

# **Jurisdictional Variation in American Indian Criminal Justice: An Argument for Stronger Understanding and Better Methods**



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Cover: Powwows capture the spirit of the Dakota, Lakota and Nakota people with lively dancing, drum music and colorful dress. All nine tribes in South Dakota host at least one powwow a year, and visitors are welcome to attend.

Photo courtesy of S.D. Department of Tourism.

## 1. INTRODUCTION

In 1999, the Bureau of Justice Statistics (BJS) released a benchmark study on crime and victimization in the American Indian community.<sup>1</sup> The study examined five years (1992-1997) of American Indian criminal justice concerns, with a particular focus on violent crime victimization and criminal activity. Though widely read and cited, this research did not capture 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 over-representation of crime victimization according to the BJS study. The BJS research further maintains that American Indians have a higher per capita rate of violent crime victimization than other racial minorities studied. While the study did not attempt to explain these disparities, the over-representation and comparative per capita victimization rates compels 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 40 percent of homicides and 80 percent of sexual assaults against American Indian victims were committed by non-Indians. A follow-up study in 2004 largely corroborated these initial victimization findings.<sup>3</sup> The 2004 study covered the ten-year period of 1992-2002 and observed similar rates of victimization, i.e., it found that 66 percent of all crimes against American Indian victims were committed by a member of another race.

These findings, however, deviate from the experiences 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 continues that effort.

Our concern for the reliability of the BJS reports was rooted in the experience of prosecutors in and around Indian country<sup>4</sup> in South Dakota. 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 may be generally accurate at the national level, yet too broad to reflect the reality of violent crime in the context of the northern plains in and near 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.<sup>5</sup>

To investigate further, we began a detailed study of South Dakota's state and federal criminal justice systems which focus on intentional homicide and forcible rape. Homicides are the best reported, investigated and prosecuted crimes, offering us considerable insight into the nature and impact of the most violent of crimes. Rapes are significantly less well-reported. They were included in the study because of their seriousness and because our intent was to replicate the BJS study in the South Dakota

context to gain a clearer understanding of its contributions in the area of American Indian criminal justice research.

## **2. RESEARCH FOUNDATIONS**

Violent crimes can be either intra-racial—committed by a member of one race against a member of the same race—or inter-racial—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 intra-racial. The intra-racial character of violent crime, generally, has been found to be the case as well as in the more specific context of homicide cases.<sup>6</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>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 inter-racial character of these crimes, compared with the distinctly intra-racial 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 intra-racial. This study, as well as others employing conflict theory, suggests more lenient treatment of minority group members convicted of intra-racial violent crimes exists because majorities sanction minorities more severely in crimes where they (the majority) 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 intra-racial character and that they are more threatened by property crimes committed by

minorities because of the inter-racial character of property crimes. This view is further supported by observations that whites received harsher sentences in intra-racial violent crimes than minorities in situations when victims of white defendants tended to be white themselves.<sup>10</sup>

Moreover, in the general population, violent crimes most frequently occur between people who know each other.<sup>11</sup> Victim-offender research shows 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>12</sup>

These observations that (1) violent crime tends to be intra-racial and that (2) these victims often know their offenders, compel a critical review of the BJS findings on American Indian crime and, in particular, violent crime victimization. Of particular concern is whether these findings fit the specific context of rural areas in and around Indian country throughout the United States, where American Indian reservations and border communities exist. Researchers in the American Indian criminal justice subfield have focused on this type of contextual research for some time.<sup>13</sup> Donald Green's research 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>14</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 demonstrates that differences in self-identification of American Indian defendants produce different accounts of American Indian arrest trends. Ignoring this context harms

the reliability of research findings in this area and, we suspect, in other studies of American Indian justice concerns. Without understanding context, as 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 the criminal justice systems' treatment of American Indian defendants, and is necessary to combat the wrongly assumed monism of American Indian culture and the failure to properly capture variations in American Indian self-identification. For these reasons, and others, Green suggests that states might be the most appropriate unit of analysis.<sup>15</sup> National aggregate studies like the BJS efforts, have difficulty managing these contextual factors, or less obvious factors that generally need to be included in research design efforts to enhance the reliability and validity of studies. Our state-level experience strongly suggests some of these factors were omitted from the BJS efforts to describe American Indian criminal justice.

## **2.1 The South Dakota Experience**

In considering 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 1910.<sup>16</sup> Nonetheless, a substantial amount of Indian country — about one-third of the county — remains mostly in the form of “allotted lands” and, thus, is “Indian country” subject to federal and tribal jurisdiction. The county is, therefore, divided into a “checkerboard” jurisdictional arrangement in which parcels of land that are subject to state jurisdiction (those areas which are *not* “Indian country” as a matter of federal law) are intermixed with parcels of land subject to

federal and tribal jurisdiction (those areas which 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 years 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 six cases, the victim was Indian. In all cases, however, the victim was in a family relationship with the perpetrator. Specifically, two wives, a husband, an adoptive father, a brother-in-law, and a mother's boyfriend were the victims. The adoptive father and the mother's boyfriend were non-Indians.<sup>17</sup> Most of these cases were intra-racial and, furthermore, 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 first-hand experience from Bennett County. Academic literature contradicts the BJS findings and creates a *prima facie* case for further inquiry. A potential explanation for the gap between the BJS findings and experiences in the South Dakota cases may be the difference between rural and urban victimization rates and criminal behavior in general. We expect that American Indians who reside in and near 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 in which they live. Given their small numbers in urban areas, American Indian inter-racial victimization rates tend to be higher than those experienced in African American, Asian or Latino communities in such areas.<sup>18</sup> These gaps, however, are not expected to exist in rural settings. In the rural context within and around Indian country, American Indian violent victimization rates tend to be opposite of the urban setting. In the northern plains Indian country region, where economic development has not been achieved with the same frequency as in other American Indian communities throughout the country, the American Indian community is typically more discrete. Its tribal members are culturally-oriented toward the tribe and its own members; accordingly, we expect far less inter-racial violent crime in and around rural Indian country than was reported by the BJS research.

## **2.2 Problems With The Data**

In furthering our understanding of the gaps between our expectations and the BJS publications on *American Indians and Crime*, we contacted the BJS authors of the 1999 and 2004 publications. Our main interest was to learn more about the methodology used and the challenges 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, co-author of the 1999 study, nor Steven Perry, sole 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 states where the federal government has jurisdiction over major crimes in Indian country. In fact, Perry

apparently learned of the nature of the research's methodological shortcomings from our initial phone call in the fall of 2006.<sup>19</sup>

The absence of federal data in these studies of American Indian crime seemed to us a very serious error of omission.<sup>20</sup> It is not, however, the only design flaw 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. Of course, 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>21</sup> In general, problems with the utilization of survey data to study crime trends include recall bias, under- and over-reporting, 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....inadequate question format that invalidates responses."<sup>22</sup>

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 the BJS research reliability of the two publications at issue here.

### 3. 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,<sup>23</sup> as well as state-level and federal data that BJS did not access in the publication of its 1999 and 2004 reports on *American Indians and Crime*. Our research evaluated 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 crime. Intentional homicide data was collected from 1993 through 2002 and forcible rape data was collected for cases from 2000 to 2004. Our research was limited to these to crimes because we wish to parallel the BJS studies as closely as possible both within and outside Indian country.<sup>24</sup>

We also had the benefit of an additional, pre-existing, state-level dataset<sup>25</sup> to test victimization trends. Because this data has a far greater array of variables than the federal and state case dataset used for the primary analysis in this research, we were able to develop explanatory models for the relationship between victimization and race. These explanatory models help us to delve deeper into the factors that contribute to the differences in American Indian and non-Indian victimization trends in the state. However, this additional victimization dataset did not include federal case data.

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 its NCVS which goes beyond police reports; it uses individual surveys to obtain information of

unreported crime. While 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>26</sup> There were no concerns in over- or under-reporting for murder and manslaughter; it would be impossible for one to falsely report that he or she has been the victim of manslaughter or murder. Homicide cases provide the most comprehensive and accurate data while providing a strong, comparative basis to observe trends in South Dakota against those denoted by the BJS research.<sup>27</sup>

The inclusion of forcible rape data was important to expand the research beyond intentional homicide. 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 confronting our community. 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, 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.<sup>28</sup> An Amnesty International USA study of sexual violence against American Indian women in the United States, asserts that jurisdictional complexity and chronic under-funding of law enforcement and Indian health services mean justice is denied for American Indian women.<sup>29</sup>

Given these concerns, the current research seeks to add insight at the state level into trends in American Indian crime and victimization. Such insight is essential in order

to mitigate the destructive influence of violent crimes on individuals and communities. State prosecutors and policy makers have access to complete statistics regarding crimes that occur within their own geographic boundaries. Data on crimes committed in Indian country involving an American Indian defendant and/or an American Indian victim are not routinely reported to the South Dakota Attorney General because these crimes are prosecuted by the federal government or tribal government—not the state government.<sup>30</sup> Consequently, a comprehensive effort to collect accurate data on the full range of crimes that occur within South Dakota should be the ultimate goal. This study begins that effort with detailed research of intentional homicide and forcible rape, with a particular interest in overcoming the deficit of reliable information present when dealing with the jurisdictional complexity of American Indian crime and victimization.

### **3.1 South Dakota Homicide Study**

According to the 2000 Census, more than 42,000 of the State's self-identified 62,000 American Indians live within American Indian Reservations or on American Indian trust lands within South Dakota's geographic boundaries.<sup>31</sup> It is unacceptable and inaccurate to ignore these extensive areas from the BJS analysis.

Because the South Dakota Attorney General's Office does not collect data for crimes prosecuted in South Dakota Indian country by the United States, the authors contacted the United States Attorney's Office in South Dakota to acquire records for those crimes. This allowed us to combine the state and federal data to deliver a more accurate sense of crime in the state. These combined records were then compared with the BJS research to look closely at the question of whether the BJS research work can be generalized.

The BJS studies claimed that 42 percent of American Indian murder victims were murdered by a non-Indian. According to the same BJS report, white victims were murdered by non-whites just over 14 percent of the time and Black victims were murdered by non-Blacks only 6 percent of the time.<sup>32</sup> Our research paints a different picture (see Table 1). From the data maintained by the South Dakota Attorney General's Office, we observed that nearly 73 percent of American Indian victims of intentional homicide were killed by American Indians. In other words, 72.7 percent of these crimes were intra-racial. From the federal data collected from the U.S. Attorney's Office, we observed that 97 percent of American Indian victims of intentional homicide were killed by American Indians. When we combined datasets, we found the intra-racial 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 intra-racial homicide in South Dakota. From our analysis, we found that intentional homicide is predominantly intra-racial in South Dakota, contrary to the BJS findings.

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

<b>Victim Race</b>	<b>Area of Study</b>	<b>Source</b>	<b>Percent Intra-racial Offender</b>
American Indian	National	BJS 2004	58%
White	National	BJS 2004	86%
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%

The rate at which American Indians were murdered proportionally to the size of their population provides another strong distinction between the BJS findings and the current research.<sup>33</sup> The BJS studies reported American Indian victims constituted 0.7 percent of murder victims nationwide, which is proportional to their population in the United States.<sup>34</sup> Our research found, however, this number to be much higher. In the federal and state combined dataset, American Indians made up 64 percent of intentional homicide victims in South Dakota, despite only representing 8.3 percent of the State's population (see Table 2). This is a serious concern for the State of South Dakota. The percentage of American Indian intentional homicide victims is particularly problematic on South Dakota Reservations which had an intentional homicide rate of 22 per 100,000 inhabitants, a rate that is comparable with cities such as Chicago, but higher than that of Los Angeles or New York City.

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

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

\*Source: U.S. Department of Justice, Federal Bureau of Investigations, Crime in the United States 2002, Release date: October 27, 2003, pp. 124, 132 and 148 (Table 8, Offenses Known to Law Enforcement by City 10,000 and over in Population).

\*\*Source: Bureau of Justice Statistics, A BJS Statistical Profile, 1992-2002, American Indians and Crime, December 2004, NCJ 203097.

<sup>†</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.

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>35</sup> However, as we see in Table 3, the state and federal datasets combined show that American Indians committed about 62 percent of intentional homicides in South Dakota, which is well above their 8.3 percent population percentage in the state.



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

<b>Defendant Race</b>	<b>Defendant Gender</b>	<b>Number of Defendants</b>	<b>Defendant Race by Gender % Dist.</b>	<b>Defendant Race Total</b>	<b>Race % Dist.</b>
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%</b>	<b>234</b>	<b>*100%</b>

\*Due to rounding, totals may not equal 100%.

We also examined defendants by race and gender. Males represented about 77 percent of American Indian defendants in the federal dataset, nearly 88 percent of American Indian defendants in the state dataset and just fewer than 80 percent of American Indian defendants in the combined federal and state datasets. Females represented just more than 23 percent of American Indian defendants in the federal dataset and roughly 12 percent of American Indian defendants in the state dataset. Females represented 21 percent of American Indian defendants in the state and federal combined datasets. That compares with almost 84 percent of white male defendants and almost 16 percent of white female defendants in the combined and state datasets. 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>36</sup> Our findings were that 85 percent of the murder victims in the state dataset had a prior relationship.<sup>37</sup>

### **3.2 South Dakota Rape Study**

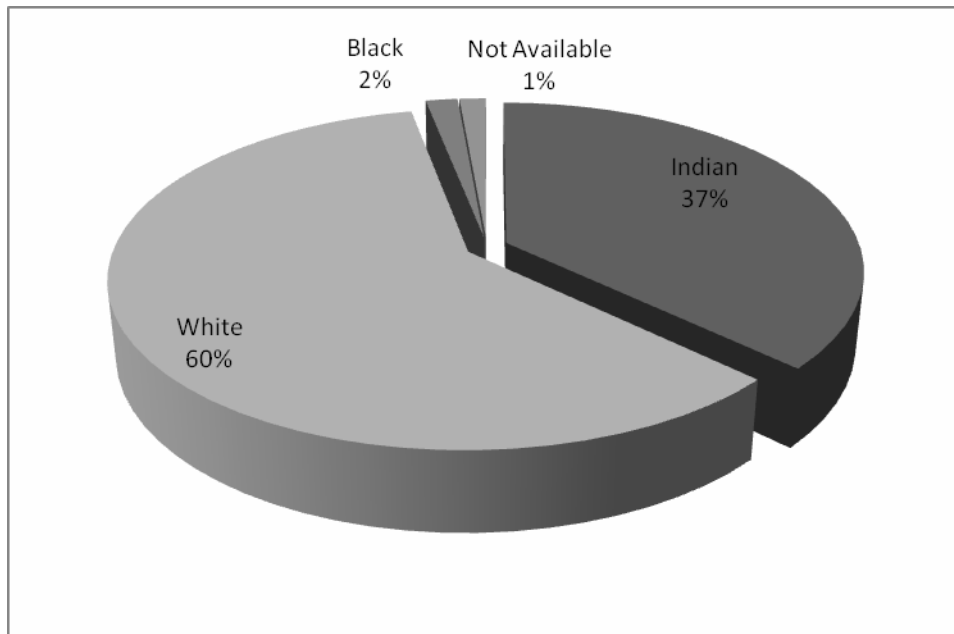
The 1999 BJS study revealed that American Indian victims of rape/sexual assault most often reported that the victimization involved an offender of a different race. About nine in ten American Indian victims of rape or sexual assault were estimated to have had assailants who were white or Black. The 1999 BJS study further breaks down the race of offenders and states that American Indian victims were raped/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>38</sup> The percentage of American Indians victimized by interracial rape/sexual assault as reported by BJS in 2004 was also remarkably high.<sup>39</sup> The 2004 BJS study claimed that nearly four in five (80 percent) American Indian victims of rape/sexual assault described the offender as white. The study further breaks down the race of offenders and shows that American Indian victims were raped/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 collected by the South Dakota Attorney General (SDAG) states otherwise. The SDAG dataset suggests that, among American Indians who were victims of rape, 69 percent were victims of intra-racial rape. In the federal data acquired for this

research, American Indian rape victims were victims of intra-racial rape 99 percent of the time. With these two data sources combined, we found that 83 percent of American Indian rape cases were intra-racial. A similar trend was observed for whites. Combining both the SDAG and federal datasets showed that white rape victims were victims of intra-racial rape in 85 percent of the cases. Contrary to the BJS's national findings, rape is predominantly intra-racial 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/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<sup>40</sup> (see Figure 1). This rate is about four and one-half times that of their population percentage.

**Figure One**  
**Victim Race – State and Federal Forcible Rapes Combined**



South Dakota reservations had a forcible rape rate of 25.4 per 100,000 inhabitants in 2004; a rate that was lower than Los Angeles, but higher than New York City. It was far lower than the state of Alaska, the national leader with 85.1 rapes per 100,000 inhabitants.<sup>41</sup>

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

<b>Jurisdiction</b>	<b>Population</b>	<b>Rapes</b>	<b>Rate per 100,000</b>
<b>Alaska</b>	<b>655,435</b>	<b>558</b>	<b>85.1</b>
<b>South Dakota</b>	<b>770,883</b>	<b>338</b>	<b>43.8</b>
<b>Los Angeles, CA</b>	<b>3,864,018</b>	<b>1,131</b>	<b>29.3</b>
<b>South Dakota Indian county *</b>	<b>59,355</b>	<b>15</b>	<b>25.4</b>
<b>New York, NY</b>	<b>8,101,321</b>	<b>1,428</b>	<b>17.6</b>

Source: U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States 2004*, Release Date: October 17, 2005, pp. 86,94, 140, and 166.

\*S.D. Office of the Attorney General, Criminal Statistical Analysis Center, *Forcible Rape in South Dakota*, Release date pending. pg.48. The number of rapes is taken from the federal dataset and the term "Indian country" is used as the federal authorities define it. The population data in this row of the table includes both Indians and non-Indians in this area but this row of the table does not include non-Indian against non-Indian rapes, which crimes would be captured in the state dataset.

When state and federal datasets are combined, South Dakota American Indians had a five-year average (2000-2004) forcible rape rate of 42.3 per 100,000. That compares to the five-year average rate of 6.3 forcible rapes of white victims per 100,000. On South Dakota reservations, the federal dataset shows American Indians had a five-year average rate of 30.0 forcible rapes per 100,000. The five-year average rate of forcible rape was higher for American Indians who do not live on reservations: 68.0 per 100,000.<sup>42</sup> These findings suggest that sexual violence against American Indian women is a serious problem in South Dakota.<sup>43</sup> Clearly, more work is needed to define the problem these communities face so all interested parties can combine efforts to reduce the incidence of this pernicious crime.

### **3.3 Explaining Trends in Victim's Race**

Given the availability of additional data from a previous study of South Dakota criminal justice,<sup>44</sup> we were able to examine the potential causes of victimization trends in the state. The multivariate models in Table 5 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, consistent with the earlier discussion in this paper, that the BJS reports grossly underestimated the intra-racial 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 5 below, 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 that 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 or not 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 here because they specifically test whether 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 victim's equation, and are positive but not statistically significant in the white victim's equation.

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

	American Indian Victims			White Victims		
	<u>Coef.</u> <sup>1</sup>	<u>S.E.</u>	<u>Sig.</u>	<u>Coef.</u>	<u>S.E.</u>	<u>Sig.</u>
<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>45</sup>

These findings suggest 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 that they know. We find the results striking because extant data that assesses American Indian criminal patterns fails to demonstrate what our models suggest should be an intuitive conclusion—that victims

know the individuals that commit crimes against them and, moreover, that American Indian victims are most likely to be subject to crime from American Indian defendants.

The remaining covariates in the probit models serve as perpetrator- and victim-centered controls. While 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 non-white 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 non-white 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>46</sup> The results (see Figures 2 through 5) highlight how differently American Indian and white defendants are targeted. 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**  
**Probability of Being an American Indian Crime Victim**

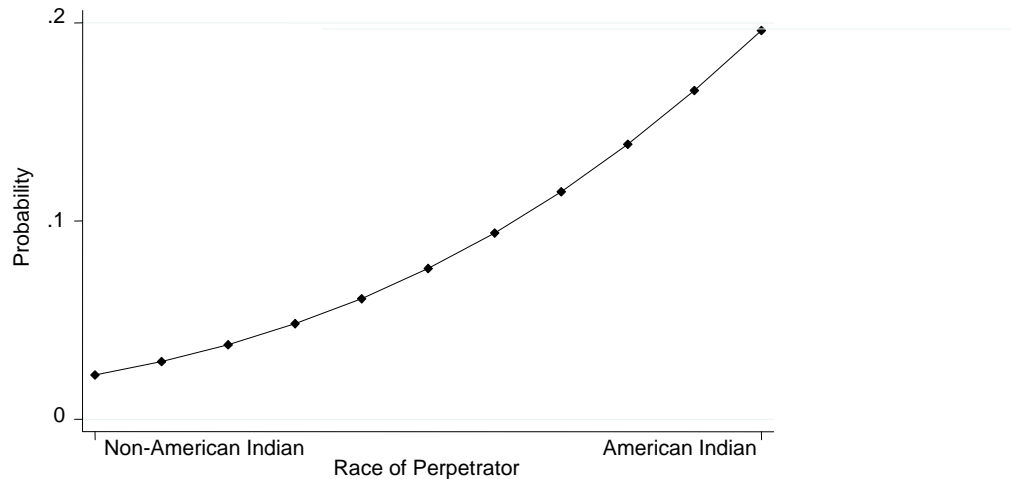
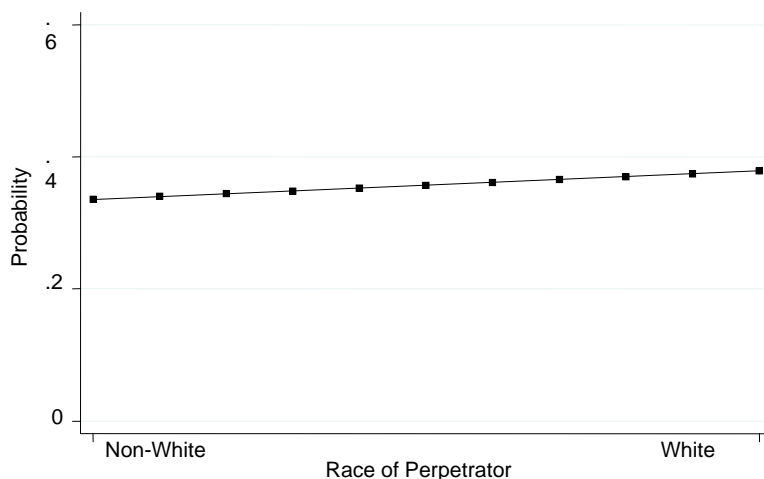


Figure 2 suggests that American Indian victims are approximately ten times more likely to be targeted by American Indian perpetrators than by non-Indian perpetrators. While Figure 2 indicates that the probability of an American Indian victim being targeted is between 0 .02 and 0.03 when the perpetrator is a non-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 3 suggests that white perpetrators show no greater propensity—all else being equal—to target white victims.

**Figure 3**  
**Probability of Being a White Crime Victim**



Figures 4 and 5 lend credence to the idea that, regardless of the victim's race, that victim is likely to be targeted by a perpetrator of the same race. Figure 4 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 non-linear.

**Figure 4**  
**Probability of Being an American Indian Crime Victim**  
**Who Knows Their Perpetrator**

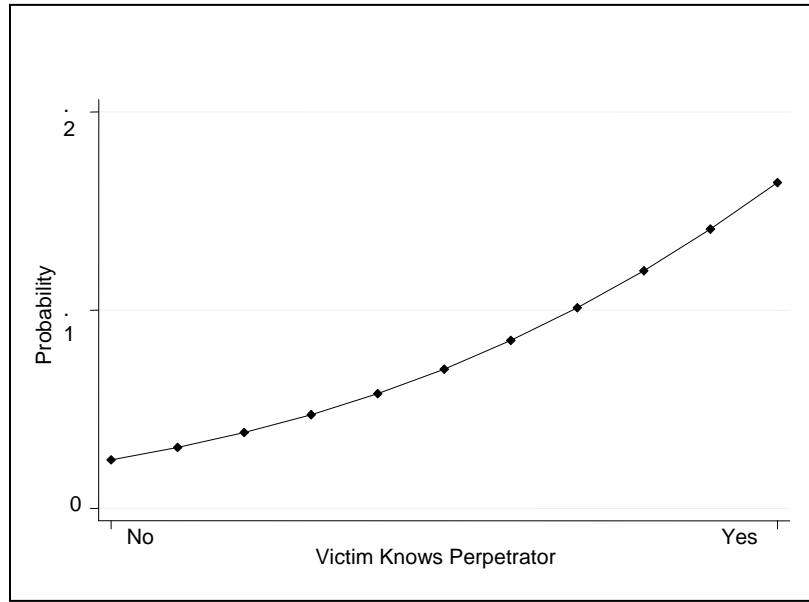
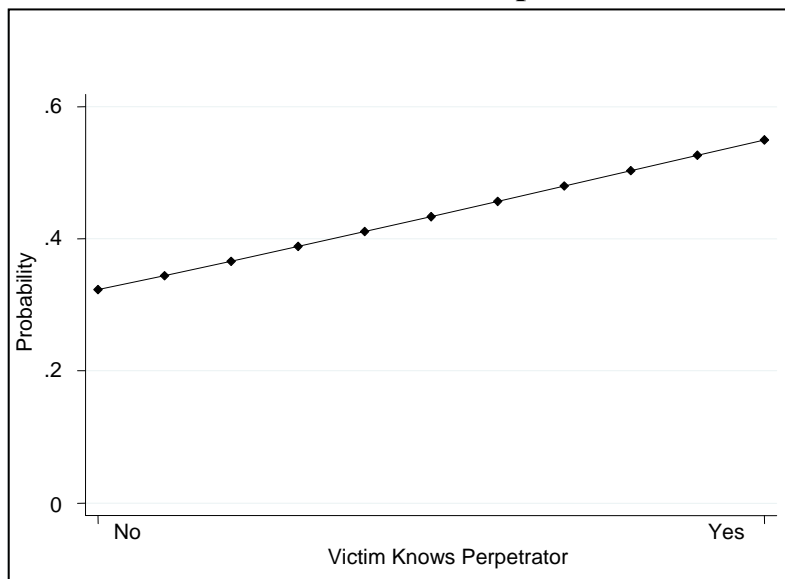


Figure 5 displays a similar relationship between victim-perpetrator familiarity and the probability of a white victim being targeted. Specifically, the probability of a white victim being targeted by a person that they know is 1.5 times greater than the probability of a white victim being targeted by a stranger.

**Figure 5**  
**Probability of Being a White Crime Victim**  
**Who Knows Their Perpetrator**



Taken together, these results tell an uncomplicated story about South Dakota: American Indian victims are more likely to be victimized by other American Indians and individuals that 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 here does not include federal data and so it 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 paper, 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.

#### **4. DISCUSSION**

To understand the error of omission at issue in the BJS reports on American Indian crime, it is necessary to more fully consider the existence and relevance of federal case data for any study of American Indians and crime. Adding to the typical challenges of researching criminal justice, studying crime in and around Indian country is particularly difficult because of the jurisdictional complexity. On many reservations, treaties, statutes, and executive orders have created federal jurisdiction over tribal lands, resources, and people.<sup>47</sup> For example, the General 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>48</sup>

Tribes in general 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 federal-tribal and state-tribal.<sup>49</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 in 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>50</sup> Nonetheless, a practical result of the state of the law is a misunderstanding of how the three jurisdictions can best work together to reduce crime and improve criminal justice administration for affected stakeholders. For example, South Dakota has adopted a statutory framework for extradition agreements between the state and the tribes, but only a single tribe has entered into such an agreement.<sup>51</sup> Other tribes 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 towards 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>52</sup>

A major Congressional response to the challenge was adopted by way of Public Law 83-280, passed in 1953. P.L. 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>53</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>54</sup> Presently, eleven states continue to assert full or limited criminal jurisdiction in accordance with P.L. 280.<sup>55</sup>

A primary reason for enacting P.L. 280 was Congress’ 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 upon them, and states resented the responsibility to take authority without federal financial help in doing so.<sup>56</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 P.L. 280. Since 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 (patrol, rapid response, prosecution, case disposition, and so on) on reservations governed by P.L.

280, which likely served to *increase* lawlessness.<sup>57</sup> Eventually Congress argued that P.L. 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>58</sup>

Goldberg and Champagne likewise propose the transfer to some states via P.L. 280 of federal jurisdiction on Indian land may have a negative effect on American Indian communities because of the “absence of federal funding for state law enforcement services within Indian Country” and “uncertainty about the scope of state jurisdiction and officers’ unfamiliarity with tribal communities,”<sup>59</sup> and their emerging results are beginning to substantiate exactly these points.<sup>60</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 as offered by the BJS approach in the 1999 and 2004 studies.

The Bureau of Justice Statistics is not, however, the only federal agency ignoring jurisdictional complexity as a relevant factor. An ad hoc advisory group convened by the U.S. 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.<sup>61</sup> 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>62</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 accurately describe trends in crime and victimization. Moreover, this complexity has never been adequately dealt with by researchers attempting to explain variation in justice system outcomes.<sup>63</sup> The fact that the BJS chose to ignore this complexity, relying mainly on the Uniform Crime Reports (UCR) state-level data but not federal case data, is a prominent example of the challenges described above. The 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.

## **5. CONCLUSION**

The BJS studies of 1999 and 2004 asserted that violent crimes against American Indians—including homicide and rape—were committed predominantly by non-Indians. This study demonstrates that, in the context of South Dakota, this assertion is flatly wrong. Most violent crime against American Indians in South Dakota is committed by another American Indian, just as most violent crime against whites in South Dakota is committed by another white. It is likely, in the view of the authors, that the BJS assertion is also incorrect with regard to other rural contexts where tribal-federal jurisdiction is practiced. 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 P.L. 280 contexts. 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 U.S. Senate Committee on Indian Affairs, Riyaz Kanji presented statistics from the 2004 BJS report on American Indian crime to persuade committee members to revise existing jurisdictional structures to improve the administration of criminal justice in Indian country.<sup>64</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 upon the BJS findings.<sup>65</sup> 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 believe it is essential that policy making institutions, stakeholders, crime victims and their families possess accurate information regarding aggregate behavior patterns and consequences.

The BJS methodology does not serve this goal. We are beginning to attempt to fully understand the difficulty of studying the output of the jurisdictional maze Kanji and others have criticized and, further, believe jurisdictional variation has a direct affect 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. We further suggest that the

unique and complex character of Indian country demands attention from contemporary researchers and public agencies attempting to track American Indian crime demographics and their implications.

Our findings in the areas of intentional homicide and forcible rape are clear evidence 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 single state context of South Dakota, intentional homicides and forcible rape are primarily intra-racial 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 more carefully understand and account for jurisdictional variation to all engaged in the study and administration of American Indian criminal justice. Whenever any study is launched focusing on American Indians and crime, agencies and advocates alike ought to be careful to take into account all relevant data when advancing conclusions and administrative or policy reforms.

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<sup>1</sup> Bureau of Justice. "American Indians and Crime." (U.S. DOJ Publication No. NCJ-173386). Washington, DC: U.S. Department of Justice (1999) located at <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic.pdf> (last accessed January 30, 2008).

<sup>2</sup> Ibid, at page 1.

<sup>3</sup> Bureau of Justice. "American Indians and Crime." (U.S. DOJ Publication No. NCJ 203097). Washington, DC: U.S. Department of Justice (2004) located at <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic02.pdf> (last accessed January 30, 2008)

<sup>4</sup> Congress has defined "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.

<sup>5</sup> See generally *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 (1999).

<sup>6</sup> Richard Frase, "State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy," *Issues in Columbia Law Review*. Vol 105 (4). 1190-1232. 2005. Donald A. Dripps, "Constitutional Theory for Criminal Procedure: Miranda, Dickerson, and the Continuing Quest for Broad-but-Shallow," *William & Mary Law Review*, Vol. 43, (2001); 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: 1411-1496. (2004)

<sup>7</sup> Bureau of Justice. "American Indians and Crime." (1999 and 2004).

<sup>8</sup> Alex Alvarez and Ronet Bachman, "American Indian Sentencing Disparity: An Arizona Test," *Journal of Criminal Justice*, 24(6), 549-562 (1996).

<sup>9</sup> Ibid.; Steven R. Cureton "Justifiable Arrests or Discretionary Justice: Predictors of Racial Arrest Differentials," *Journal of Black Studies*. Vol. 30, Iss. 5, pp. 703-720 (2000); Michael J. Leiber and Jayne M. Stairs, Race, Contexts, and the Use of Intake Diversion," *Journal of Research in Crime and Delinquency*, Vol. 36, No. 1, 56-86 (1999); Leiber and Stairs, 1999; Andrew L. Hochstetler and Neal Shover, "Street Crime, Labor Surplus, and Criminal Punishment, 1980-1990," *Social Problems*, Vol. 44, No. 3 (1997); Jeff Yates, "Racial incarceration disparity among states," *Social Science Quarterly*. Vol. 78, No. 4, pp. 1001-1010 (1997); 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*. Vol. 46, Iss. 3, pp. 290-305 (1981).

<sup>10</sup> Alvarez and Bachman, 1996; Darnell, F. Hawkins, "Devalued Lives and Racial Stereotypes: Ideological Barriers to the Prevention of Family Violence Among Blacks." *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*. Vol. 65, pp. 719-745 (1987); Donald Black, *Sociological Justice*. New York: Oxford University Press (2000).

<sup>11</sup> Bureau of Justice Statistics. "Family Violence Statistics: Including Statistics on Strangers and Acquaintances." (U.S. DOJ Publication No. NCJ 207846). Washington, DC: U.S. Department of Justice, p. 13 (2005). Found in Table 2.1, reporting that 46.1% of all violent crimes committed between 1998 and 2002 were committed by strangers, while 53.9% of violent crimes were committed by either family members, significant others, or friends and acquaintances.

<sup>12</sup> Ibid., p. 17. Found in Table 3.1, reporting that 26.0% of the murders—including non-negligent manslaughter—committed in 2002 were committed by strangers, while 74.0% were committed by family members, significant others, or friends and acquaintances.

<sup>13</sup> In his work reviewing earlier American Indian criminal justice studies, Donald Green, *Supra*, n. 14., 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* 40:3 (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;

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Mhyra S. Minnis, "The Relationship of the Social Structure of an Indian Community to Adult and Juvenile Delinquency," *Social Forces* 41 (1963): 395-403.

<sup>14</sup> Donald E. Green, "The Contextual Nature of American Indian Criminality," in *American Indian Culture and Research Journal*, 17: 2, 99-119 (1983).

<sup>15</sup> *Ibid*, p. 112.

<sup>16</sup> *United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (8<sup>th</sup> Cir. 1975).

<sup>17</sup> 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 race of perpetrators and victims and their relationships to each other, is based upon 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 over 3,000.

<sup>18</sup> As an example of minority populations within national municipalities, Los Angeles' minority population in 2005 is estimated at 50.9 % of the city's total population; Seattle, 31.1%; Albuquerque, 27.8%; Denver, 28.1%; New York 56.0%; and Boston, 44.7%. U.S Census Bureau's American Fact Finder, located at [http://factfinder.census.gov/home/saff/main.html?\\_lang=en](http://factfinder.census.gov/home/saff/main.html?_lang=en) (last accessed April 10, 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.

<sup>19</sup> Telephone conversation with Steven Perry, 2:45pm, September 21, 2006. Follow-up conversation with Steven Smith in January confirmed findings from 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.

<sup>20</sup> See generally the discussion in Section 4 below.

<sup>21</sup> Larry J. Siegel, *Criminology: Theories, Patterns, and Typologies*, Ninth Edition, Thomson/Wadsworth (2007). Martin D. Schwartz, "Methodological Issues in the Use of Survey Data for Measuring and Characterizing Violence Against Women," *Violence Against Women*, Vol. 6, 815 (2000).

<sup>22</sup> Siegel (2000), page 36.

<sup>23</sup> Though we did not consider survey data for this research given the obvious problems with its reliability (See generally, *Supra*, notes 22 and 23, and accompanying text).

<sup>24</sup> The research on homicides in the state system includes intentional homicides only. Statutes at issue here 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 = Non Family or Unknown 1st Degree) Statute: 22-16-4; Code 0904 (Murder = Non Family or Unknown 2nd Degree) Statute: 22-16-7,9; 22-17-5,6; Code 0905 (Murder = Manslaughter 1st Degree) Statute: 22-16-15; 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 *U.S. Code as of: 01/19/04* 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 > PART I > CHAPTER 109A > § 2241. Vehicular manslaughter and vehicular homicide are excluded from the report because of their involuntary nature. One of the study's purposes is to report the number of crimes in which defendants target victims of a race other than their own. Obviously, unintentional crimes have little to contribute in this regard, because the victim is just as unintentional as the crime.

<sup>25</sup> 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*, Vol. 48, Issue 2. 171-207 (2003);

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Braunstein and Schweinle, “Explaining Race Disparities in South Dakota Sentencing and Incarceration.”\* In South Dakota Law Review, Volume 50 (May 2005).

<sup>26</sup> Christopher Chorba, The Danger of Federalizing Hate Crimes: Congressional Misconceptions and Unintended Consequences of the Hate Crimes Prevention Act, 87 VA. L. REV. 319, 338 (2001). Discussing the trend for hate crimes to be over reported.

<sup>27</sup> 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 both defendants and the victims. The information included: name, State Identification Number (“SID”), 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 South Dakota Criminal History Report, Interstate Identification Index (“Triple I”) and Investigative Report (“IVR”) 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, Uniform Crime Reports (“UCR”) and 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.

<sup>28</sup> *New York Times*. “For Indian Victims of Sexual Assault, a Tangled Legal Path.” April 25, 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> (last accessed January 16, 2008).

<sup>29</sup> Also cited in the New York Times article (supra, note 24) 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> (last accessed January 16, 2008).

<sup>30</sup> See 18 U.S.C. § 1153 (1994), granting prosecutorial authority over crimes committed in Indian country to United States Attorneys. The U.S. Attorney’s Office, District of South Dakota, made valuable contributions to the report by providing context for the federal statistical findings that follow. Tribal data is not included because tribes lack the authority under federal law to prosecute the serious crimes at issue. The Indian Civil Rights Act provides, in particular, that tribes lack the authority to impose punishment of over one-year in jail. 25 U.S.C. §1302(7).

<sup>31</sup> The source of this estimate is the *U.S. 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). 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. For example, 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 federal-tribal jurisdiction. See, fn. 4, supra. The Supreme Court has likewise 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 federal-tribal jurisdiction thus is likely less than the Census numbers would imply.

<sup>32</sup> BJS (1999), *Supra*, note 1 at page 7; BJS (2004), *Supra*, note 3 at page 9.

<sup>33</sup> 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 U.S. GEN. ACCOUNTING OFFICE, RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORIST STOPS, REP. TO THE HONORABLE JAMES E. CLYBURN, CHAIRMAN, CONG. 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 from making insinuations without scientific analysis.

<sup>34</sup> BJS, 1999, 19; BJS, 2004, 12.

<sup>35</sup> BJS, 1999, 19; BJS, 2004, 12.

<sup>36</sup> BJS, 1999, 22; BJS, 2004, 14.

<sup>37</sup> Unfortunately, the federal dataset does not contain information on victim/offender relationships.

<sup>38</sup> BJS, 1999 at 7.

<sup>39</sup> See BJS, 2004, at 8-9. Neither BJS study defines the term “rape/sexual assault.” The various statutes and holdings defining 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.

<sup>40</sup> Again, readers are cautioned from drawing conclusions from this comparison. See *supra*, n. 45.

<sup>41</sup> U.S. Department of Justice, Federal bureau of Investigation, Crime in the United States 2004. Release Date: October 17, 2005, pages 86, 94, 140 and 166.

<sup>42</sup> S.D. Office of the Attorney General, Criminal Statistical Analysis Center, *Forcible Rape in South Dakota*, Release date pending. pg.69, 70, 71

<sup>43</sup> 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 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.

<sup>44</sup> See Generally, Braunstein and Feimer (2003) and Braunstein and Schweinle (2005), *Supra*, note 25.

<sup>45</sup> The significance levels reported here indicate the following:  $p < 0.10$  indicates that we can be 90% confident that the relationship that 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.

<sup>46</sup> Long, J. Scott and Jeremy Freese. 2005. *Regression Models for Categorical Outcomes Using Stata*, 2<sup>nd</sup> Ed. College Station, TX: Stata Press.

<sup>47</sup> C. Smith, Chief Editor, *American Indian law Deskbook*, 110-128 (3d ed. 2004)

<sup>48</sup> General Crimes Act, 18 U.S.C. §1152; Assimilative Crimes Act, 18 U.S.C. §13; Major Crimes Act 18 U.S.C. §1153; See definition of Indian country, *Supra*, note 4.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid*.; Robert N. Clinton, “Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze.” *Arizona Law Review*, 18, 503 (1976).

<sup>51</sup> SDCL 23-24B-1. The Sisseton-Wahpeton Oyate has a current extradition agreement with South Dakota.

<sup>52</sup> Alvarez and Bachman, American Indian Sentencing; Richard Braunstein and Steve Feimer, “South Dakota Criminal Justice: A Study of Race Disparities,” *South Dakota Law Review*, Vol. 48, Issue 2. 171-207 (2003); Braunstein and Schweinle, “Explaining Race Disparities in South Dakota Sentencing and Incarceration.”\* In *South Dakota Law Review*, Volume 50 (May 2005).; Dan Haugen, “Judges set higher bail for Indians, report says.” *Sioux Falls Argus Leader*. (September 24, 2006) A-1; Dan Haugen, “State, tribes struggle without extradition pacts.” *Sioux Falls Argus Leader*. (September 24, 2006) A-1; South Dakota Equal Justice Commission, 2006. “Final Report and Recommendations.” Retrieved January 15, 2007, from <http://www.sdjudicial.com/downloads/SDEJCFinalReport2006jan.pdf>.

<sup>53</sup> Judith V. Royster & Rory SnowArrow Fausett, “Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion,” 64 *WASH. L. REV.* 581, 600 (1989).

<sup>54</sup> 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).

<sup>55</sup> David H. Getches, Charles F. Wilkinson, and Robert A. Williams, “*Cases and Materials on Federal Indian Law* 429 (5<sup>th</sup> ed.),” American Casebook Series, West (2004); C. Smith, Chief Editor, *American Indian law Deskbook*, 121-128 (3d ed. 2004).

<sup>56</sup> Carole Goldberg “Public Law 280: The Limits of State Jurisdiction Over Reservation Indians.” *University of California Law Review* 22, 535-39 (1975).

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<sup>57</sup> Flies-Away, J.T., Garrow, C. and Jorgensen, M., "Divorce and Real Property on American Indian Reservations: Lessons for First Nations and Canada." *Atlantis: A Women's Studies Journal/Revue d'etudes sur les femmes*, Vol. 29.2, Winter/Spring 2005, pp. 81-92; Carole Goldberg and Duane Champaign, "A Second Century of Dishonor: Federal Inequities and California Tribes." Los Angeles: UCLA American Indian Studies Center (1996); Carole Goldberg-Ambrose, "Planting Tail Feathers: Tribal Survival and Public Law 280." Los Angeles: UCLA American Indian Studies Center (1997); Vanessa J. Jimenez and Soo C. Song, "Concurrent Tribal and State Jurisdiction Under Public Law 280." *American University Law Review*. 47 (1998); Nancy B. Thorington, "Civil and Criminal Jurisdiction Over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments." *McGeorge Law Review* 31, 973 (2000).

<sup>58</sup> (Jimenez & Song, "Concurrent Tribal and State Jurisdiction," 1636.

<sup>59</sup> *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.

<sup>60</sup> Goldberg and Champagne, "A Second Century."

<sup>61</sup> Report of the Native American Advisory Group, November 4, 2003. Available at <http://www.ussc.gov/NAAG/NativeAmer.pdf> (last accessed on July 1, 2008).

<sup>62</sup> One of South Dakota's federal judges has repeatedly criticized the federal sentencing guidelines as unduly harsh with regard to Indians. Judge Kornmann in 1999 stated that Indians in the federal system often receive tougher sentences than those convicted of the same crime in state court. Judge Kornmann is quoted as saying "Does it make any sense that these Indians are subject to greater penalties than the rest of us?" Advisory Commission, *supra* n.2, at 34. 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*, Feb. 7, 2005 at [www.indiancountry.com/content.cfm?id=1096410311](http://www.indiancountry.com/content.cfm?id=1096410311)

<sup>63</sup> Braunstein and Schweinle, *Supra*, n. 27.

<sup>64</sup> Prepared Statement of Riyaz A. Kanji on "The Constitutionality of Legislation Restoring Tribal Jurisdiction Over Non-Indians," Before the United States Senate Committee on Indian Affairs, Thursday, September 27, 2007. Available at [http://indian.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing\\_ID=80&Witness\\_ID=320](http://indian.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=80&Witness_ID=320)

<sup>65</sup> *Supra*, n. 42.