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1989

### Going to the Penitentiary: A Study of Disparate Sentencing in South Dakota (with Steve Wise)

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# GOING TO THE PENITENTIARY

## A Study of Disparate Sentencing in South Dakota

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This article examines the sentencing patterns involving Indian and non-Indian male felons incarcerated in the South Dakota State Penitentiary during the period from 1981 through 1985. The study reveals no systemic, statistically significant patterns of discrimination in the sentencing process that result in commitment to the state penitentiary. This conclusion remained true when important factors such as prior record, county of conviction, and the judge imposing the sentence were introduced as controls. These results, however, must be viewed with caution with respect to cases of individual discrimination and the potential of discrimination at other critical decisional points in the criminal justice process such as arrest, probation, and parole decisions.

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Native Americans constitute the largest minority in the state of South Dakota. According to the 1980 census, the Native American population is 44,948, which is about 6.5% of the state's population of 690,768. Despite their modest numbers in the general population, Native Americans represent a substantially higher percentage of the population in the South Dakota State Penitentiary. For example, as of December 1985, Native Americans made up 21% of the prison population (210 out of 979 inmates). These figures highlight a serious disparity between the

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CRIMINAL JUSTICE AND BEHAVIOR, Vol. 16 No. 2, June 1989 155-165

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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 has only jurisdictional authority over Indians for offenses committed off the reservation and outside of Indian country.

One of the few certain things about criminal sentencing is that it is an increasingly common subject of empirical research (Blumstein, Cohen, Martin, & Toory, 1983). Most of this research deals with black criminal defendants, and the overall results have been inconclusive. Some studies concluded that disparity is due to racial discrimination, but more often these studies concluded that the disparity is due to the effect of legal factors, such as the seriousness of the offense and the defendant's prior record (Spohn, Gruhl, & Welch, 1982).

One of the few recent sentencing studies involving Native Americans noted that little research has been done on how the legal system treats other minorities, even though in some states Chicanos and Native Americans make up a significant proportion of the nonwhite population (Brynum & Paternoster, 1984). The two most prominent studies involving Native Americans reveal an interesting set of findings.

A study in an unnamed western state (Hall & Simkus, 1974), which involved a comparison of the distribution of the types of sentences imposed on Native Americans by district courts, concluded that Native American offenders were more likely to receive sentences involving incarceration in the state prison. The study also found that Native Americans were less likely to receive sentences that would have allowed them to escape stigmatization as a "convicted felon."

The research controlled for the influence of such variables as prior offenses, length of sentence, education, employment, occupation, marital status, age, and sex and found that Native American offenders were less likely to receive deferred sentences than were white offenders (65.2% to 79.4%), while Native Americans were more likely to receive partially suspended sentences involving incarceration in the state prison (16.3% to 8.1%). The study also found that Native Americans were less

likely to receive deferred sentences (12.7% to 24.4%), more likely to receive sentences involving a limited period of incarceration with the remainder of the sentence suspended (4.2% to 2.6%), and more likely to receive sentences of full imprisonment (76.1% to 59.4%).

In a second authoritative study (Brynum & Paternoster, 1984) involving Native Americans, the data employed in the analysis came from an unnamed upper-plains state with a relatively large Native American population. The focus of the analysis was the granting of parole. The study controlled for prior felony convictions, the number of major infractions as defined by South Dakota Department of Corrections policy, age, and educational level.

The study found that non-Indians served an average of 75% of their sentence before their release from prison, while Indians served an average of 86% of the sentence imposed. This difference is even more striking in the burglary sample where non-Indians served an average of 64% and Indians served an average of 84% of their sentence.

The overall result of the empirical research involving disparate sentencing and race has not been conclusive. Sentencing practices and sentencing disparity in general have, nevertheless, spurred continued controversy and calls for reform, particularly at the federal level, where Congress has enacted sentencing guidelines that will sharply limit federal judicial discretion in the sentencing process. The sentencing process remains at the heart of the public policy debate about the deprivation of personal liberty and the protection of the community, and therefore requires continuous scrutiny.

## METHOD

### SUBJECTS

We collected data from the entrance record sheets of male inmates in the South Dakota prison system. Before inmates enter

the prison system, prison authorities interview them and list useful information on the entrance record. Much of the information was therefore self-reported by the inmates, but the penitentiary verified important information such as the inmate's prior record and sentence imposed through rap sheets, presentence reports, and the judgment of conviction.

The sample initially included all inmates currently incarcerated in the South Dakota prison system who were sentenced during the period January 1, 1981, through June 30, 1985—a total of 733 inmates. Other racial minorities were excluded from the study population since the study focuses on the Native American-white sentencing disparity. This eliminated only nine black or Hispanic inmates from the sample. Next we divided the data into offense categories. Since the study was to analyze individual offenses, crimes with no or relatively few Native American inmates were eliminated from the sample. For example, of the 43 inmates in the study population for drug offenses, there were no Native American offenders and this category was therefore eliminated.

The final sample consisted of 557 inmates with 409 whites (73.4%) and 148 Native Americans (26.6%). This percentage approximates the 21% Native American population in the general prison population in 1985. The ethnicity of the offenders was determined by self-evaluation.

## PROCEDURE

We gathered data from the entrance record sheets for the sample subjects on important legal, extralegal, and process variables. These test factors were as follows:

- (1) Race of the offender—whether the inmate was white or Native American
- (2) Sentence length—measured in years
- (3) Number of prior felonies—the number of previous felony convictions, collapsed into three categories: no prior felonies, one prior felony, and two or more felonies
- (4) Defense attorney type—the type of attorney that represented the inmate: retained attorney, court-appointed attorney, or no attorney

- (5) Case disposition—whether the conviction was the result of a guilty plea or a not-guilty plea and a trial
- (6) Type of offense—the specific crime for which the offender was sentenced (e.g., third degree burglary)
- (7) Bail status—whether the offender was in jail or out on bond before sentencing
- (8) County of conviction—the county in which the inmate was sentenced
- (9) Judge—the judge who sentenced the inmate
- (10) Education—the number of years of education the offender completed
- (11) Age—the inmate's age at the time of incarceration
- (12) Employment—the number of years at the longest job the offender held.

The dependent variable in this study was the severity of sentence. Studies have used various measures of sentence severity to examine the relationship between ethnicity and the sentence received, including the sentence length in years and the type of sentence (probation, fine, or jail sentence). Most studies then introduce the seriousness of the offense as a control variable; again, there is little agreement on how to operationalize this variable.

Since the sample in this study is drawn from a population of prison inmates who have received the same type of sentence—a term of years of incarceration—and each crime committed by the subjects of this study has a set measure of severity according to the maximum sentence set by the legislature, the severity of the sentence variable was operationalized as the percentage of the maximum sentence received by the offender. We believe this is a superior method of classifying the dependent variable since it produces a natural interval scale and permits analysis across offense categories with a “built in” control for offense seriousness.

#### DATA REDUCTION

Statistical findings were calculated using the Statistical Package for the Social Sciences software (SPSS/X). The two-dimensional cross-tabulation tables group the percentage of maximum sen-

tence in five categories: less than 20%, 21% to 40%, 41% to 60%, 61% to 80%, and 81% to 100%. This group in effect makes percentage of maximum sentence an ordinary polytomy. Association between the independent and dependent variables was tested by calculating Kendall's  $\tau_c$ .

## RESULTS

Table 1 displays the final sample divided according to felony class, type of offense, and race.

The statistical analysis of the data began with a cross-tabulation of the percentage of maximum penalty by race for the entire sample to determine whether Native Americans in the sample received a significantly higher percentage of the maximum sentence than whites. As demonstrated in Table 2, there was little association between race and the percentage of maximum sentence received by offenders in the sample (Kendall's  $\tau_c = -0.05$ ). More simply, our study indicates that Native American offenders do not receive significantly more severe sentences than whites.

The next step was to introduce and control for other important variables to examine their influence on the dependent variable. One legal factor introduced was the number of prior felony convictions for each offender. It was hypothesized that an offender who has a more extensive criminal record would receive a higher percentage of the authorized maximum sentence. The cross-tabulation of the sentence severity variable by number of prior felonies evinced some association between these two variables (Kendall's  $\tau_c = 0.17$ ). One would, however, expect the association to be greater. Judges may be more cognizant of the nature of the offender's prior record, that is, the type of prior conviction, rather than merely the number of prior felonies. Or perhaps the incidence of guilty pleas (92% in our study) and plea bargaining has an impact on the influence of the offender's prior record.

When the control variable of prior felony convictions was introduced, again there was no significant association between

TABLE 1  
Study Population Divided by Felony Class, Offense, and Race

Maximum Penalty	Felony Class/	Race		Row Total	Percent
		White	Indian		
Life	<u>Class 1</u>				
	Manslaughter 1st	12	8	20	3.6
25 years	<u>Class 2</u>				
	Robbery 1st	16	5	21	3.8
	Burglary 1st	15	9	24	4.3
15 years	<u>Class 3</u>				
	Burglary 2nd	16	7	23	4.1
10 years	<u>Class 4</u>				
	Aggravated Assault	25	13	38	6.8
	Sexual Contact	37	4	41	7.4
	with Child				
	Escape	8	8	16	2.9
	Grand Theft	88	18	106	19.0
	Possession of	8	7	15	2.7
	Stolen Property				
	Burglary 3rd	89	43	132	23.7
5 years	<u>Class 5</u>				
	Forgery	33	8	41	7.4
	No Account Check	29	1	30	5.4
2 years	<u>Class 6</u>				
	DWI 3rd Offense	33	17	50	9.0
Column Total		409	148	557	100.0
Percent		73.4	26.7		

race and sentence severity. In fact (as shown in Table 3), for offenders with only one prior felony there is a fairly strong negative association between race and the percentage of maximum sentence (Kendall's  $\tau_c = -0.19$ ), which suggests that whites with one prior felony received a higher percentage of the maximum sentence than Native Americans. The basic finding is, controlling for the offender's prior felony record, that Native Americans did not receive harsher sentences than whites. We also found no significant association among race and number of prior felonies; Native Americans in the sample did not have a significantly higher number of prior felonies than whites.



TABLE 2  
Analysis of Sentence Severity by Race

Percentage of Maximum Penalty	Race		Row Total	Percent
	White	Indian		
Less than 20%	54	23	77	13.8
21% - 40%	121	46	167	30.0
41% - 60%	89	31	120	21.5
61% - 80%	54	27	81	14.5
81% - 100%	91	21	112	20.1
Column Total	409	148	557	100.0
Percent	73.4%	26.7%		
	Kendall's tau(c) = -0.05			

TABLE 3  
Sentence Severity by Race Controlling for Prior Record

Percentage of Maximum Penalty	Race		Row Total	Percent
	White	Indian		
Less than 20%	11	10	21	15.2
21% - 40%	28	17	45	32.6
41% - 60%	24	4	28	20.3
61% - 80%	11	6	17	12.3
81% - 100%	21	6	27	19.6
Column Total	95	43	138	100.0
Percent	68.8%	31.2%		
	Kendall's tau(c) = -0.19			

In addition, the study examined offenders within offense categories and offense classes. The hypothesis was, although no significant disparity was demonstrated in the sample as a whole, perhaps disparity occurred for certain crimes or class of felonies. Collapsing the sample into offense categories or classes introduced the problem of sample size and zero cells in certain cross-tabulations. Therefore, only the salient offense categories and classes where these difficulties were not present were selected for analysis. Burglary third, grand theft, and DWI third offense were chosen on this basis for offense category analysis, and Class 4 property offenses were chosen for offense class analysis. The cross-tabulation tables demonstrate that no significant association exists between race and sentence severity for the offenses and offense class selected for individual analysis.

The results thus far showed no meaningful disparity in the statewide sample between the sentences received by Native Americans and whites. In further analysis, the sample was divided to eliminate judges who had sentenced only white offenders and counties in which only white offenders had been sentenced. We hypothesized that although statewide totals might show no disparity in sentencing practices, the inclusion of judges who have only sentenced whites and counties where only whites had been sentenced might have masked disparity among judges who sentence white and Native American offenders and in counties where both whites and Native Americans were sentenced. This hypothesis proved to be incorrect since there was no significant disparity demonstrated in sentencing practices by judges in counties that sentenced both whites and Native Americans—even when prior record, offense category, and offense class were introduced as control variables.

As a final step, we decided to examine two individual counties—Minnehaha and Pennington Counties—which are the two largest off-reservation counties and that have significant Indian populations. This obviously reduced the sample size and made the imposition of control variables impossible. The basic conclusion reached, however, was that for each county no significant association existed between race and the percentage of the maximum sentence received by the offender.

## DISCUSSION

In summary, this 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 the sentence were introduced as controls. The analysis indicates that during 1981 through 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.

These results, however, must be viewed with caution and do not support a conclusion that no discrimination exists in sentencing Native American offenders or at other decisional points in the criminal justice system. This study does not rule out disparity or discrimination in any particular case. This study examined a population for statistically significant disparity and does not, indeed cannot, address *individual* cases.

Yet the fact remains that Native Americans are represented disproportionately in the South Dakota prison system. On one hand, there is the possibility that this is related to different patterns of behavior, including problems related to alcoholism and poverty, among Native American offenders. On the other hand, the police decision to arrest an offender, the prosecutor's decision as to what offense to charge and whether or not reduce a charge (i.e., reducing a felony to a misdemeanor), and the judge's decision to impose probation rather than a prison term are all influential in "funneling" particular offenders into the prison system. Also, subsequent discretionary parole decisions, which "funnel" offenders out of the prison system, may reflect disparity. None of these decisional points is examined in this study, which focuses solely on offenders who have been sentenced to incarceration.

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