This clearly demonstrates serious concerns for the state of South Dakota. The percentage of American Indian intentional homicide victims is particularly problematic on South Dakota reservations that had an intentional

**Table 1**  
**Race of Offender in Murder Cases**

Victim Race	Area of Study	Source	Percent Interracial Offender
American Indian	National	BJS 2004	42%
White	National	BJS 2004	14%
American Indian	South Dakota state cases	Current study	73%
American Indian	South Dakota federal cases	Current study	97%
American Indian	South Dakota combined state and federal cases	Current study	92%
White	South Dakota combined state and federal cases	Current study	82%

**Table 2**  
**Comparative Homicide Victimization Rates**

Jurisdiction	Population	Number of Homicides	Rate per 100,000
South Dakota Reservations <sup>a</sup>	59,355	13	22.0
Chicago, IL <sup>a</sup>	2,938,299	648	22.0
Los Angeles, CA <sup>a</sup>	3,830,561	654	17.1
New York, NY <sup>a</sup>	8,084,693	587	7.3
US American Indian Population <sup>b</sup>	2,475,956	(not reported)	3.6 <sup>c</sup>

<sup>a</sup>Source: US Department of Justice, Federal Bureau of Investigations, *Crime in the United States 2002* (27 October 2003), 124, 132, 148 (Table 8: "Offenses Known to Law Enforcement by City 10,000 and over in Population").

<sup>b</sup>Source: Bureau of Justice Statistics, *A BJS Statistical Profile, 1992–2002: American Indians and Crime* (December 2004), NCJ 203097.

<sup>c</sup>This was the reported rate for 2001 only. According to the 2004 BJS report, the rate dropped from 6.6 in 1995 to 3.6 in 2001.

homicide rate of 22 per 100,000 inhabitants, a rate that is comparable with cities such as Chicago but higher than Los Angeles or New York City. This rate is lower than the District of Columbia, which leads the nation with 46.2 intentional homicides per 100,000 inhabitants.

In addition to being disproportionately victimized by intentional homicide, American Indians in South Dakota commit intentional homicide at a level disproportionate to their population. The 2004 BJS study suggested that American Indians committed about 1 percent of murders nationwide. This is roughly equivalent to their national population presence.<sup>32</sup> However, as we see in table 3, the combined state and federal data sets show that American Indians

**Table 3**  
**Combined State and Federal Homicide Crimes**

Defendant Race	Defendant Gender	Number of Defendants	Defendant Race by Gender % Dist.	Defendant Race Total	Race % Dist.
American Indian	Male	114	49%	144	62%
	Female	30	13%		
White	Male	69	29%	82	35%
	Female	13	6%		
Black	Male	5	2%	6	3%
	Female	1	0.4%		
Unavailable	Male	2	1%	2	1%
	Female	—	—		
<b>TOTAL</b>		<b>234</b>	<b>100%<sup>1</sup></b>	<b>234</b>	<b>100%<sup>1</sup></b>

<sup>1</sup> The totals for columns 4 and 6 do not add up to 100%. This is a result of a rounding error. We rounded to the nearest whole number, unless the value was below 1, in which case we presented the decimal value.

committed about 62 percent of intentional homicides in South Dakota, which is well above their 8.3 percent population percentage in the state.

We also examined defendants by race and gender. Males represented about 77 percent of American Indian defendants in the federal data set, nearly 88 percent of American Indian defendants in the state data set, and just fewer than 80 percent of American Indian defendants in the combined federal and state data sets. Females represented a little more than 23 percent of American Indian defendants in the federal data set and roughly 12 percent of American Indian defendants in the state data set. Females represented 21 percent of American Indian defendants in the combined state and federal data sets. That compares with almost 84 percent of white male defendants and almost 16 percent of white female defendants in the combined and state data sets. American Indian women were more likely to commit intentional homicide on a reservation than off. Comparison of these numbers with BJS findings is impossible because the BJS studies did not examine murderers by gender.

There is some agreement between the BJS studies and our findings on the relationship between defendants and victims for all race categories. The BJS studies suggested that between 84 and 85 percent of murder victims had a prior relationship.<sup>33</sup> Our findings were that 85 percent of the murder victims in the state data set had a prior relationship.<sup>34</sup>

#### SOUTH DAKOTA RAPE STUDY

The 1999 BJS study revealed that American Indian victims of rape or sexual assault most often reported that the victimization involved an offender of a

different race. About nine in ten American Indian victims of rape or sexual assault were estimated to have had assailants who were white or black. The 1999 BJS study further breaks down the race of offenders and states that American Indian victims were raped or sexually assaulted by whites 82 percent of the time and by blacks 6 percent of the time. The remaining 12 percent were classified as “other.”<sup>35</sup> The percentage of American Indians victimized by interracial rape or sexual assault (as reported by BJS) was also remarkably high.<sup>36</sup> The 2004 BJS study claimed that nearly four in five (80 percent) American Indian victims of rape or sexual assault described the offender as white. The study further breaks down the race of offenders and shows that American Indian victims were raped or sexually assaulted by whites 78 percent of the time, by black offenders 8 percent of the time, with 14 percent categorized as “other.”

The data developed by the SDAG states otherwise. The SDAG data set suggests that among American Indian victims of rape, 69 percent were victims of intraracial rape. In the federal data acquired for this research, American Indian rape victims were victims of intraracial rape 99 percent of the time. When we combine these two data sources, we found that 83 percent of American Indian rape cases were intraracial. A similar trend was observed for whites. Combining the SDAG and federal data sets showed that white rape victims were victims of intraracial rape in 85 percent of the cases. Contrary to the BJS’s national findings, rape is predominantly intraracial in South Dakota.

The rate at which American Indians are raped in proportion to their population size is another area of concern. Here the BJS and SDAG findings are roughly consistent. The BJS studies reported that American Indian victims constituted 5 percent of rapes or sexual assaults nationwide, which is five times their population percentage. The SDAG study found that American Indians made up 37 percent of first- and second-degree rape victims in South Dakota, despite only representing 8.3 percent of the state’s population (see fig. 1).<sup>37</sup> This rate is about 4.5 times that of their population percentage. South Dakota reservations had a first-degree rape rate of 25.4 per 100,000

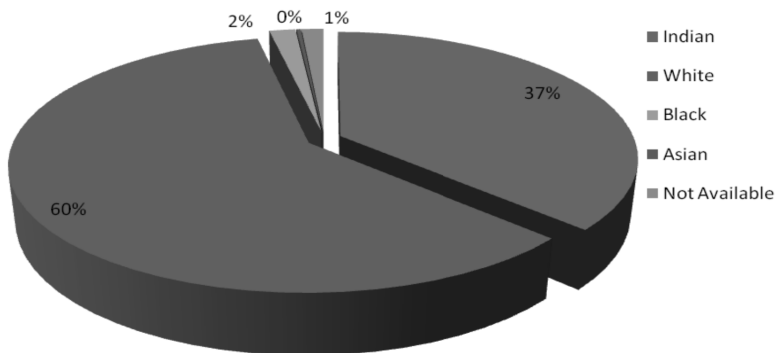


FIGURE 1. Victim Race—State and Federal Forcible Rapes Combined.

inhabitants in 2004—a rate that was lower than Los Angeles but higher than New York City.<sup>38</sup> It was far lower than the state of Alaska, the national leader with 85.1 rapes per 100,000 inhabitants.

When state and federal data sets are combined, South Dakota American Indians had a forcible rape rate of 42.3 per 100,000. That compares to 6.3 white victims per 100,000. On South Dakota reservations, American Indians had a rate of 30 forcible rapes per 100,000. The rate was higher for American Indians who do not live on reservations: 68 per 100,000.<sup>39</sup> These findings suggest that sexual violence against American Indian women is a serious problem in South Dakota. Clearly, more work is needed to define the problem these communities face so that all interested parties can combine efforts to reduce the incidence of this pernicious crime.

#### EXPLAINING TRENDS IN VICTIM'S RACE

Given the availability of additional data from a previous study of South Dakota criminal justice, we were able to take a closer look at the potential causes of victimization trends in the state.<sup>40</sup> The multivariate models in table 4 further underscore the reliability concerns of the BJS reports by examining the conditions under which American Indian and white victims are victimized by the defendants in a series of criminal cases in South Dakota. We believe that differences should exist across these models and that the BJS reports underestimated the intraracial character of crime in Indian country.

To test these hypotheses, we ran two sets of probability models. The first model, noted in the left-most column of table 4, examines the conditions under which American Indians are targeted as crime victims in South Dakota. The dependent variable—an American Indian victim—is a measure indicating whether the victim of reported crime in South Dakota was American Indian (coded 1) or not (0). The second model includes as its dependent variable a measure indicating whether the victim of the reported crime was white (1) or not (0).

The covariates in these models include victim- and perpetrator-specific measures. The first two measures, perpetrator race and relationship to victim, are of most interest in this article because they specifically test whether

**Table 4**  
**Comparative Rape Victimization Rates**

Jurisdiction	Population	Rapes	Rate per 100,000
Los Angeles, CA	3,694,820	1,131	30.6
<b>South Dakota Reservations</b>	<b>59,355</b>	<b>15</b>	<b>25.4</b>
New York, NY	8,008,278	1,428	17.8
<b>South Dakota</b>	<b>754,844</b>	<b>71</b>	<b>9.4</b>

Source: US Department of Justice, Federal Bureau of Investigation, *Crime in the United States 2004* (17 October 2005), 94, 140, 166.

**Table 5**  
**Crime Victims and Racial Differences**

	American Indian Victims			White Victims		
	Coef. <sup>1</sup>	S.E.	Sig.	Coef.	S.E.	Sig.
<b>Perp. Race</b>	1.155	0.218	***	0.116	0.155	
<b>Relationship to Victim</b>	0.994	0.216	***	0.585	0.151	***
<b>Perp. Age at Arrest</b>	0.002	0.012		-0.010	0.007	
<b>Perp. Education Level</b>	-0.109	0.057	**	0.022	0.037	
<b>Perp. Unemployment Dummy</b>	-0.096	0.221		0.232	0.129	*
<b>Perp. Gender</b>	-0.268	0.276		0.306	0.189	*
<b>Constant</b>	-0.743	0.780		-0.927	0.495	*
<b>-2 Log-Likelihood (<math>\chi^2</math>)</b>	66.714		***	43.786		***
<b>% Correctly Predicted</b>	93.3			64.2		
<b>Observations</b>	430			430		
<sup>1</sup> Probit coefficients reported	*** p < 0.001			**p < 0.05		*p < 0.10 <sup>1</sup>

<sup>1</sup> The significance levels reported here indicate the following: p < 0.10 indicates that we can be 90% confident that the relationship we are observing is not occurring by random chance; p < 0.05 similarly suggests that we can be 95% confident; and p < 0.01 indicates 99% confidence.

American Indian (and white) victims are more likely to be victimized by individuals of their own race. As table 5 demonstrates, American Indian victims appear to be disproportionately targeted by perpetrators of the same race, while white victims are not so targeted. This is demonstrated in table 5 by the fact that coefficients associated with the “perpetrator race” variables are positive and statistically significant in the American Indian victims’ equation and are positive but not statistically significant in the white victims’ equation.

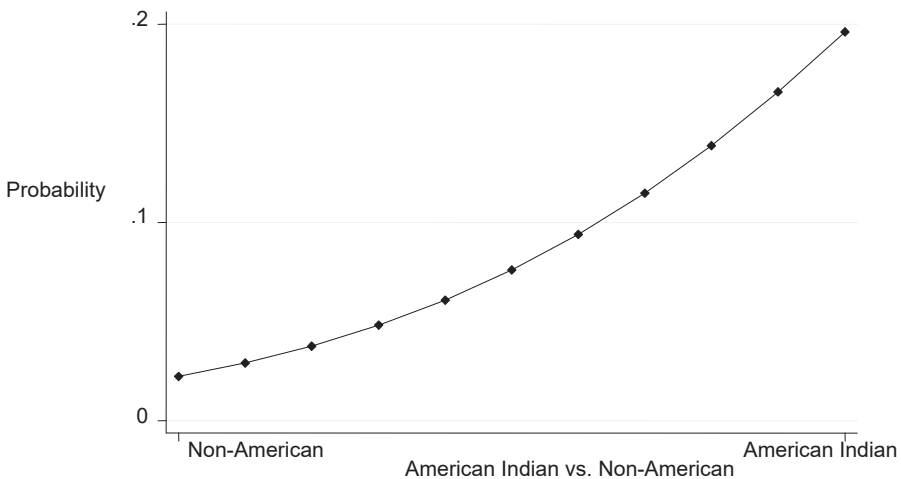
These findings suggest that white perpetrators are not specifically targeting white victims, while American Indian victims—likely because of the greater population homogeneity in Indian country—are more likely to be targeted by other American Indians. The “relationship to victim” coefficients suggest that, regardless of race, perpetrators are more likely to target individuals they know. We find the results striking because extant data that assess American Indian criminal patterns fail to come to what our models suggest should be an intuitive conclusion—that victims know the individuals who commit crimes against them, and, moreover, that American Indian victims are most likely to be subject to crime from Native defendants.

The remaining covariates in the probit models serve as perpetrator- and victim-centered controls. Although the perpetrator’s age variable fails to reach conventional levels of statistical significance in each model, the perpetrator’s

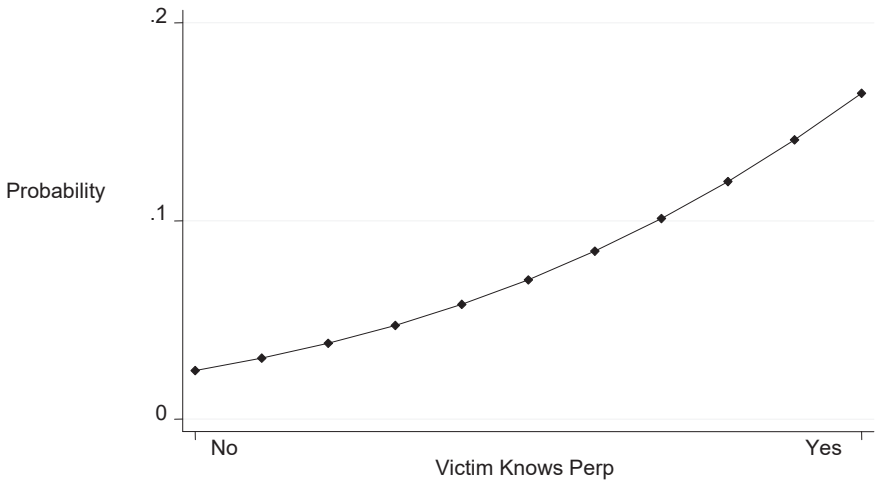
education level is negative and significant in the American Indian victim model. The latter finding suggests that perpetrators who target American Indian victims have lower education levels than do perpetrators who target non-American Indians. We also included measures representing whether the perpetrator was employed at the time the crime was committed and the perpetrator's gender. The employment coefficient was positive and significant ( $p < 0.10$ ) in the white victim model, suggesting that those targeting white victims are more likely to have steady jobs than are those targeting nonwhite victims. The gender variable (1 = male; 0 = female) also was positive and significant ( $p < 0.10$ ), suggesting that men are more likely to target white victims than they are to target nonwhite victims. The latter two findings, however, fail to reach conventional levels of statistical significance ( $p < 0.05$ ) and should be interpreted with caution.

Because probit coefficients offer no obvious interpretation based on their substantive value, we used Long and Freese's (2005) *SPost* estimation suite for Stata to generate predicted probabilities and figures.<sup>41</sup> The results (see figures 2 through 5) underscore how American Indian and white defendants are targeted differently. These figures also suggest that same-race crime is a significant concern among the American Indian population, while perpetrator familiarity with the victim is significant regardless of race.

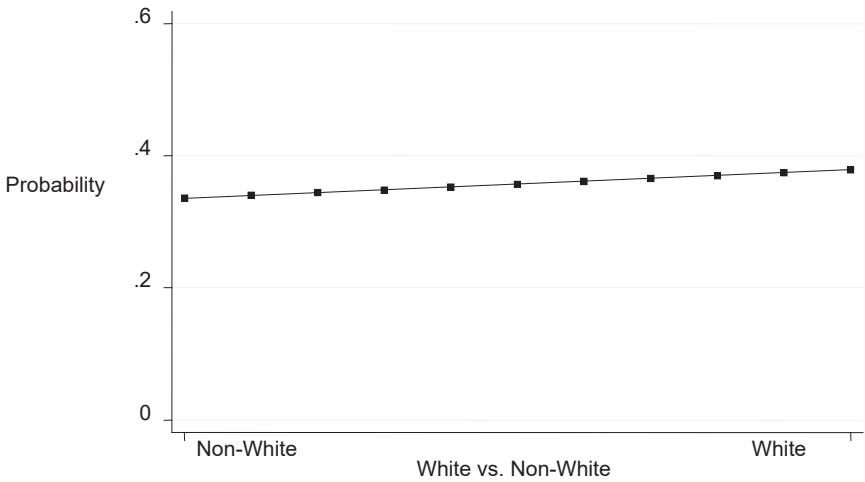
Figure 2 suggests that non-American Indian victims are approximately ten times more likely to be targeted by American Indian perpetrators than by non-American Indian perpetrators. Although figure 2 indicates that the probability of an American Indian victim being targeted is between 0.02 and 0.03 when the perpetrator is a non-American Indian, this probability increases to just under 0.2 when the perpetrator is American Indian. As we have previously noted, this finding is unsurprising except in the context of the BJS data, which suggests exactly the contrary. In comparison, figure 4 suggests that white perpetrators show no greater propensity—all else being equal—to target white victims.



**FIGURE 2.** *Probability of Being an American Indian Crime Victim: American Indian vs. Non-American Indian Perpetrators.*



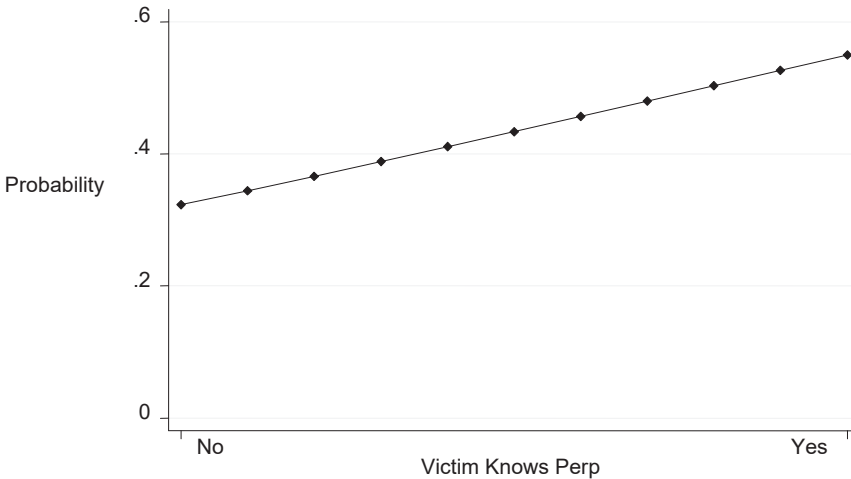
**FIGURE 3.** Probability of Being an American Indian Crime Victim When Victim Knows the Perpetrator.



**FIGURE 4.** Probability of Being a White Crime Victim: White vs. Non-White Perpetrators.

Figures 3 and 5 lend credence to the idea that, regardless of the victim’s race, victim is likely to be targeted by a perpetrator of the same race. Figure 3 suggests that the probability of an American Indian victim being targeted by an unfamiliar perpetrator is between 0.02 and 0.03. The probability of an American Indian victim being targeted by a familiar perpetrator is nearly ten times higher and clearly nonlinear. Figure 5 displays a similar relationship between victim-perpetrator familiarity and the probability of a white victim being targeted. Specifically, the probability of white victims being targeted by





**FIGURE 5.** *Probability of Being a White Crime Victim When Victim Knows the Perpetrator.*

persons they know is 1.5 times greater than the probability of a white victim being targeted by a stranger.

Taken together, these results tell an uncomplicated story from South Dakota: American Indian victims are more likely to be victimized by other American Indians and individuals they know than by non-Indians or strangers. We anticipate this observation is even stronger within reservation communities. We need to keep in mind that the data analyzed in this article do not include federal data and so may not be indicative of what happens within Indian country generally. Still, analysis of state-level data from South Dakota produced clear distinctions between American Indian and non-American Indian victimization trends, and, based on the analysis in the prior sections of this article, there is good reason to expect that the distinctions would be even stronger within reservation communities under federal jurisdiction. Conversely, in more urban settings where American Indians constitute a much smaller percentage of the area's population, we would expect results to be less inconsistent with the BJS findings. However, it is difficult to assert this without taking a better account of all relevant data at issue in American Indian criminal justice.

## DISCUSSION

To understand the error of omission at issue in the BJS reports on American Indian crime, it is necessary to consider more fully the relevance of federal case data for studies of American Indian criminal justice. In addition to the typical challenges of researching criminal justice, studying crime in and around Indian country is particularly difficult because of the jurisdictional complexity at issue in this area. On many reservations, treaties, statutes, executive orders, and governmental programs have created federal jurisdiction over tribal

lands, resources, and people. For example, the Indian Country Crimes Act, the Assimilative Crimes Act, and the Major Crimes Act provide the federal government with jurisdiction over crimes committed by and against American Indians within Indian country, a term defined by federal law.<sup>42</sup>

In general, tribes exercise concurrent jurisdiction over crimes committed by American Indians in Indian country, so the two types of jurisdiction in Indian country are best thought of as tribal-federal-federal and tribal-state-state.<sup>43</sup> States retain jurisdiction over crimes committed by non-Indians against non-Indians in Indian country and also retain jurisdiction over victimless crimes committed by non-Indians in Indian country. Unfortunately, gaps in knowledge about this jurisdictional patchwork, and uncertainty as to how it might apply in individual cases, can give rise to bias, hostility between stakeholders, and disparate outcomes.

A number of reasons have been offered to justify, from a policy perspective, federal criminal jurisdiction in Indian country, ranging from a perceived difficulty in obtaining juries capable of rendering a fair trial due to intensified discrimination in border towns, to the perception that forcing tribes under state criminal jurisdiction violates treaties and essentially eliminates tribes as distinct political entities.<sup>44</sup> Nonetheless, a practical result of the state of the law is misunderstanding about tribal and federal capacities to complement state jurisdiction. For example, South Dakota has adopted a statutory framework for extradition agreements between the state and the tribes, but only a single tribe of nine in the state has entered into such an agreement.<sup>45</sup> Other tribes do sometimes extradite tribal members to the state, but, except for the tribe with which the formal agreement has been made, the state cannot rely on a consistent tribal policy toward extradition. The absence of formal agreements including extradition pacts between states and tribes can result in, at least, arguably valid “flight risk” fears and, in the view of many commentators, higher bail, fewer alternative sentences, and greater time served for American Indians as compared to non-Indians convicted of similar crimes.<sup>46</sup>

A major congressional response to the challenge was adopted by way of Public Law (PL) 83-280, passed in 1953. PL 280, as it is popularly known, established an alternative for some parts of Indian country. For specified states—as well as several others that opted in—the law transferred criminal and civil jurisdiction over Indian country from the federal government to the states.<sup>47</sup> Six states were mandatory participants in the terms of the law (California, Minnesota, Nebraska, Oregon, Wisconsin, and, later, Alaska), and a number of others (Florida, Idaho, Montana, Nevada, Texas, Utah, and Washington) opted to participate.<sup>48</sup> Presently, eleven states continue to assert full or limited criminal jurisdiction in accordance with PL 280.<sup>49</sup>

A primary reason for enacting PL 280 was Congress’s perception of an absence of law enforcement on certain Indian reservations. Despite this public-spirited reasoning, few liked the law. Tribes resented having state jurisdiction thrust on them, and states resented the responsibility to take authority without federal financial help in doing so.<sup>50</sup> Ironically, the law may have worsened the situation with regard to law enforcement. Shortly after its passage, the Bureau of Indian Affairs asserted that it was not responsible for

providing any criminal justice funding to tribes subject to PL 280. Because Congress could not legislate attitude, hostility between states and tribes served to limit opportunities for resource sharing through cooperative agreements. Thus in most cases, neither states nor tribes had the will or the resources to provide justice services (for example, patrol, rapid response, prosecution, and case disposition) on reservations governed by PL 280, which likely served to *increase* lawlessness.<sup>51</sup> Eventually Congress argued that PL 280 “resulted in a breakdown in the administration of justice to such a degree that Indians are being denied due process and equal protection of the law.”<sup>52</sup>

Goldberg and Champagne likewise suggest that the transfer of federal jurisdiction to some states through PL 280 may have a negative effect on American Indian communities because of the lack of federal funds for state law-enforcement services within Indian country and the lack of familiarity that state criminal-justice administrators have with tribal communities. The Goldberg and Champagne findings substantiate these concerns.<sup>53</sup> Congress has left the states, tribes, and the federal government with a challenging and unique context, necessitating greater attention to the details when studying American Indian criminal justice, not less attention as offered by the BJS approach in the 2004 and 1999 studies.

The BJS is not, however, the only federal agency with a stake in this area to ignore jurisdictional complexity as a relevant factor. An ad hoc advisory group convened by the US Sentencing Commission in 2003 to examine disparities between federal and state outcomes for American Indian defendants compared aggravated assault outcomes in South Dakota and New Mexico with the federal system cases and found disparities between South Dakota and New Mexico and the federal system. Unfortunately, the Sentencing Commission chose to ignore jurisdictional variation in their research design, so it remains unclear how much impact jurisdictional differences had on these outcomes.<sup>54</sup> The same could be said for academic research that has, to date, not sufficiently taken this question on.

The complexity of jurisdictional variation frustrates the study of American Indian criminal justice, making it difficult to describe trends in crime and victimization accurately. Moreover, researchers attempting to explain variation in justice system outcomes have never adequately dealt with this complexity.<sup>55</sup> The fact that BJS chose to ignore this complexity, relying mainly on the UCR state-level data but not federal case data, is a prominent example of the challenges described above. BJS, the US Sentencing Commission, and, we suspect, other agencies continue to struggle with and often ignore these complexities. The cost is reduced validity of research findings—not to mention misdirected public dialogue and reform efforts that follow in the wake of these efforts.

## CONCLUSION

The BJS studies of 1999 and 2004 asserted that non-Indians committed violent crimes against American Indians—including homicide and rape—predominantly. The current study demonstrates that in the specific context of South Dakota criminal justice this assertion is wrong. In South Dakota, another

American Indian commits most violent crimes against American Indians, just as most violent crime committed by whites in South Dakota is committed by another white. It is likely, in the view of the authors, that the BJS assertion is also wrong with regard to other rural contexts throughout Indian country. The authors submit that BJS went wrong, primarily, by omitting from its study any analysis of case data from federal agencies responsible for investigation and prosecution of American Indian crime in non-PL 280 contexts and, further, by not including a representative sample of Native respondents in their NCVS sample design. The authors further suggest that dissemination of the erroneous BJS findings may result in serious policy error, insofar as much of the discussion of policy alternatives and the need for policy reform in this area has relied to some degree on these widely cited research projects.

Consider the following example: In a recent statement to the US Senate Committee on Indian Affairs, Riyaz Kanji presented statistics from the 2004 BJS report on American Indian crime to compel committee members to revise existing jurisdictional structures to improve the administration of criminal justice in Indian country.<sup>56</sup> Specifically, Kanji advocated what he characterized as a return of tribal criminal jurisdiction over non-Indians, which he believes is necessary to remedy deficits in both enforcement and prosecution in a variety of crimes committed in Indian country. Most notably, Kanji focused on sex crimes against women, for which he cited the BJS findings and the findings of the Amnesty International USA report that also relied on the BJS findings. The fact that both Kanji, a well-respected and well-trained Indian law practitioner, and Amnesty International, with its years of noted advocacy in a wide variety of justice areas, relied on badly flawed BJS findings to justify recommendations for reform is illustrative of the larger problems the authors of this article are concerned about. In short, we feel it is essential that policy-making institutions, stakeholders, and crime victims and their families possess accurate information regarding aggregate behavior patterns and consequences.

We do not feel that the BJS methodology serves this goal. We are beginning to understand more fully the difficulty of studying the output of the jurisdictional maze that Kanji and others have criticized and, further, believe jurisdictional variation has a direct effect on criminal justice system outcomes. The current study is meant, in part, to highlight the lack of both reliability and validity of the BJS observations, when applied in contexts outside the most general national population sample. We suggest further that the unique character of American Indian criminal justice demands greater attention to the details that specific contexts present. Contemporary researchers and public agencies attempting to track American Indian crime demographics and their implications need to pay close attention to these concerns when developing research designs examining trends in this area of research.

Our findings in the areas of intentional homicide and forcible rape are clear instances of what we expect to be a much larger gap in our collective understandings of this important area of study. We know that in the specific context of South Dakota, intentional homicides and forcible rape are primarily intraracial and among people who are, at least, acquaintances, though BJS

reports largely the opposite. The hope is that greater accuracy in this area of research will help facilitate discussions centered on lessening and preventing violence in South Dakota and, by association, in and around Indian country throughout the United States. We hope the research will demonstrate the need to understand and account more carefully for jurisdictional variation to all engaged in the study and administration of American Indian criminal justice. To the extent that multiple jurisdictions are at issue in American Indian justice, agencies and advocates alike ought to be careful to take into account all relevant data when advancing conclusions and administrative or policy reforms.

### NOTES

1. Bureau of Justice Statistics (BJS), "American Indians and Crime," US Department of Justice Publication No. NCJ-173386 (Washington, DC: US Department of Justice, 1999), <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic.pdf> (accessed 30 January 2008).

2. *Ibid.*, 1.

3. BJS, "American Indians and Crime," US Department of Justice Publication No. NCJ-203097 (Washington, DC: US Department of Justice, 2004), <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf> (accessed 30 January 2008).

4. Congress has defined the term *Indian country* as: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same" (18 U.S.C. § 1151, 1949). Federal and tribal attorneys also claim Indian country status for any lands taken into trust under 25 USC s. 465; this issue is in litigation.

5. Richard Frase, "State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy," *Issues in Columbia Law Review* 105, no. 4 (2005): 1190–232; David C. Baldus and George Woodworth, "Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception," *De Paul Law Review* 53 (2004): 1411–96.

6. Bureau of Justice, "American Indians and Crime" (1999, 2004).

7. Frase, "State Sentencing Guidelines"; Donald A. Dripps, "Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-Shallow," *William and Mary Law Review* 43 (2001): 1–77; Baldus and Woodworth, "Race Discrimination and the Legitimacy of Capital Punishment."

8. Alex Alvarez and Ronet Bachman, "American Indian Sentencing Disparity: An Arizona Test," *Journal of Criminal Justice* 24, no. 6 (1996): 549–62.

9. *Ibid.*; Steven R. Cureton, "Justifiable Arrests or Discretionary Justice: Predictors of Racial Arrest Differentials," *Journal of Black Studies* 30, no. 5 (2000): 703–20; Michael J. Leiber and Jayne M. Stairs, "Race, Contexts, and the Use of Intake Diversion," *Journal of Research in Crime and Delinquency* 36, no. 1 (1999): 56–86;

Andrew L. Hochstetler and Neal Shover, "Street Crime, Labor Surplus, and Criminal Punishment, 1980–1990," *Social Problems* 44, no. 3 (1997): 358–68; Jeff Yates, "Racial Incarceration Disparity among States," *Social Science Quarterly* 78, no. 4 (1997): 1001–10; Pamela Irving Jackson and Leo Carroll, "Race and the War on Crime: The Sociopolitical Determinants of Municipal Police Expenditures in 90 Non-Southern U.S. Cities," *American Sociological Review* 46, no. 3 (1981): 290–305.

10. Alvarez and Bachman, "American Indian Sentencing Disparity"; Darnell F. Hawkins, "Devalued Lives and Racial Stereotypes: Ideological Barriers to the Prevention of Family Violence among Blacks," in *Violence in the Black Family*, ed. R. L. Hampton (Lexington, MA: Lexington Books, 1986); Darnell F. Hawkins, "Beyond Anomalies: Rethinking the Conflict Perspective on Race and Criminal Punishment," *Social Forces* 65 (1987): 719–45; Donald Black, *Sociological Justice* (New York: Oxford University Press, 2000).

11. BJS, "Family Violence Statistics: Including Statistics on Strangers and Acquaintances," US Department of Justice Publication No. NCJ-207846 (Washington, DC: US Department of Justice, 2005), 13. Table 2.1 reports that 46.1 percent of all violent crimes committed between 1998 and 2002 were committed by strangers, while 53.9 percent of violent crimes were committed by either family members, significant others, or friends and acquaintances. *Ibid.*, 17. Table 3.1 reports that 26 percent of the murders—including nonnegligent manslaughter—committed in 2002 were committed by strangers, while 74 percent were committed by family members, significant others, or friends and acquaintances.

12. In Donald E. Green, "The Contextual Nature of American Indian Criminality," *American Indian Culture and Research Journal* 17, no. 2 (1983): 99–119; the author cites the following as strong examples of the contextual focus necessary in this area of research: Larry E. Williams, Bruce A. Chadwick, and Hoard M. Bahr, "Antecedents of Self-Reported Arrest for Indian Americans in Seattle," *Phylon* 40, no. 3 (Fall 1979): 243–52; Edwin L. Hall and Albert A. Symkus, "Inequality in the Types of Sentences Received by Native Americans and Whites," *Criminology* 13 (1975): 199–222; Mhyra S. Minnis, "The Relationship of the Social Structure of an Indian Community to Adult and Juvenile Delinquency," *Social Forces* 41 (1963): 395–403.

13. Green, *supra*, n. 12.

14. *Ibid.*, 112.

15. United States ex rel. *Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975).

16. Larry Long served as state's attorney for Bennett County, South Dakota, from March 1973 through December 1990. The cases referenced in the above paragraph were all prosecuted by Long and are all found in the Office of the Bennett County, South Dakota, Clerk of Courts as follows: *State v. Roy J. Black Feather*, No. 9348 (1972); *State v. Cleveland Kills in Sight*, No. 74-77; *State v. Timothy Sean Caffrey*, No. 81-24; *State v. Carl Iron Shell, Jr. and Nelson Iron Shell*, No. 81-92; *State v. George Blue Bird, Jr.*, No. 83-40; and *State v. Mary Kate Poor Thunder*, No. 88-01.

The information as to the race of perpetrators and victims and their relationships to each other is based on the personal knowledge and recollection of Larry Long as the prosecutor of these cases. During the relevant time frame, Bennett County had a total population of slightly more than three thousand.

17. As an example of minority populations within national municipalities, Los Angeles's minority population in 2005 is estimated at 50.9 percent of the city's total

population; Seattle, 31.1 percent; Albuquerque, 27.8 percent; Denver, 28.1 percent; New York, 56 percent; and Boston, 44.7 percent. US Census Bureau's American Fact Finder, [http://factfinder.census.gov/home/saff/main.html?\\_lang=en](http://factfinder.census.gov/home/saff/main.html?_lang=en) (accessed 10 April 2007). In most of South Dakota, as well as the Northern Plains generally, communities are largely white and have far less diversity than the metropolitan areas noted above.

18. Telephone conversation with Steven Perry, 2:45 p.m., 21 September 2006. Follow-up conversation with Steven Smith in January confirmed findings from an earlier conversation with Perry that BJS did not include federal crime data when calculating violent crime victimization rates in their reports on American Indian criminal justice.

19. See generally, discussion section of current article.

20. Larry J. Siegel, *Criminology: Theories, Patterns, and Typologies*, 9th ed. (Belmont, CA: Thomson/Wadsworth, 2007); Martin D. Schwartz, "Methodological Issues in the Use of Survey Data for Measuring and Characterizing Violence Against Women," *Violence Against Women* 6 (2000): 815.

21. Siegel, *Criminology*, 36.

22. The research on homicides in the state system includes intentional homicides only. Statutes at issue include South Dakota Code 0901 (Murder = Family 1st Degree) Statute: 22-16-4; Code 0902 (Murder = Family 2nd Degree) Statute: 22-16-5, 7, 9; Code 0903 (Murder = Nonfamily or n 1st Degree) Statute: 22-16-4; Code 0904 (Murder = Nonfamily or Unknown 2nd Degree) Statute: 22-16-7, 9; 22-17-5, 6; Code 0905 (Murder = Manslaughter 1st Degree) Statute: 22-16-1; 22-16-15; Code 0906 (Murder = Manslaughter 2nd Degree) Statute: 22-16-20; Code 0950 (Murder = Degree/Details Unknown) Statute: Any; Code 0999 (Murder = Free Text) Statute: Any. The research on homicides in the federal system includes US Code as of 19 January 2004. South Dakota Codified Laws, Section 1111. Murder; Section 1112. Manslaughter. Research on forcible rape in the state system includes SDCJ 22-22-1. Rape. Forcible rape in the federal system included title 18, pt. I, ch. 109A, § 2241. Vehicular manslaughter and vehicular homicide are excluded from the report because of their involuntary nature.

23. This data was collected for prior study of South Dakota criminal justice, contracted by the South Dakota Governor's office in 2001. See generally, Richard Braunstein and Steve Feimer, "South Dakota Criminal Justice: A Study of Race Disparities," *South Dakota Law Review* 48, no. 2 (2003): 171–207; Rich Braunstein and Amy Schweinle, "Explaining Race Disparities in South Dakota Sentencing and Incarceration," *South Dakota Law Review* 50 (May 2005): 440–74.

24. Christopher Chorba, "The Danger of Federalizing Hate Crimes: Congressional Misconceptions and Unintended Consequences of the Hate Crimes Prevention Act," *Virginia Law Review* 87 (2001): 319, 338. Discusses the trend to overreport hate crimes. See also, *supra*, n. 20.

25. Arrest reports do not always contain a fully detailed description of the crime and parties involved. As such, a substantial portion of our work included the tedious task of collecting information on defendants and victims. The information included name, state identification number, Federal Bureau of Investigation number, gender, race, date of birth, age at the time of offense, type of crime, location of the crime, number of prior arrests, disposition, weapon type, and relationship of defendant to victim. SDAG researchers ran a South Dakota Criminal History Report, Interstate Identification Index, and Investigative Report on each defendant. These reports

provided the primary information for each case. Researchers found missing data through Division of Criminal Investigation agents, local law-enforcement agencies, states attorneys, clerks of court, Department of Health Vital Statistics, Department of Public Safety Driver Licensing Database, South Dakota Uniform Crime Reports (UCR), and South Dakota National Incident-Based Reporting System (NIBRS). The data included in this report can only be as accurate as the data provided by each of the contributing agencies.

26. *New York Times*, "For Indian Victims of Sexual Assault, a Tangled Legal Path," 25 April 2007. Also cited in that article is a report by Amnesty International USA focused on sexual assault in Alaska, Oklahoma, and South Dakota. That report can be found at <http://www.amnestyusa.org/document.php?id=ENGAMR510352007&lang=e> (accessed 16 January 2008).

27. See 18 U.S.C. § 1153 (1994), granting prosecutorial authority over crimes committed in Indian country to US attorneys. The US attorney general's office, district of South Dakota, made valuable contributions to the report by providing context for the federal statistical findings that follow.

28. The source of this estimate is the *US Census Bureau, Census 2000 Summary File 1 (SF 1)*, [http://factfinder.census.gov/servlet/GCTTable?ds\\_name=DEC\\_2000\\_SF1\\_U&geo\\_id=04000US46&\\_box\\_head\\_nbr=GCT-PH1&format=ST-8](http://factfinder.census.gov/servlet/GCTTable?ds_name=DEC_2000_SF1_U&geo_id=04000US46&_box_head_nbr=GCT-PH1&format=ST-8) (accessed 18 September 2008). Even this estimate is not free from the error associated with imprecise understanding of related issues. The census has adopted, in some cases, a legally inaccurate approach to the question of "reservation" status. E.g., Lake Traverse is described by the census as a "reservation," although the US Supreme Court has found "reservation" status for the area has been "terminated." *DeCoteau v. District County Court*, 420 U.S. 425, 428 (1975). None of the land assigned by the census to the Lake Traverse Reservation is thus "reservation," although a limited amount of the land is Indian country subject to tribal-federal jurisdiction. See *supra*, n. 4. Likewise, the Supreme Court has found that the original external boundaries of the Yankton Reservation have been eliminated, but the census has also ignored that case. *South Dakota v. Yankton Sioux Tribe*, 522 US 329 (1997). Furthermore, the census includes land taken into trust under 25 USC s. 465 within its totals; the state has argued that such lands are not rightfully included within the definition of *Indian country* set out in 18 USC 1151. The number of Indians who actually live within areas subject to tribal-federal jurisdiction thus is likely less than the census numbers would imply.

29. BJS (1999), *supra*, n. 1, p. 7; BJS (2004), *supra*, n. 3, p. 9.

30. Examining the rate of forcible rape for Indians in proportion to their population provides a discussion-worthy observation but is by no means a scientific observation. The assumption that events should affect racial groups in proportion to their population is problematic because the insistence of true proportionality is void of a benchmark by which to compare the racial composition of the victims and defendants. See US General Accounting Office, "Racial Profiling: Limited Data Available on Motorist Stops," Rep. to the Honorable James E. Clyburn, Chairman, Congressional Black Caucus 20 (2000) (discussing the necessity for a benchmark in assessing disproportional traffic stops). There are numerous variables that can explain for lack of proportionality without indicating injustice. With that in mind, the proportionality observations made in this work are just that: observations. Readers are cautioned against making insinuations without scientific analysis.



31. BJS, 1999, 19; BJS, 2004, 12.

32. Ibid.

33. BJS, 1999, 22; BJS, 2004, 14.

34. Unfortunately, the federal data set does not contain information on victim/offender relationships.

35. BJS, 1999, 7; BJS, 2004, 9.

36. See BJS, 1999, 7–8. See also BJS, 2004, 8–9. Neither BJS study defines the term *rape/sexual assault*. The various statutes and holdings defining the term *rape/sexual assault* are too numerous and complex to explain in great detail here. The legal complexity makes it difficult to say if the BJS studies include solely forcible rape or if they also include statutory rape. The possibility that the BJS studies includes statutory rape makes comparing the SDAG findings with the BJS findings slightly more difficult but still worthwhile.

37. Again, readers are cautioned from drawing conclusions from this comparison. See *supra*, n. 30.

38. US Department of Justice, Federal Bureau of Investigation, *Crime in the United States 2004* (17 October 2005), 140, 166.

39. It must be noted that the federal data in this study includes first-degree forcible rape convictions while numbers quoted from *Crime in the United States* represent one offense for each female victim of a forcible rape, attempted forcible rape, or assault with intent to rape, regardless of the victim's age. Statutory rape, in which no force is used but in which the female victim is under the age of consent, is included in the aggregated arrest total for the sex offenses category. Sexual attacks on males are counted as aggravated assaults or sex offenses, depending on the circumstances and the extent of any injuries.

40. *Supra*, n. 23.

41. SPest estimation suite for Stata 10.0 is series of commands that first translate ordered probit coefficients into predicted probabilities and then use those predicted probabilities to construct graphs that clearly present relationships between variables. This approach has become a standard way to interpret maximum likelihood coefficients in political science and sociology in the past five (or so) years. J. Scott Long and Jeremy Freese, *Regression Models for Categorical Outcomes Using Stata*, 2nd ed. (College Station, TX: Stata Press, 2005).

42. See definition of *Indian country*, *supra*, n. 4.

43. Ibid.

44. Ibid.; Robert N. Clinton, "Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze," *Arizona Law Review* 18 (1976): 503.

45. SDCL 23-24B-1. The Sisseton-Wahpeton Oyate has a current extradition agreement with South Dakota.

46. Alvarez and Bachman, "American Indian Sentencing Disparity"; Braunstein and Feimer, "South Dakota Criminal Justice"; Braunstein and Schweinle, "Explaining Race Disparities in South Dakota Sentencing and Incarceration"; Dan Haugen, "Judges Set Higher Bail for Indians, Report Says," *Sioux Falls Argus Leader*, 24 September 2006, A-1; Dan Haugen, "State, Tribes Struggle without Extradition Pacts," *Sioux Falls Argus Leader*, 24 September 2006, A-1; South Dakota Equal Justice Commission 2006, "Final Report and Recommendations," <http://www.sjudicial.com/downloads/SDEJCFinalReport2006jan.pdf> (accessed 15 January 2007).

47. Judith V. Royster and Rory SnowArrow Fausett, "Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion," *Washington Law Review* 64 (1989): 581, 600.

48. South Dakota's attempts to assert jurisdiction over roads through Indian country on the basis of PL 280 has been stymied, to date, by a federal court decision. See *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990).

49. David H. Getches, Charles F. Wilkinson, and Robert A. Williams, *Cases and Materials on Federal Indian Law* 429, 5th ed., American Casebook Series (Eagan, MN: West, 2004).

50. Carole Goldberg, "Public Law 280: The Limits of State Jurisdiction over Reservation Indians," *University of California Law Review* 22 (1975): 535–39.

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52. Jimenez and Song, "Concurrent Tribal and State Jurisdiction," 1636.

53. *Law Enforcement and Criminal Justice under Public Law 280: Project Narrative*. Taken from funded grant request to National Institute of Justice. Goldberg and Champagne, 2001.

54. Goldberg and Champagne, *A Second Century of Dishonor*. One of South Dakota's federal judges has repeatedly criticized the federal sentencing guidelines as unduly harsh with regard to Indians. In 1999 Judge Kornmann stated that Indians in the federal system often receive tougher sentences than those convicted of the same crime in state court. Kornmann is quoted as saying: "Does it make any sense that these Indians are subject to greater penalties than the rest of us?" *South Dakota Advisory Committee to the US Commission on Civil Rights, Native Americans in South Dakota: An Erosion of Confidence in the Justice System* 7, Denver, CO. US Commission on Civil Rights, Rocky Mountain Regional Office, 2000. After the Supreme Court decisions in 2005 regarding the federal sentencing guidelines, Judge Kornmann again attacked them: "I think the [federal] guidelines are racist, out of whack." David Melmer, "Federal Sentencing Up to Judges," *Indian Country Today*, 7 February 2005, [www.indiancountry.com/content.cfm?id=1096410311](http://www.indiancountry.com/content.cfm?id=1096410311) (accessed 15 May 2007).

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