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1989

I Fought the Law and the Law Won': A Report on Women and Disparate Sentencing in South Dakota (With Chris Hutton, and Steve Feimer)

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"I Fought the Law and the Law Won": A Report on Women and Disparate Sentencing in South Dakota

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I. INTRODUCTION

One of the inveterate marks of sexism is the general invisibility of women as subjects of research in important institutional settings. This is particularly true in the criminal justice setting, exponentially vivified from the prairie perspective of the upper plains. Compounding the problem is the possible overlay of racism on sentencing decisions applied to both men and women.

In an effort to address the question of what role race and sex play in the sentencing in South Dakota, the researchers examined the files of women incarcerated in the South Dakota Penitentiary between 1980 and 1988 to determine whether there was substantially significant disparity in the sentences imposed on white and Native American women. As a supplement to the statistical analysis, the researchers also asked the current inmates to describe their perceptions of the equity of the sentencing process. Finally, the study included a statistical comparison of the sentences received by female and male inmates for selected offenses.

II. BACKGROUND

A. Race as a Factor in Sentencing

As two researchers have noted, "the quality of justice available to Native Americans [sic] and the quality of treatment they receive under the law has been a major concern in South Dakota."¹ As Pommersheim

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1. Pommersheim & Wise, *Going to the Penitentiary: A Study of Disparate Sentencing in South Dakota*, 117 S.D. BARRISTER 19 (July-Aug. 1987) [hereinafter Pommersheim & Wise] (citing South Dakota Advisory Committee to the United States Commission on Civil Rights, *Liberty and Justice for All* 1 (1977) [hereinafter *Liberty and Justice for All*]).

and Wise have observed, although these concerns have been discussed for many years,² little research has been done in the state to either confirm or deny that unequal treatment exists.³

According to the Bureau of Census, Native Americans constitute the largest minority in the state of South Dakota, representing approximately 6.5% of the state's population of 609,768.⁴ Consistently, however, they constitute a much higher percentage of the prison population.⁵ As of December 1987, Native Americans made up twenty-three percent of the male prison population.⁶ Of the women offenders incarcerated as of December 1987, nineteen of fifty-three, or thirty-six percent were Native Americans.⁷

These figures highlight a serious disparity between the representation of Native Americans in the general population and their representation in the state prison population. This disparity is even more disturbing when viewed in light of the fact that the state only has jurisdictional authority over Indians for offenses committed off the reservation and outside of Indian country.⁸

The reasons for this over representation of Native Americans are difficult to pinpoint. Whether it might be due, at least in part, to discrimination in sentencing is the focus of this study.

2. Pommersheim & Wise, *supra* note 1, at 19: *Liberty and Justice for All*, *supra* note 1, at 1.

3. Pommersheim & Wise, *supra* note 1, at 19.

4. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, 1980 CENSUS OF THE POPULATION, *General Population Characteristics, South Dakota* 43-10 (1982). "These figures reveal significant growth since the 1970 census figures which showed a Native American population of 32,365 comprising 4.9% of the state's total population (665,507)." Pommersheim & Wise, *supra* note 1, at 20 (citing BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, 1970 CENSUS OF THE POPULATION, *General Population Characteristics, South Dakota* Table 17 (1971)). "Bureau of Census population statistics for Native Americans are generally conceded to be low and estimates of the Indian population in South Dakota vary significantly. Nevertheless, the census data indicate a population increase of 39 percent [sic] for Native Americans between 1970 and 1980." Pommersheim & Wise, *supra* note 1, at 20 (citing *Liberty and Justice for All*, *supra* note 1, at 3). Whether this is due to population growth or improved counting procedures is unknown.

5. Pommersheim & Wise, *supra* note 1, at 20.

6. SOUTH DAKOTA BOARD OF CHARITIES AND CORRECTIONS, ANALYSIS OF INMATE POPULATION: CALENDAR YEAR REPORT 1985-87. Two hundred forty-six out of one thousand seventy-five inmates were Native Americans. This compares to the November 1976 figures of 131 out of 500 inmates or approximately 26% of the prison population.

7. *Id.*

8. Pommersheim & Wise, *supra* note 1, at 20. See also 18 U.S.C. § § 1151, 1152, and 1153 (1982 Supp. II 1984) (defining Indian country and preserving tribal and federal criminal jurisdiction over all Indians who commit criminal offenses on the reservation, on trust land, or in dependent Indian communities off the reservation).

1. Research Context

Many researchers have attempted to discern whether and to what extent race plays a part in sentencing decisions. The focus of most studies is men, with emphasis on disparity between whites and blacks.⁹ The results of the studies are provocative because no clear picture has emerged to explain the role of race. In fact, some of the study results are contradictory in assessing the impact of race in sentencing. For example, several researchers have concluded that factors other than race — such as the nature of the offense and the defendant's criminal record — play the pivotal role in sentence length.¹⁰ On the other hand, some studies have concluded that race does have an influential role,¹¹ although it is manifested both in severity and leniency toward black defendants, depending on the social context and nature of the crime.¹² These studies have not been able to provide a definitive answer as to how race affects sentencing, but they have raised important questions and suggested some answers for decision-makers to take into account.

Studies of Native Americans in the sentencing context are rare. During the last two decades, three major studies on disparate sentencing of Native Americans have been completed.¹³ Most recently, researchers examined sentencing data on all males sent to the South Dakota State Penitentiary between 1981 and 1985, who were still incarcerated in 1985.¹⁴ This resulted in a group of 733 inmates.¹⁵

9. Hagan & Bumiller, *Making Sense of Sentencing: A Review and Critique of Sentencing Research* in 2 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 1 (1983); Kleck, *Racial Discrimination in Criminal Sentencing*, 46 AM. SOC. REV. 783 (1981) [hereinafter Kleck]; LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOC. REV. 842 (1980); Myers & Talarico, *The Social Contexts of Racial Discrimination in Sentencing*, 33 SOC. PROBS. 236 (1986); Peterson & Hagan, *Changing Conceptions of Race: Towards an Account of Anomalous Findings of Sentencing Research*, 49 AM. SOC. REV. 56 (1984) [hereinafter Peterson & Hagan]; Pruitt & Wilson, *A Longitudinal Study of the Effect of Race on Sentencing*, 17 LAW & SOC'Y REV. 613 (1983); Unnever & Hembroff, *The Prediction of Racial/Ethnic Sentencing Disparities: An Expectation States Approach*, 25 J. RES. CRIME & DELINQ. 53 (1988) [hereinafter Unnever & Hembroff].

10. See, e.g., Kleck, *supra* note 9.

11. Thornberry, *Sentencing Disparities in the Juvenile Justice System*, 70 J. CRIM. L. & CRIMINOLOGY 164 (1979); Christianson, *Our Black Prisons*, 27 CRIME & DELINQ. 364 (1981).

12. Pommersheim & Wise, *supra* note 1, at 21. See, e.g., Peterson & Hagan, *supra* note 9.

13. Pommersheim & Wise, *supra* note 1, at 19; Hall & Simkus, *Inequality in the Types of Sentences Received by Native Americans and Whites*, 13 CRIMINOLOGY 199 (1975) [hereinafter Hall & Simkus]; Brynum & Paternoster, *Discrimination Revisited: An Exploration of Frontstage and Backstage Criminal Justice Decision Making*, 69 SOC. & SOC. RES. 90 (1984) [hereinafter Brynum & Paternoster].

14. Pommersheim & Wise, *supra* note 1, at 24. Any inmate sentenced during the pe-

Information collected from the entrance record about date of sentencing, the county of conviction, and the crime; the sentence received; the judge, defense attorney, and prosecutor; whether the conviction resulted from a guilty plea or trial; the race, age, education, military service, employment, and prior record of the offender; the offender's resident or nonresident status; whether an offender reported having drug, alcohol, or mental health problems, and if so whether he had received treatment for the problem; and marital status.¹⁶

The data was "divided into offense categories; inmates sentenced for more than one crime were categorized according to the crime for which they received the longest sentence."¹⁷ Finally, the categories were examined to determine the Native American-to-white ratio.¹⁸ "Since the study . . . focus[ed] on individual offenses, crimes with few or no Native American inmates were eliminated from the sample."¹⁹ This reduced the pool to 557 inmates, of whom 409 were white and 148 Native American.²⁰

After evaluating the sentences imposed, the researchers concluded:

[T]his study did not reveal any significant disparity regarding the sentences received between Native Americans and whites convicted of felonies who were sentenced to a term of incarceration in the state prison system. This conclusion remained true when important factors such as prior record, the county of conviction, and the judge imposing sentence were introduced as controls. The analysis indicates that during 1981-1985, once a South Dakota judge decided that a prison term was the appropriate sentence, race was not a significant influence in the length of sentence imposed.²¹

The researchers cautioned, however, that these results cannot lead to the conclusion that there is no discrimination toward Native Ameri-

riod 1981-85, who had been paroled or released after serving his sentence before the summer of 1985, was excluded from the sample since his file was removed from the active files and was not readily accessible. Thus the sample initially included all inmates incarcerated in the South Dakota prison system in 1985 who were sentenced during the period 1981-85.

15. *Id.* "Before . . . coding the data, judgments were made to exclude other racial minorities from the sample since the study focuses on Native American/white sentencing disparity. This eliminated only nine black or Hispanic inmates from the sample." *Id.*

16. *Id.* at 24.

17. *Id.* If the sentences were the same, the categorization was based on the offense with the longest maximum punishment.

18. Pommersheim & Wise, *supra* note 1 at 24.

19. *Id.* For example, drug offenses were eliminated since none of the forty three inmates incarcerated for this offense were Native American. *Id.*

20. *Id.* 73.4% and 26.6%, respectively. This percentage approximates the 21% Native American population in the South Dakota prison system. *Id.*

21. *Id.* at 34.

cans in the sentencing process.²² They emphasized that their conclusions were based only on statistical results and did not assess discrimination in individual cases.²³ In addition, they pointed out that the study only examined sentences and not, for example, discrimination in charging decisions or parole.²⁴

The second major study of Native American and white offenders compared sentences imposed by district courts in an unnamed western state.²⁵ The researchers, Hall and Simkus "examined offenders sentenced to 'probationary' types of sentences . . ." ²⁶ "given to persons convicted of felonies, and those incarcerated for having committed similar crimes."²⁷ The study "controlled for the influence of such variables as prior offenses, length of sentence, education, employment, occupation, marital status, age and sex . . ." ²⁸ Hall and Simkus concluded that Native American offenders in the group which received probationary types of sentences were less likely to receive deferred sentences than white offenders²⁹ and were more likely to receive partially suspended sentences which included serving time in the state prison.³⁰ With respect to the second group of offenders studied, Hall and Simkus found that "Native-Americans were less likely to receive deferred sentences,"³¹ more likely to be sentenced to some period of

22. *Id.*

23. *Id.* (citing Young, *Liberty and Justice for All?*, Sioux Falls Argus Leader, Aug. 13, 1986).

24. *Id.*

25. *Id.* at 21 (citing Hall & Simkus, *supra* note 13).

26. Pommersheim & Wise, *supra* note 1, at 21 (citing Hall & Simkus, *supra* note 3, at 203). Probationary types of sentences are deferred sentences, suspended sentences and sentences involving a short term of imprisonment followed by probation. Hall & Simkus, *supra* note 3, at 204.

27. Pommersheim & Wise, *supra* note 1, at 21 (citing Hall & Simkus, *supra* note 13, at 205). "The data describing offenders belonging to the first population included information on all white offenders (1,574) and all Native American offenders (221) sentenced to probationary types of sentences for having committed felonies under state jurisdiction between July 1966 and the end of March 1972." Hall & Simkus, *supra* note 13, at 203. The second population was "composed of virtually all those whites and Native Americans sentenced for felony offenses in the . . . state between July 1966 and July 1977 (342)." *Id.* at 204.

28. *Id.* at 205-06.

29. 65.2% of the Native Americans received deferred sentences compared to 79.4% of the white population. *Id.* at 207.

30. 16.3% of the Native Americans received partially suspended sentences compared to 8.1% of the white population. *Id.*

31. Pommersheim & Wise, *supra* note 1, at 21 (citing Hall & Simkus, *supra* note 13, at 211). 12.7% of the Native Americans received deferred sentences compared to 24.4% of the white population. *Id.*

incarceration with a portion of the sentence suspended,³² "and more likely to receive a sentence of full imprisonment."³³ They summarized their findings as follows:

The native American [sic] offender is at a disadvantage because of his relative lack of power and influence, negative stereotypes with which he is associated, and because of his increased visibility. In short, native American [sic] offenders may be punished "because of what they *are*, rather than what they *do*." All of these factors may make the native American [sic] offender more likely to receive those types of sentences which involve not only the ascription of the convicted felon status, but incarceration in the state prison as well.³⁴

The third study of sentencing of Native Americans examined parole decisions for offenders admitted to the prison system of an unnamed midwestern state in 1970.³⁵ "The study controlled for prior felony convictions, number of major infractions . . . age, and education level."³⁶ The authors found that Native Americans served eighty-six percent of the sentence imposed before their release, compared to seventy-five percent served by non-Native Americans.³⁷ Brynum and Paternoster also noted that the actual sentences imposed were shorter for Native Americans than for the other racial groups,³⁸ but cautioned that conclusions about the sentencing process as a whole should not be drawn from the latter statistical measure, since the study did not examine the likelihood of a sentence to probation for Native Americans compared to whites.³⁹

32. Pommersheim & Wise, *supra* note 1, at 21 (citing Hall & Simkus, *supra* note 13, at 211). 4.2% of the Native Americans received partially suspended sentences compared to 2.6% of the white population. *Id.*

33. Pommersheim & Wise, *supra* note 1, at 21-22 (citing Hall & Simkus, *supra* note 13, at 211). 76.1% of the Native Americans received a sentence of full imprisonment compared to 59.4% of the white population. *Id.* "Full imprisonment" is "incarceration in the state prison for a length of time sufficient to be released by parole or mandatory discharge from prison that does not involve a period of 'probation.'" *Id.* (citing Hall & Simkus, *supra* note 13, at 220 n.5).

34. *Id.* at 203.

35. Brynum & Paternoster, *supra* note 13 at 95. The sample contained 137 offenders, of which 54 (39%) were Native Americans. *Id.* at 96.

36. Pommersheim & Wise, *supra* note 1, at 22 (citing Brynum & Paternoster, *supra* note 13, at 96).

37. Pommersheim & Wise, *supra* note 1, at 22 (citing Brynum & Paternoster, *supra* note 13, at 99). An exception to this statistical measure appears in the burglary convictions, where Native Americans served eighty-four percent of their sentences, compared to only sixty-four percent for non-Native Americans. *Id.*

38. Brynum & Paternoster, *supra* note 13, at 97. Native Americans were sentenced to an average of 18.6 months compared to 26.5 months for non-Native Americans. *Id.*

39. *Id.* at 104-05.

As these studies indicate, it is difficult to draw universal conclusions about race as a factor in sentencing, particularly with Native Americans and whites because the results of the studies are inconsistent. In addition, the existence of discrimination in individual cases and discrimination in other facets of the criminal justice process may be undetected. Scrutiny of these aspects of the process is essential to assess whether and how discrimination permeates the system as a whole.

B. *Sex as a Factor in Sentencing*

Although most of the research on disparity in sentencing addresses the impact of race on the sentences imposed on male offenders,⁴⁰ a few studies have measured differences in punishment for female and male offenders.⁴¹ Other studies have endeavored to gauge whether there are disparities in sentences meted out to female offenders of different races, primarily white-black.⁴² While all of the studies are valuable contributions to the literature, it is difficult to draw conclusions applicable to the country as a whole because of the small samples, different factors measured, and the almost universal assumption that studies of sentencing address only one phase of a multi-phase process in which prosecutors' approaches to diversion and charge reduction may be more revealing of disparity than after-the-fact measures conducted of sentencing *per se*.⁴³ Fortunately, none of the studies pretend to answer more than they can and all of them acknowledge the need for additional research to assess the situation of women within the sentencing framework.

As a general proposition, there are two dominant theories about whether women and men are sentenced differently. One is the "discrimination" theory, suggesting that there is a combination of paternalism, which more commonly favors women in sentencing, and an overly-punitive attitude, which may impose harsher sentences on them because of their deviation from the standard of behavior appropriate

40. See, e.g., Spohn, Gruhl & Welch, *The Effect of Race on Sentencing: A Re-examination of an Unsettled Question*, 16 LAW & SOC'Y REV. 72 (1981-1982).

41. Spohn, Welch & Gruhl, *Women Defendants in Court: The Interaction Between Sex and Race in Convicting and Sentencing*, 66 SOC. SCI. Q. 178 (1985) [hereinafter *Women Defendants in Court*]; Zingraff & Thomson, *Differential Sentencing of Women and Men in the U.S.A.*, 12 INT'L J. SOC. L. 401 (1984) [hereinafter Zingraff & Thomson].

42. Foley & Rasche, *The Effect of Race on Sentence, Actual Time Served and Final Disposition of Female Offenders*, in THEORY AND RESEARCH IN CRIMINAL JUSTICE 93 (1979) [hereinafter Foley & Rasche].

43. Spohn, Gruhl, & Welch, *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175 (1987) [hereinafter Spohn, Gruhl & Welch].

for women.⁴⁴ The second theory is the "non-discrimination" theory, which suggests that any differences in sentencing are based on the nature of the crime, record and other factors relevant to the case itself.⁴⁵

To test whether these theories are valid, Zingraff and Thomson studied offenders sentenced to the North Carolina penitentiary system between 1969 and 1977.⁴⁶ They selected four felony and four misdemeanor offenses and measured the length of sentence imposed on women and men. They also factored in race, age, degree of culpability, location, record and number of sentences received. Using Multiple Classification Analysis to assess the differences between sentences for males and females, Zingraff and Thomson concluded that with respect to the felonies studied, women received significantly lower sentences than men.⁴⁷ For the misdemeanors, however, the sentences were comparable.⁴⁸ They acknowledged that additional research is needed to explain the differences, but offered as a preliminary explanation the notion that the more discretion involved, the more likely paternalism can infect the sentencing decision. Thus, in their opinion, felonies give rise to more possibilities for the operation of discretion, because they implicate a wider range of possible sentences. Misdemeanors, on the other hand, involve little discretion in sentencing because of the narrow latitude given to judges with respect to acceptable penalties.⁴⁹ Zingraff and Thomson do point out that their study indicates the disparities in felony sentences could not be explained only by legally-relevant background factors.⁵⁰

The pattern of paternalism was also suggested in a gender based study in Arizona of 2,500 convicted felony offenders. The study attempted to control the variables of offense seriousness and prior criminal records by focusing on first-time "non-dangerous" felony offenders found guilty of serious crimes against person and property. Johnston, Kennedy and Shuman found a consistent pattern of preferential treatment of female defendants in the areas of plea bargaining, prison confinement and sentence length.⁵¹ Johnston, Kennedy and Shuman cautioned that not all variables were controlled, such as defendant's

44. Zingraff & Thomson, *supra* note 41, at 403.

45. *Id.*

46. *Id.*

47. *Id.* at 408.

48. *Id.*

49. *Id.* at 408-10.

50. *Id.* at 410.

51. Johnston, Kennedy & Shuman, *Gender Differences of Felony Offenders*, FED. PROBATION, Mar. 1987, at 49.

motivation and degree of culpability.⁵²

Similar themes were addressed in a 1985 study of "Metro City," where the researchers examined 50,000 cases from 1968-1979 to assess the position of women compared to men, and women of different races compared to each other in the sentencing process.⁵³ Using Multiple Regression Analysis, they compared men and women without any controls, then factored in race and charge, and analyzed both sentence severity and the prison/no prison choice. They concluded that, in general, women are treated more leniently than men with respect to the length of sentence and the decision whether to incarcerate at all.⁵⁴ When race was added to the equation, they found that black men were sentenced to prison more often and for longer terms than any other group, and that white men and black women were imprisoned for comparable terms.⁵⁵ They concluded that the differential in sentencing is more likely due to racial discrimination against black men, than to paternalism toward black women.⁵⁶

The same researchers conducted a follow-up study in 1987 of the role of race and sex discrimination in the decision to reject or dismiss charges against white, black and Hispanic males and females in Los Angeles.⁵⁷ They launched this study because of their belief that discrimination may exist in the early stages of the criminal process in handling of defendants, even though it may not be evident in sentencing.⁵⁸ The authors examined 33,000 cases and factored in race, sex, age, prior criminal record, seriousness of charge, and use of a weapon. They concluded that, in the decision by a prosecutor to reject a charge, there was discrimination in favor of females, and that white males were treated more favorably than black or Hispanic males.⁵⁹ This bolsters their conclusion that prosecutors take race and gender into account in rejecting charges. Once a charge has been filed, gender plays a role in the decision to dismiss it, but race is not a significant factor. Spohn, Gruhl and Welch are uncertain why the race and gender disparity exists, but speculate that discrimination accounts for it: where the evidence is strong, race or sex plays little part, but where the case is marginal, consideration of race or sex may make the prosecutor less

52. *Id.* at 52-54.

53. *Women Defendants in Court*, *supra* note 41.

54. *Id.* at 181.

55. *Id.* at 183. The researchers noted that there were too few white women to obtain statistically valid results. *Id.* at 182, 184.

56. *Id.* at 182.

57. See Spohn, Gruhl & Welch, *supra* note 43.

58. *Id.* at 176.

59. *Id.* at 183-84.

comfortable in taking the case forward.⁶⁰ In shifting the focus from sentencing to the early stages of the criminal process, Spohn, Gruhl and Welch added valuable insight into the existence of discrimination as a factor in the treatment of defendants.

One possible answer to the question of why there is disparity along gender lines appears in a study consisting of interviews of criminal justice personnel.⁶¹ Daly, who interviewed 35 court officials, advanced the theory of "familial paternalism" to explain gender based disparities in sentencing.⁶² Daly concluded that since women are perceived as the primary caregivers of children, leniency in the sentencing of women translates into the protection of the social institution of the family in the views of court officials. Conversely, that same leniency was not afforded to men even if they were the primary breadwinners.⁶³ The author noted that research in this area is sparse and suggested that more observation and interpretation on a first-hand basis is needed.⁶⁴

Finally, the effect of race on sentence and actual time served by women incarcerated in the Missouri State Correctional Center for Women between 1959-1974 was the subject of a 1979 study.⁶⁵ The data collected on the 974 inmates⁶⁶ were age, race, offense, sentence received, date, and type of release.⁶⁷ The authors concluded that, overall, the sentence lengths for both groups were comparable.⁶⁸ For crimes against persons, whites received a mean sentence almost double that of blacks; however, the authors attributed that fact primarily to the murder convictions in the sample.⁶⁹ They also found that blacks were sentenced more harshly for assault and property crimes.⁷⁰ Finally, they found that when the offense was a crime against a person, whites received more severe sentences than blacks. They hypothesized that the race of the victim may have contributed to this, with offenses against whites more likely to result in a heavier penalty.⁷¹ They also found

60. *Id.* at 186.

61. Daly, *Structure and Practice of Familial-Based Justice in a Criminal Court*, 21 LAW & SOC. REV. 267 (1987).

62. *Id.* at 268. The court officials interviewed were prosecutors, defense attorneys, probation officers and judges. *Id.*

63. *Id.* at 287.

64. *Id.* at 288.

65. Foley & Rashe, *supra* note 36.

66. Three hundred fifty-four inmates were black, six hundred eleven were white, and nine were classified as "other." *Id.* at 95.

67. *Id.* at 96.

68. *Id.* at 96-97.

69. *Id.* at 101.

70. *Id.*

71. *Id.*

that blacks tended to serve more of their sentences⁷² and were granted parole less often⁷³ than white inmates.

This sampling of studies which have examined female offenders reveals that discrimination based on both sex and race may infect the criminal justice process at all stages, including charging, sentencing and post-conviction. While the studies acknowledge that they are but a small step in examining the extent to which discrimination influences decisions about offenders, they are important both for their methodological approaches and substantive conclusions. They are limited in value, however, because each study examines only a small sample of the population and the results cannot be extrapolated to the nation as a whole. Additional studies should help to fill these gaps, and the work that has been done represents a solid foundation for future research endeavors.

III. RESEARCH AND METHODOLOGY

The primary focus of this study was to determine from the data whether there is a relationship between punishment severity and race during sentencing. In other words, do Native American women, as a group, receive more severe punishment than their white counterparts? Related to this issue is the question of which factors (*e.g.*, age, criminal history, number and ages of children) are most important in determining punishment? And, are these factors different or similar among whites and Native Americans? The results of this part of the study appear in Part A below.

A second focus of the study was disparity in sentencing between males and females. Because the information was collected in South Dakota, the researchers thought it appropriate to compare available data on males and females within the state in an effort to provide as complete a picture as possible of the state's sentencing patterns.⁷⁴ To this end, the data from the 1985 Pommersheim-Wise study⁷⁵ were compared with the data on women collected for this study. Those results appear in Part B below.

72. *Id.* at 102.

73. *Id.* at 103.

74. *See infra* text at 20-23.

75. *See supra* notes 14-24 and accompanying text.

A. *Race as a Factor in Sentencing: Native American and White Women*

1. Statistical Assessment of Disparity

a. *Sample Selection*

Base line data used in this study were collected during the spring and summer of 1988 from records at the Springfield Correctional Facility, which houses all female inmates and some male inmates of the South Dakota State Penitentiary. The study population consisted of all women sentenced to a term of imprisonment and incarcerated from January 1, 1980, to July 1, 1988, a total of 307 inmates.⁷⁶

The primary focus of the study was disparity between sentences for white and Native American inmates; other minorities were omitted from this study.⁷⁷ In addition, since the study required a comparison of sentences, offense categories involving only one race were eliminated.⁷⁸ These two limiting factors left a total of 272 inmates in the study; 180 were white, 92 were Native American.

Finally, because inmates are often convicted of more than one offense, it was necessary to develop a scheme for defining the primary offense which would be analyzed in the study. Inmates with more than one charge were assigned to an offense category based on the crime for which they received the longest sentence. If sentence lengths were identical, the offense which carried the most severe maximum penalty was used.

b. *Operationalizing Punishment Severity*

Reaching definitional agreement on punishment severity has always proved to be troublesome, simply because judges, jurors, victims and convicts all have differing views on the issue. For purposes of this study, punishment was operationalized as *the percentage of maximum penalty sentenced, minus years suspended*. For example, if one is convicted of aggravated assault, a Class 4 felony, which carries a ten year maximum penalty, and is sentenced to eight years with two years suspended, then that prisoner receives sixty percent of the maximum penalty. In this way, punishment is described as the portion of sentence received relative to the maximum penalty.

c. *Prisoner Data*

During the intake interview, prison authorities collect a variety of

76. The female inmate population at the Springfield Correctional Facility averages around fifty inmates at any one time.

77. This eliminated five black and two Hispanic women from the pool.

78. For example, the offenses of perjury, attempt to distribute a controlled substance and aiding and abetting escape involved only white inmates and thus, were eliminated. This resulted in a reduction of the total by twenty-eight women.

information relating to conviction, offense, age, race, defense type, prior felonies, juvenile record, and employment status. Although much of the information is obtained as "self-reported" statements, prison officials are able to verify most of the factual data (i.e., prior felonies, conviction status, juvenile records). In all, the data base contained information from twenty-six variables.⁷⁹

d. *Felony Classification*

In South Dakota, criminal offenses are classified into one of eight felony classes, each with a different maximum penalty. Table I below includes a list of offenses of which women have been convicted by felony class and the maximum penalty, with the number of offenders included for each offense.⁸⁰

e. *Demographic Characteristics*

Often differences and similarities between groups can be detected by examining frequency and percentage distributions. In this section, the demographic variables of marital status, number and ages of children, age, education, criminal history, and employment are considered.

79. County; offense; number of convictions; sentence length; maximum penalty; percent of the maximum received; judge; whether there was a defense attorney; type of plea; race; whether a weapon was used to commit the offense; alcohol, drug or mental problem; age; education; military status; whether the person had ever been employed; juvenile record; number of prior felonies; sentence data; length of sentence minus years suspended; percent of the maximum penalty with suspension; sex; number of children under age ten and age ten and over.

80. Class A and B felonies include murder, with a maximum penalty of death or life imprisonment. None of the inmates in the sample were convicted of either class of offense.

Table I

**OFFENSE TYPE BY FELONY CLASS WITH FREQUENCY
OF WHITE-NATIVE AMERICAN CONVICTIONS**

Felony Class Maximum Penalty	1 Life	Number of Cases	
	<u>Imprisonment</u>	<u>White Native American</u>	
	Manslaughter	1	1
	1st Arson	2	1
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Felony Class Maximum Penalty	2 <u>25 yrs</u>		
	1st Robbery	2	1
	1st Burglary	1	2
<hr/>			
Felony Class Maximum Penalty	3 <u>15 yrs</u>		
	2nd Burglary	6	2
<hr/>			
Felony Class Maximum Penalty	4 <u>10 yrs</u>		
	Aggravated Assault	3	10
	Grand Theft	28	4
	Possession of Stolen Property	1	1
	3rd Burglary	8	5
	Vehicular Homicide	1	1
	Accessory to Manslaughter	1	1
	Child Abuse	5	3
	2nd Robbery	1	1
	Dist. of Controlled Substance	11	2
	Intentional Damage to Property	1	3
<hr/>			
Felony Class Maximum Penalty	5 <u>5 yrs</u>		
	Forgery	38	20
	No Account Checks	22	5
	Distribution of Marijuana	5	2
<hr/>			
Felony Class Maximum Penalty	6 <u>2 yrs</u>		
	3rd DWI	30	21
	Possession of Forged Instrument	1	2
	NSF Checks	12	4

Because female inmates were the subject of this study, the researchers chose to examine marital status and the number and ages of the inmates' children, not only to determine whether they play a role in sentencing but also as a descriptive device. As a whole, twenty-seven percent of the inmates were currently married, while seventy-three percent were never married or divorced. The breakdown by race was virtually identical to this percentage. With respect to children, the researchers endeavored to determine whether the inmates had any children, and if so, what their ages were. Thirty-four percent of the inmates had no children. Fifty-six percent of the inmates had between one and five children under age ten. Twenty-six percent of the inmates had children ten years of age or older.⁸¹ Most inmates in the study were relatively young. Sixty-eight percent were thirty or younger, and almost half (49.3%) were twenty-five or younger. Seventeen inmates were forty-five or older, with sixty-three being the age of the oldest inmate. When race was factored in, 70% of white inmates were thirty or younger, as were 65.2% of Native Americans. The Native American inmate population was slightly older than the white inmate population, with a mean of 29.5 years and a median of 28 years, compared to a mean of 27.8 years and a median of 25 years for the white inmates.

The years of education for white and Native Americans differed significantly. The mean for whites was 11.2 years of formal schooling (or GED) and for Native Americans, 10.2 years. Fifty-seven percent of the Native American women had formal education of ten years or lower, while 27.2% of white women ended their education at that level. As a group, the female inmates averaged 10.9 years of formal schooling.

During the intake interview, inmates were asked to provide information about their juvenile and felony record. In some cases, the information was confirmed by a pre-sentence report. The inmates reported that 83.8% of their number had no juvenile record⁸² and 79% had no prior felony convictions as adults.⁸³

In examining the intake sheets, it became apparent that most of the inmates had been employed in some capacity, but most had been mar-

81. Broken down by race, of the 92 Native American inmates, 31 (33%) had children 10 years of age or older and 57 (52%) had children under 10 years of age. Of the 180 inmates, 40 (23%) had children 10 years of age or older and 96 (53%) had children under 10 years of age. Eighty women, including twenty-one Native Americans and fifty-nine whites, had no children.

82. The breakdown by race was comparable: 83.9% of white and 83.7% of Native Americans had no juvenile record.

83. The white inmates reported that 81% had no prior felony convictions, while the Native Americans reported 75% had none. The whites reported 14.4% had only one prior felony conviction, while the Native Americans were comparable, with 15% having one prior felony conviction.

ginally employed and often for very brief periods.⁸⁴ Because many of the jobs were comparable and almost no inmates had professional training, we organized the data to reflect only whether they had ever been employed. Nearly all—90%—had been employed in some capacity, although white inmates reported 95.6% employment and Native Americans, 79%. Furthermore, it was not clear from the intake interview whether the inmate was employed either at the time of committing the offense or at the time of sentencing, so we could not determine what role, if any, employment played in the sentencing decision.

f. *Testing for Differences in Punishment Severity*

Many studies of racial discrimination in the criminal justice process use only descriptive statistics for analysis. However, by using inferential statistics not only can we generalize from a sample to a population, but we can test hypotheses. In this case, a student's t-test was used to analyze the difference between white and Native American female inmates on our operationalized punishment variable. Using all felony classes, and after subtracting for years suspended, white inmates, on average, are sentenced to 44.3% of their maximum penalty (standard deviation 29.6), whereas Native American inmates are sentenced to an average of 45% of their maximum penalty (standard deviation 32.4), a difference of 0.7%. The results are presented in Table II.⁸⁵

84. Many inmates reported having been a housekeeper, waitress or maid, and often for as long as a one-or-two week period.

85. For those unfamiliar with statistical analysis, the following explanation of terms may be useful. "Tails" are the extreme ends of a normal distribution curve. Thus, a score has a small probability of falling into a tail region. S. GRAY, *NO-FRILLS STATISTICS* 89 (1983). When a score does fall into a tail region, one might assume it is because of something other than chance. *Id.* at 90. Statistical tests are designed to see whether a numerical value falls into a tail region. *Id.* at 90. A "two-tailed" test will assess whether the sample mean is "different from" the population mean, but will not determine whether the mean is "higher" or "lower." *Id.* at 93.

"Standard deviation" describes "the way scores disperse themselves around the mean." *Id.* at 47. If there is a lot of spread, the standard deviation will be large relative to the mean. "One standard deviation" indicates how many units you must go either below or above the mean to include 34.13% of all scores, since 68.26% of all scores will fall between one standard deviation below and one standard deviation above the mean. *Id.* at 47-48. Thus, if the mean sentence is 44.3% of the maximum penalty and the standard deviation is 29.6, then 68.26% of all sentences should fall between 14.7% and 73.9% of the maximum penalty.

Statistical analysis involves comparing samples of a population to the population, and can be done by comparing the means of each group. If the means of random samples of the same size from a population are computed, they form a normal distribution curve. The standard deviation of the distribution of these means is the "standard error." Thus, if we have a particular sample mean, we can determine whether the mean of any sample is likely to come from that population's distribution of sample means or whether the mean is significantly different and likely comes from another population. *Id.* at 92.

Table II
PERCENT OF MAXIMUM PENALTY
WITH YEARS SUSPENDED
BY OFFENSE

Group	Number of Cases	Mean (Percent)	Standard Deviation	SE	2-tailed Probability
Whites	180	44.3	29.6	2.20	0.862
Native Americans	92	45.0	32.4	3.37	

Our research question was "how likely is it to see a difference of 0.7% in sentences received in the population?" Results of the student's t-test procedure show a t-value of -0.17 with an observed significance level of 0.86 (two-tailed probability). In other words, about 86% of the time a difference of 0.7% in sentence received would occur between whites and Native Americans when the two population means are equal. Given these findings, it appears unlikely that for female inmates a statistically significant relationship exists between punishment severity and race.

In an effort to evaluate the statistical information more critically, we examined the offense categories with the greatest number of inmates to see if disparity in sentencing existed there. Most inmates in the study were convicted of Class 5 felonies (33.8%), followed closely by Class 4 (33.4%) and Class 6 (25.8%). Because of the small total number of inmates in the study (272), we were reluctant to differentiate among classes and attempt to draw universal conclusions.⁸⁶ With that caution, separating the offenses into felony classes did not change the overall result: white and Native American women receive equivalent percentages of the maximum penalty.

By further examining the individual offenses of which the largest numbers of inmates were convicted,⁸⁷ we hoped to discern any differences in sentences between the two groups. Again, as Table III indicates, the sentences were comparable, although not identical.

g. Empirical Model Building

In addition to discovering any relationship between punishment se-

86. For example, the 33.4% of the inmates incarcerated for Class 4 felonies represented ninety-one inmates, of whom sixty were white and thirty-one Native American.

87. These offenses also were selected for comparison of sentences for male and female offenders. See *infra* note 110 and accompanying text.

Table III
PERCENT OF MAXIMUM PENALTY WITH
YEARS SUSPENDED BY OFFENSE

Offense	Number of Cases		Percent of Maximum Penalty with Years Suspended (Average)	
	W	NA	W	NA
Aggravated Assault	3	10	31	34.4
Grand Theft	28	4	33.3	25.3
Forgery	38	20	39	38.2
No Account Check	22	5	40.2	44
3rd DWI	30	21	73.6	67.2

verity and race, we were interested in knowing which independent variables or variable combinations best explained any variance in punishment severity. For example, does having a juvenile record, prior felony conviction or using a weapon affect sentencing decisions? And, do the same factors apply for both whites and Native Americans?

Because some independent variables (e.g. weapon, juvenile record) were recorded as nominal level data, finding a straightforward statistical procedure for analyzing their impact on punishment was somewhat problematic. However, by recording the nominal level variables as "dummy" variables, analysis can be performed using a multiple regression procedure. For example, if a weapon was used, a "1" was assigned to the weapon variable and if no weapon was used, the weapon variable would be coded as "0".⁸⁸

In order to build a parsimonious regression model—one in which the fewest number of variables explains the greatest amount of variance—a selection procedure known as *Stepwise Selection* was used. With *Stepwise Selection*, only those variables which meet a certain criterion are allowed into the model. In this case, an associated F-value probability of 0.05 or less would enter the equation.

88. K. MEYER & J. BRUDNEY, *APPLIED STATISTICS FOR PUBLIC ADMINISTRATORS* 309 (1987).

"[T]he second variable is selected based on the second highest partial correlation. If the variable passes the . . . criteria, it also enters the equation."⁸⁹ "After each step, variables already in the equation are examined for removal."⁹⁰ "Variable selection terminates when no more variables meet the entry or removal criteria."⁹¹

As independent variables are added to the equation, the amount of explained variance or R^2 is increased. In a "perfectly fit model" the independent variables would explain all of the variance in the dependent variable. This, however, is rarely the case with social science data and certainly not the case here.

When regression analysis was applied to the data, we found only two variables (age and alcohol/drug use) met the selection criteria (probability of F-to-enter = <0.05). The amount of variance explained by these two variables was very small, $R^2 = 0.035$.

In short, the independent variables, whether taken individually or in the aggregate do not seem to make a significant impact on punishment severity either for white or Native American female inmates.

2. Inmate Perceptions of Disparity

To gain further insight into the existence of disparity in sentencing, the researchers developed a questionnaire which was distributed to all female inmates currently incarcerated at the Springfield Correctional Facility. A group meeting was held between the inmates and researchers to follow up on the initial questionnaire, and individual interviews were also conducted at that time. One life-term inmate incarcerated since 1973 dictated several hours of tapes to provide us with her insight into the existence of disparate treatment in the system, as well as its strengths and weaknesses.⁹² We analyzed this data in an effort to determine whether personal experiences and observations support the statistical results suggesting that there is no disparity in sentencing. We anticipated that the personal accounts might fill in some of the details which cannot be gleaned from a statistical analysis — such as whether discrimination occurred in a particular case. We should note that at the time of completing the questionnaire, the inmates did not know the results of the statistical analysis and so had relied on their own, admittedly limited, observations.

The results were an interesting mix of impressions, with both whites and Native Americans reporting no discrimination against their own or the other race. Almost half of those responding thought Native Ameri-

89. M. NORUSISS, ADVANCED STATISTICS GUIDE 48 (1985).

90. *Id.*

91. *Id.*

92. Interview with Billie Hamm, inmate at the Women's Correctional Facility, Springfield, South Dakota, (Mar. 1987) (transcripts are on file with authors).

cans receive longer sentences because of prejudice or unfortunate stereotypes. Some relied solely on a comparison of their own case with other inmates',⁹³ while others gave more generalized impressions.⁹⁴ Some thought Native Americans were treated more leniently, or that the races were treated equally once they had been found guilty and the decision made to impose a prison sentence.⁹⁵

The women suggested several reasons other than race to explain perceived unfairness in sentencing. One suggested that South Dakota communities are too small to be fair and tend to exaggerate minor crimes.⁹⁶ Another claimed the prosecutor in her case was not striving for justice, but only for "another notch on his gun."⁹⁷ Another thought women aged twenty-four and younger tend to receive shorter sentences and are released sooner.⁹⁸ Finally, one inmate said South Dakota "slams lengthy sentences on everyone," and wondered, "[i]s it Mid-western tradition?"⁹⁹

When asked whether men or women receive harsher sentences for the same crime, many of the inmates responded that judges sentence women more harshly. Some of the reasons cited were: "they assume mothers are born perfect mothers,"¹⁰⁰ "women aren't supposed to get in trouble,"¹⁰¹ and it is worse when the offense "isn't accepted by the puritanist attitude most men still harbor towards women."¹⁰² Other women disagreed, pointing out that "many women come in with sixty days, ninety days, and the same guy comes in with five years."¹⁰³ One woman suggested there should be a difference in treatment, saying "judges are harder on the women here in South Dakota than they are on men. Showing no compassion for the babies and husband they are separated from."¹⁰⁴

The inmate who gave us her detailed observations had conflicting impressions about discrimination, which resulted in a more complex

93. Interview with an unnamed inmate at the Women's Correctional Facility, Springfield, South Dakota (Mar. 1987) (transcript on file with authors). "I came in with two white women and they both got lesser time and are already paroled." *Id.*

94. *Id.* "I also did time in Oklahoma and Wyoming. It was true in all these places that Indian women received longer sentences." *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

picture of the sentencing and incarceration process. With respect to racial discrimination she commented:

I don't feel that a Native American Indian is any worse off than the whites. If they are treated different in the system, I have noticed they come in with a chip on, and they seem to think they have more rights because they're Native American or their attitude is bad. I have some good friends, and I'm a half breed; however, it is not the whites who are prejudiced in the prison system it is the Indian themself [sic]. They are very, very prejudiced against white inmates, against guards, against the system, and they expect better treatment than anybody else gets.¹⁰⁵

But upon further reflection, she added:

I do believe that if the American Indian is treated any different, it's because they usually are very, very quiet people. I have found them easier to do time with because they do stay to themselves [sic], but they usually hang out with their own, but they're very, very intimidated by the white status authority. So rather than speak up to get what they want, or to not get walked all over, or whatever, they will let it slide and then somebody will say, '[w]ell you can't do that, it's against your rights,' and all of a sudden they realize they have rights. But it is not with intent that the staff shows favoritism.¹⁰⁶

With respect to the effectiveness of prison as a method of rehabilitation she commented:

Actually, something you find very interesting is the fact that once women come in here, they revert back to almost high school days. You know, they talk parties, and men, and dress, and makeup. If they're 40 years old, they begin to flit and flop around, wear their hair in ponytails, and try to be 15 again. I'm not quite sure I understand, unless it's the lack of responsibility in prison . . . [A]ctually every bit of responsible characteristics that we are taught to respond to are taken from us in a system devised to dominate. I think it subdues us because of the authority.¹⁰⁷

She emphasized this lack of responsibility and its detrimental effect on those who will be released from prison, pointing out how easily people become institutionalized, how the lack of responsibility causes recidivism, and how the personal growth people experience on the outside is completely lacking in prison.¹⁰⁸

105. Interview with Billie Hamm, inmate at the Women's Correctional Facility, Springfield, South Dakota (Mar. 1987) (transcript on file with authors).

106. *Id.*

107. *Id.*

108. Interview with Billie Hamm, inmate at the Women's Correction Facility, Springfield, South Dakota (Mar. 1987) (transcript on file with authors). In this context, she stated:

Based on these comments it is evident that many inmates of both races perceive the existence of racial discrimination. Their personal observations may be limited and not unbiased, but equally likely, they reflect the continued existence of disparate treatment in at least some cases.

B. Sex as a Factor in Sentencing — Males and Females Incarcerated in South Dakota

Although the primary focus of this study was to detect racial discrimination in the sentences given to Native American and white women in South Dakota, the researchers thought it would be useful to compare the sentences given to women and men in the state. The rationale was that the study of female inmates had a methodology similar, although not identical, to the 1985 study of male inmates of the South Dakota penitentiary.¹⁰⁹ We hoped to gain a more complete picture of sentencing in the state by making the comparison.

At the outset, it is important to note that the data from the two studies are different in significant ways, so any conclusions reached are tentative, at best. First, the period of time for the two studies is different, with that of the male inmates measuring sentence lengths of inmates sentenced between 1981-1985 still in the penitentiary during the summer of 1985, and that of female inmates measuring sentence lengths from 1980 through 1988. One reason for the differing time periods is the very small number of female inmates. Their low number, compared to the relatively large number of male inmates, makes a comparison of sentencing data more difficult because of the inability to make reasonable generalizations. Related to the population size is the problem of criminal behavior — most of the women were incarcerated for non-violent, less serious offenses than the men. Finally, the study of male inmates did not include an analysis of the number and ages of their children, so it is not possible to compare the nature of each group's families to see whether that plays an important role. These methodological problems render it impossible to completely explain differences in sentences between the two groups.

With these qualifications in mind, the researchers assessed the

We have a girl in here right now that is 15 years old and she will not get any of those steps of growth. She'll learn how to become a homosexual, how to become cruel, how to do drugs, how to be vicious, jealous, conniving and learn more evil than she knew on the street. So if you can tell me that makes a better citizen well then I'd like to know how?

Id.

109. See *supra* notes 11-19 and accompanying text.

sentences imposed on female and male offenders in the state. The methodology was as described in Section II.A above, with the further modification that the only offenses with a sufficient number of females to compare to the males were aggravated assault, grand theft, passing no account checks, forgery and driving while intoxicated (DWI).¹¹⁰ Table IV below lists the offenses and percentages of maximum penalty minus years suspended for both sexes.

Table IV
STUDENT T-TEST
PERCENT OF MAXIMUM PENALTY BY SEX
FOR SELECTED OFFENSES

	Number of Cases	Mean (Percent)	Standard Deviation	Standard Error	2-Tailed Probability*
Aggravated Assault					
Men	37	58.1	29.1	4.7	0.008
Women	13	33.6	21.1	5.8	
Grand Theft					
Men	106	48.3	24.2	2.3	0.001
Women	32	32.2	23.5	4.1	
Forgery					
Men	41	65.3	25.3	3.9	0.000
Women	58	40.4	22.1	2.9	
Passing No Account Check					
Men	30	58.0	28.9	5.2	0.017
Women	27	40.9	22.7	4.3	
DWI, 3rd Offense					
Men	50	84.1	16.5	2.3	0.002
Women	51	70.9	24.6	3.4	

* Significant at the 0.05 level

As is apparent from the figures, women receive significantly lower sentences than men convicted of the same offense in the five selected categories. Explaining the differences is problematic. For example, the relatively low sentences for women convicted of aggravated assault could be offense-based, that is, that their conduct was relatively less

110. Aggravated assault and grand theft are Class 4 felonies; passing a no account check and forgery are Class 5 felonies; DWI third offense is a Class 6 felony.

culpable than their male counterparts.¹¹¹ On the other hand, paternalism could be a factor, in that a judge could view a woman's deviation from her expected conduct as an anomaly and less of a threat than a similar act by a male. Also, the relatively small number of cases could explain the judge's perception of women as law abiding citizens, making the need to punish an individual offender less pressing.

Such proffered explanations are less persuasive when a sex neutral offense such as DWI is under consideration. In that type of case, the conduct of an offender is similar, regardless of sex, yet the punishments are disparate. It is interesting to note, however, that the punishments are closer for this offense than for any of the others, and that the penalties for both sexes are relatively high, at eighty-four percent of the maximum penalty for men and seventy percent for women.

In an effort to scrutinize this data, the researchers chose to control for prior felonies to see whether that had an impact on the punishment received. Table V lists the percentages of the maximum penalty for offenders of both sexes, breaking the groups into those with none, one, and two or more prior felonies.

The effects on the male offenders of a prior conviction are what would be expected: the penalties for all but one category increase with each conviction. For the female inmates, however, the effect of prior felony convictions is negligible, with the exception of one offense category. Why a judge would consider a prior felony an aggravating circumstance for a male and not a female is certainly not apparent from the data. Perhaps other factors in the individual woman's file would justify the different treatment — for example, that the prior felony was non-violent or not particularly egregious, or that the woman had become the sole parent in her family. Such explanations are speculative, however, for the data reveal no concrete rationale for the difference in treatment.

IV. CONCLUSION

The statistical analysis of the sentences imposed on Native American and white women during 1980-1988 indicates that the sentences for both groups are comparable for similar offenses. On its face, the study suggests that judges do not discriminate based on race in the imposition of sentences for female offenders. Such a conclusion would be overbroad, however, for it fails to account for discrimination which

111. See, e.g., *Women Defendants in Court*, *supra* note 41, at 179.

Table V
PERCENT OF MAXIMUM PENALTY BY SEX
FOR SELECTED OFFENSES WITH
PRIOR RECORD CONSIDERED

	Nbr. Cases	Percent of Max.	Nbr. Cases	Percent of Max.	Nbr. Cases	Percent of Max.
	No Prior Felonies		One Prior Felony		Two or More Prior Felonies	
Aggravated Assault						
Men	19	55.2	7	60.0	11	61.8
Women	10	33.7	3	33.3	0	-0-
Grand Theft						
Men	41	37.5	25	42.8	40	62.7
Women	26	34.3	4	23.2	2	24.0
Forgery						
Men	19	57.8	7	68.5	15	73.3
Women	42	38.2	9	41.1	7	52.4
Passing No Account Check						
Men	8	50.0	3	40.0	17	62.3
Women	21	40.5	0	-0-	3	43.3
DWI, 3rd Offense						
Men	20	76.6	15	88.3	15	90.0
Women	43	70.9	5	70.0	3	73.3

might have occurred in individual cases but is not statistically significant. In addition, since this study addresses discrimination in sentencing, it does not attempt to measure the disparity in treatment in other phases of the criminal process, such as arrest and plea bargaining.

Furthermore, whether or not actual disparity exists, the perception of unfair treatment does, as is indicated by the comments of some of the penitentiary inmates of the penitentiary. Their impressions reflect the views of many in the state who allege that discrimination permeates the system.¹¹² Such conclusions may be erroneous, but may also

112. *E.g.*, Giago, *Harsh Penalties for Indians Suggest Dual Justice System*, Sioux Falls Argus Leader, Sept. 4, 1988, at 7, col. 1; Young, *Liberty and Justice for All?* Sioux Falls Argus Leader, Aug. 10-13, 1986 (four-part series).

indicate the existence of discrimination in other phases of the system.

The statistical analysis of sentences imposed on female and male offenders for selected offenses indicates that sex does play an important role in sentencing, and that in South Dakota, a woman will likely receive a significantly lower penalty than a man convicted of the same offense. This conclusion must be qualified because of the flaws in the data compared. However, even with the differences in study populations accounted for, it appears women receive lighter sentences. Why that happens — whether because of paternalism, single parenthood or less violent offense — is not apparent from the data. Likewise, whether that result is appropriate, because of legally relevant factors such as prior convictions, is not explained by the statistics. Further exploration of this information should precede any decision to lengthen women's sentences or shorten men's merely to achieve statistical equality. The factors resulting in disparate results may represent valid differences in the position of the female and male offenders and not represent discrimination because of sex.

As one director of studies of sentencing practices quipped: "[a]fter fifty years of research on whether or not there are racial or ethnic disparities in sentencing, there is only one generalizable finding: Sometimes judges discriminate and sometimes they don't."¹¹³

The results of this study indicate that as a general proposition, judges in South Dakota might discriminate on the basis of sex, and probably do not discriminate on the basis of race for female offenders. Why they behave in this way remains unanswered, though the data and inmate commentary suggest a rich source for continuing investigation.

113. Unnever & Hembroff, *supra* note 9, at 53.