

## University of South Dakota School of Law

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

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NATIVE  
AMERICANS,  
CRIME, AND  
JUSTICE

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*For Harry and Grethe Nielsen, my parents, with love, and to  
Dr. Chester Cunningham, my counsellor and guide,  
with great appreciation*

M.O.N.

*For Dr. Gwynne Nettler, a wise man, whom I am fortunate to  
count as friend, colleague, and mentor, and for Herb Goldstein and  
Mack Gordon, native guides of a different sort*

R.A.S.

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## "I FOUGHT THE LAW AND THE LAW WON"

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### 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.

### 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 con-

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cern in South Dakota" (Pommersheim and Wise, 1987). As Pommersheim and Wise have observed, although these concerns have been discussed for many years (1987:19), little research has been done in the state to either confirm or deny that unequal treatment exists (1987:19).

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.<sup>1</sup> Consistently, however, they constitute a much higher percentage of the prison population (1987:1). As of December 1987, Native Americans made up twenty-three percent of the male prison population.<sup>2</sup> Of the women offenders incarcerated as of December 1987, nineteen of fifty-three, or thirty-six percent were Native Americans.

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. (Pommersheim and Wise, 1987:20)<sup>3</sup>

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.

## 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. To this end, the data from the 1985 Pommersheim-Wise study (1987) were compared with the data on women collected for this study. Those results appear in Part B below.

### *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 fe-

male 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.

The primary focus of the study was disparity between sentences for White and Native American inmates; other minorities were omitted from this study. In addition, since the study required a comparison of sentences, offense categories involving only one race were eliminated. 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 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.<sup>4</sup>

*d. Felony Classification*

In South Dakota, criminal offenses are classified into one of eight felony classes, each with a different maximum penalty. Table 26.1 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.<sup>5</sup>

*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.

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 divorced or never married. 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.<sup>6</sup> 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 record and 79% had no prior felony convictions as adults.

In examining the intake sheets, it became apparent that most of the inmates had been employed in some capacity, but most had been marginally employed and often for very brief periods. 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

Table 26.1 Offense Type by Felony Class with Frequency of White-Native American Convictions

		Number of Casts	
		White	Native American
Felony Class	1		
Maximum penalty	<i>Life imprisonment</i>		
	Manslaughter	1	1
	1st arson	2	1
Felony class	2		
Maximum penalty	<i>25 yrs</i>		
	1st robbery	2	1
	1st burglary	1	2
Felony class	3		
Maximum penalty	<i>15 yrs</i>		
	2nd burglary	6	2
Felony class	4		
Maximum penalty	<i>10 yrs</i>		
	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
Felony class	5		
Maximum penalty	<i>5 yrs</i>		
	Forgery	38	20
	No account checks	22	5
	Distribution of marijuana	5	2
Felony class	6		
Maximum penalty	<i>2 yrs</i>		
	3rd DWI	30	21
	Possession of forged instrument	1	2
	NSF checks	12	4

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, whereas Native American inmates are sentenced to an average of 45% of their maximum penalty, a difference of 0.7%.

Our research question was "how likely is it to see a difference of 0.7% in sentences received in the population?" About 86% of the time a difference of 0.7% in sentence received would occur between Whites and Native Americans when the



Table 26.2 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

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. 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, we hoped to discern any differences in sentences between the two groups. Again, as Table 26.2 indicates, the sentences were comparable, although not identical.

#### *g. Empirical Model Building*

In addition to discovering any relationship between punishment severity 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? [At this point in the original article, results of the statistical analysis are presented.]

In short, these 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. 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 Americans receive longer sentences because of prejudice or unfortunate stereotypes. Some relied solely on a comparison of their own case with other inmates,<sup>7</sup> while others gave more generalized impressions.<sup>8</sup> 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.

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. Another claimed the prosecutor in her case was not striving for justice, but only for "another notch on his gun." Another thought women aged twenty-four and younger tend to receive shorter sentences and are released sooner. Finally, one inmate said South Dakota "slams lengthy sentences on everyone," and wondered, "[i]s it Midwestern tradition?"

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;" "women aren't supposed to get in trouble;" and it is worse when the offense "isn't accepted by the puritanist attitude most men still harbor towards women." Other women disagreed, pointing out that "many women come in with sixty days, ninety days, and the same guy comes in with five years." 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."

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

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.

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.

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.

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. 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

Table 26.3 Percent of Maximum Penalty by Sex for Selected Offenses with Prior Record Considered

	<i>Nbr.</i>	<i>Percent</i>	<i>Nbr.</i>	<i>Percent</i>	<i>Nbr.</i>	<i>Percent</i>
	<i>Cases</i>	<i>of Max.</i>	<i>Cases</i>	<i>of Max.</i>	<i>Cases</i>	<i>of Max.</i>
	<i>No Prior Felonies</i>		<i>One Prior Felony</i>		<i>Two or More Prior Felonies</i>	
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

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 sentences imposed on female and male offenders in the state. The methodology was described in the original article 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). Table 26.3 lists the offenses and percentages of maximum penalty minus years suspended for both sexes.

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 culpable than their male counterparts. 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 26.3 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.

### 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 might have occurred in individual cases but it 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.<sup>9</sup> Such conclusions may be

erroneous, but may also 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" (Unnever and Hembroff, 1988:53).

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.

#### NOTES

1. U.S. Department of Commerce, 1980, 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 and Wise, 1987:20, citing U.S. Department of Commerce 1970, 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 and Wise, 1987:20, citing U.S. Commission on Civil Rights. South Dakota Advisory Committee, 1977:3). Whether this is due to population growth or improved counting procedures is unknown.

2. South Dakota Board of Charities and Corrections, 1987. 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.

3. 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 com-

mit criminal offenses on the reservation, on trust land, or in dependent Indian communities off the reservation).

4. 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.

5. 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.

6. 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.

7. 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 white women and they both got lesser time and are already paroled."

8. (As note 7). "I also did time in Oklahoma and Wyoming. It was true in all these places that Indian women received longer sentences."

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