

Examining the Treatment of American Indian Defendants in United States Federal Courts

by

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ABSTRACT

In this dissertation, I examine the treatment and sentencing of American Indian defendants. This work contributes to research on cumulative disadvantage and the role race and social context play to influence federal sentencing outcomes. Disparities in federal sentencing for racial and ethnic minorities are an important concern to scholars and policy makers. Literature suggests that blacks and Latinos are sentenced more harshly than similarly situated white offenders. These findings are concerning because they suggest that minorities are treated unfairly by the criminal justice system, questions the legitimacy of how offenders are processed and treated, and defendants of color who are meted out tougher punishments face substantial social and economic difficulties thereafter. Although the black-white and Latino-white disparities have been identified and highlighted, less is known about whether disparities extend to other minority groups, and consequently little is known about the treatment of these neglected groups.

I investigate whether American Indian defendants experience cumulative disadvantages at multiple decision points, disadvantage over time, and the effect of social context on American Indian disadvantage, drawing on the focal concerns and minority threat perspectives. The focal concerns perspective is used to develop hypotheses about how American Indian defendants will receive harsher punishments at multiple decision points. I also use this perspective to predict that American Indian disadvantages will increase over time. Lastly, I examine social context and its effect on punishment decisions for American Indians using the minority threat perspective. I hypothesize that

social context impacts how American Indian defendants are sentenced at the federal level.

Data come from the Federal Justice Statistics Program Data Series, the US Census, and the Uniform Crime Report, with a focus on data gathered from the Administrative Office of the United States Courts and the United States Sentencing Commission. A range of modeling strategies are used to test the hypotheses including multinomial logistic regression, ordinary least squares regression, and multilevel modeling.

The results suggest that cumulative disadvantages against American Indian defendants is pronounced, American Indian disparity over time is significant for certain outcomes, and social context plays a limited role in American Indian sentencing disadvantage.

DEDICATION

Kenneth Mike—Gee, we Indian did it, Next! I love you. Thank you for walking this path with me. Thank you for being by my side for the past 12 years and my best friend always. Thanks for the constant laughs, love, support, encouragement, and for pushing me. Thank you for your dedication to our family and for the many sacrifices you made so that I could make this dream of mine a reality. Most of all, thank you for our beautiful hijos. Esha Lautaro, Citlalli Tontsia, and Meztli Namichi you three are magic, answered prayers, and an ever-present source of strength and power for me. This work would not have been possible without you. *Esha*—mi lobo—you changed my life forever. Thank you for coming on this journey with me and for holding my hand. Thank you for inspiring me and for always asking *all* the questions. I hope you never lose your sense of curiosity and passion to learn. *Citlalli*—mi estrella—I'm so lucky to be your Mama. Thank you for all the hugs and laughs when I needed them the most. You showed me how to be brave and taught me about resilience. Do not let this world dull your shine, mama. *Meztli*—mi luna—you came to us at the perfect time. Thank you for being with me through the most challenging aspects of seeing my dreams realized. I felt your love and it propelled me forward. I hope all three of you know that I needed each of you and couldn't have accomplished this without you. Nobody loves you more than your Mama!

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CHAPTER 1: INTRODUCTION

The past two decades have produced compelling evidence of significantly harsher treatment and sentencing practices aimed at defendants of color (see Baumer, 2013; Mitchell, 2005; Spohn, 2000; Ulmer, 2012; Zatz, 2000). In particular, scholars have shown that black and Latino defendants, compared to similarly situated white offenders, are more likely to receive harsher treatment at early stages of the sentencing process (e.g., detention prior to sentencing), receive tougher punishments, and serve longer durations of their sentence. In some instances, Latino defendants are punished even more harshly than white *and* black defendants (see Demuth & Steffensmeier, 2004; Feldmeyer & Ulmer, 2011; Hebert, 1997; Steffensmeier & Demuth, 2000; Steffensmeier & Demuth, 2001).

Accordingly, these findings have considerably advanced scholarship, yet there are several gaps in the literature that have yet to be addressed. For example, while the disparities between white and minority defendants have been well documented, these findings have almost exclusively focused on a black-white-Latino racial and ethnic triad (for an examination of other racial and ethnic groups, however, see Franklin, 2013; Johnson & Betsinger, 2009; Kutateladze et al., 2014). Nonetheless, sentencing research for American Indians is notably underdeveloped, with American Indians typically overlooked, classified as “other” in the analysis, or omitted from the analysis altogether. In fact, American Indians are disturbingly underrepresented, underserved, and understudied in criminology and criminal justice research (Lujan, 2006; Nielson, 1996; Nielson & Silverman, 2009; Young, 1990).

The virtual inattention to American Indian defendants in criminal sentencing is unfortunate given their unique social position as one of the most historically oppressed minority groups. Similar to other minority groups, such as blacks and Latinos, American Indians have lower socioeconomic status, higher unemployment rates, and are afflicted by negative stereotypes regarding their culture and lifestyle. As a matter of fact, American Indians face considerable challenges that are *distinct* from their minority counterparts, challenges that may directly and indirectly impact criminal sentencing. Specifically, the historical connection to colonialism and subjugation, handed down by western institutions (e.g., the criminal justice system), has left American Indians severely impoverished and facing crippling social issues, such as paternalism by the federal government, extreme social isolation, challenges with identity and assimilation, lack of traditionalism, cultural suppression, forced acculturation, historical trauma, and tribal sovereignty (e.g., Evans-Campbell, 2008; Poupart, 2002, 2003 Snipp, 1992; Whitbeck et al., 2010). As a result, American Indians may be susceptible to the stigma and stereotypes connected to these issues.

It is also important to assess differential treatment for American Indians because biases in judicial decision-making can have lasting individual and social costs for the groups that are most impacted—in this case, American Indians. Continued racial disparity in sentencing processes can exacerbate the disadvantages American Indians experience and generate a wide range of collateral consequences (e.g., unemployment, family disruption, disconnect to neighborhood ties, lack of access to resources and benefits, etc.)

(Western, 2006). Biases in judicial decision-making may also weaken trust and cooperation among members of this group toward the federal criminal justice system and its actors (e.g., judges and prosecutors). For these reasons, more research that examines the criminal processing and treatment of American Indian defendants is needed.

To date, only a small number of studies have examined how American Indian defendants are sentenced. These studies have found that, similar to blacks and Latinos, American Indians are meted out tougher punishments (Alvarez & Bachman, 1996; Bachman, Alvarez, & Perkins, 1996; Franklin, 2013). American Indian defendants may encounter discrimination and receive harsher sentences because of the subjugation they continue to face and the reinforcement of negative stereotypes concerning their culture and lifestyle (e.g., savages and drunks) (Alvarez & Bachman, 1996; Bachman et al., 1996; Powers, 2006; Zatz, Lujan, & Snyder-joy, 1991). Although existing research has done well to highlight the harsher treatment of American Indian defendants and has significantly advanced scholarship, the examination of this group in courts and judicial decision-making warrants further attention from researchers for several reasons. First, previous studies have typically focused on one decision point (i.e., sentencing) and have not yet investigated cumulative disadvantages for American Indians. Second, our understanding of American Indian disadvantage has only been observed at one point in time; longitudinal research is needed to assess whether this disparity is consistent over time. Third, research that includes American Indians needs to account for social context and assess the effect of social context on how American Indians are treated.

Review of the Relevant Literature

Prior sentencing studies have identified racial and ethnic disparities in sentence outcomes and have suggested that minority defendants are disadvantaged compared to similarly situated white offenders. Black and Latino offenders particularly fared the worst (e.g., Albonetti, 1997; Bridges & Crutchfield, 1988; Doerner & Demuth, 2010; DuRose, 2007; Johnson et al., 2008; Paternoster et al., 2003; Petersilia, 1985; Rosie & Burke, 1997; Russell-Brown, 2009; Sampson & Lauritsen, 1997; Spohn, 2000; Steffensmeier & Demuth, 2000; Walker et al., 2000; Walker et al., 2011; Zatz, 1984, 1987). Prior studies also found that Asian-Americans were treated similarly as whites, and in some cases, more leniently than whites (Johnson & Betsinger, 2009; see also Everett & Wojtkiewicz, 2002; Kutateladze et al., 2014).

To date, only a small body of research has examined how American Indians are treated, and these studies have produced mixed findings. More specifically, research indicates that American Indians are over-policed (e.g., Perry, 2009a, Perry, 2009b), receive harsher sentences (e.g., Alvarez & Bachman, 1996; Bachman et al., 1996; Franklin, 2013; Wilmot & Delone, 2010), and are over-incarcerated (e.g., Archambeault, 2003; Beran, 2005; Ross, 1998). Other studies, however, found a lack of evidence for American Indian disadvantage (e.g., Engen & Gainey, 2000; Feimer et al., 1990; Hutton et al., 1989; Leiber, 1994; Pommersheim & Wise, 1989; Rodriguez, 2003). Relevant to the current dissertation, prior studies of criminal sentencing that focused on American Indian defendants reported many of the same findings—American Indians are treated and

sentenced, at minimum, as harshly as their minority counterparts (e.g., Latino and black defendants) (see Bynum, 1981; Bynum & Paternoster, 1984; Hagan, 1975, 1977; Hall & Simkus, 1975; Muñoz & McMorris, 2002; Swift & Bickel, 1974; Williams, 1979).

Although the aforementioned studies have significantly contributed to the literature on sentencing decisions concerning American Indian offenders, they have notable weaknesses. Specifically, these studies were largely limited to one state (Engen & Gainey, 2000; Feimer et al., 1990; Hutton et al., 1989; Leiber, 1994; Pommersheim & Wise, 1989; Rodriguez, 2003), or solely examined female (Hutton et al., 1989) or adolescent defendants (Leiber, 1994): they did not consider contextual factors that may influence the decision-making process (except see Ulmer & Bradley, 2018). More importantly, these prior studies have failed to examine various decision points in the criminal justice system that work jointly to produce instances of disparities

This dissertation is designed to address and overcome these weaknesses. Specifically, this dissertation seeks to advance sentencing scholarship and contribute to a growing body of literature by providing a comprehensive understanding of how American Indian defendants are treated in United States federal courts by assessing three important questions:

- (1) Are American Indian defendants more likely to experience cumulative disadvantages than similarly situated offenders of other races and ethnicities?
- (2) Have the disadvantages against American Indians increased over time?
- (3) Does social context (e.g., American Indian population size) affect how American Indian offenders are treated?

Present Study

This dissertation has two goals. The first goal is to extend the current state of sentencing research in criminology and criminal justice by emphasizing the importance of including other marginalized groups—in this case, American Indians. The examination of American Indians in US federal courts is especially important because American Indians are one of the most underprivileged racial/ethnic groups in America, with limited resources, and who suffer from unwarranted negative stereotypes about their culture and lifestyle. Collectively, these factors may directly impact their processing and treatment at different stages of the criminal justice system (e.g., charging decision and sentence outcome).

The second goal of this dissertation is to contribute to the discussions on criminal justice policy and practices. In particular, this study seeks to address the disparities that American Indian defendants may face in the federal court system. To demonstrate, despite the development of sentencing guidelines that are explicitly designed to ensure that similarly situated offenders receive congruent sentences, additional policies are needed to reduce biases—especially those that disadvantage American Indians. And, by doing so, this study also draws awareness to the collateral consequences that may stem from harsh punishment patterns and sentence disparities (e.g., reduced employment opportunities, family disruption, and disconnect to community resources). Lastly, the research presented herein can provide a more comprehensive understanding of the over-incarceration of American Indians in the United States.

In this dissertation, I draw from two prominent theoretical perspectives to examine the sentencing patterns of American Indian defendants: the focal concerns perspective and the minority threat perspective.

Focal Concerns Perspective

The focal concerns perspective suggests that judicial behavior and decision-making are guided by three focal concerns: Blameworthiness, community protection, and practical concerns and constraints (Steffensmeier, 1980; Steffensmeier et al., 1993; Steffensmeier et al., 1998; Ulmer, 1997). Defendant *blameworthiness* considers the culpability and level of harm caused by the offender. *Community protection* examines the extent to which the defendant poses a threat to his/her community. This focal concern is guided by particular factors such as education and employment, and whether a defendant is likely to recidivate. *Practical concerns and constraints* focus on the costs of sentencing an offender to prison. Practical concerns and constraints also take into account organizational concerns—the way courtroom officials interact with one another and other case-specific information (Steffensmerier et al., 1993; Steffensmeier & Demuth, 2001; Steffensmeier et al., 1998; Johnson, 2003; Ulmer & Johnson, 2004). These focal concerns assist court actors when they mete out sentences, and hypotheses derived from this perspective have received strong support from the sentencing literature (e.g., Baumer et al., 2000; Steffensmeier et al., 1998).

According to the focal concerns prospective, American Indians may face harsh treatment in the sentencing process. American Indian communities are severely

impoverished, lack resources (legal and non-legal), and are socially isolated (reservation living). Consequently, the perception of members of Indigenous communities as being outsiders may make them appear antithetical to the contemporary society and in turn they may be perceived as blameworthy, more dangerous and threatening, thus warranting severe punishment to better protect the community. In addition, American Indians are largely stigmatized by negative stereotypes about their culture and lifestyle as being savage, drunk, aggressive, and violent (Alvarez & Bachman, 1996; Bachman et al., 1996; Powers, 2006; Zatz et al., 1991). In American culture, for example, there exist subtle yet deep rooted prejudices toward American Indian communities that may extend to the courtroom environment, and suggest to court officials that American Indian defendants are deserving of more severe punishment. The normalcy of using mascots to portray American Indian culture in collegiate and professional sports (e.g., Washington Redskins, Chief Wahoo of the Cleveland Indians, etc.) demonstrates a lack of knowledge about American Indians. The mascots depict imagery that would otherwise be considered overtly racist if applied to another racial or ethnic group, yet it is largely accepted by mainstream society as honoring American Indians and their culture (see Fryberg, 2003; Kim-Prieto, Goldstein, Okazaki, & Kirschner, 2010).

Examples of these images include mascots wearing traditional American Indian regalia (e.g., headdresses, bows, and arrows), football spectators imitating the tomahawk chop and war chant (e.g., the Florida State University Seminoles), and cartoon-like caricatures of American Indians used as team logos (e.g., the Chicago Blackhawks).

Presenting American Indians in this way perpetuates harmful stereotypes and miseducates the public about American Indian culture and their way of life (Hart, 2011; Pewewardy, 1991; Wolburg, 2006; see also Rouse & Hanson, 1991), especially because these are the only depictions that the media portrays of Native people. Fryberg et al. (2008) suggest that these depictions do not honor Native people, and instead do more to constrain them because they act as “powerful social representations,” given that Native people are otherwise absent or invisible from mainstream society altogether (Pewewardy, 1995). Overall, damaging stereotypes such as these, compounded with preexisting challenges associated with colonization (e.g., marginality, oppression, and subjugation) (Alvarez & Bachman, 1996; Duran & Duran, 1995; Nielson, 1996a), and the perception of Indigenous communities as being outsiders that make them appear antithetical to the contemporary society, may lead to American Indians being perceived as blameworthy, more dangerous and threatening, thus warranting severe punishment to better protect the community.

Racial Threat Theory

In addition to the focal concerns perspective, scholars have used the racial threat theory to explain judicial behavior, decision-making processes, and the sentencing patterns for racial and ethnic minority populations. Racial threat theory was introduced by Blumer (1958) and further developed by Blalock (1967) (see also Kent & Jacobs, 2004, 2005; King, 2007; King & Wheelock, 2007; Liska, 1992; Quillian, 1995; Stults & Baumer, 2007). Blalock argued that as the racial and ethnic minority population grows in

size, it poses a threat to the majority group—members of the white population. According to Blalock, *economic* and *political* status are the main areas of concern where minorities may pose a significant threat to white majorities. The idea is that the dominant group is forced to compete with the subordinate group for coveted resources, both economically (e.g., jobs and housing) and politically (e.g., power and influence). In turn, to decrease the threat presented by a growing racial and ethnic minority population, and to sustain their power and position, whites are likely to respond with discrimination and biased actions through the use of social control efforts (e.g., criminal sanctions and incapacitation) (see Bobo & Hutchings, 1996; Bridges & Crutchfield, 1988; Eitle, D’Alessio, & Stolzenberg, 2002; Johnson, 2005; Johnson et al., 2008; Liska, 1992; Sampson & Laub, 1993; Ulmer & Johnson, 2004). Thus, racial and ethnic minorities (e.g., American Indians) may be treated unfavorably by court actors and subsequently punished more harshly as they grow in size and seemingly pose a threat.

Studies that have examined the minority threat perspective have used minority population size, especially racial composition, as a proxy in sentencing research, finding mixed results (Britt, 2000; Crawford et al., 1998; Fearn, 2005; Feldmeyer & Ulmer, 2011; Helms, 2009; Helms & Jacobs, 2002; Johnson, 2003, 2005, 2006; Johnson et al., 2008; Myers & Talarico, 1987; Ulmer, 1997; Ulmer & Johnson, 2004; Weidner et al., 2005). Of relevance here, some studies have found that the punishment that black and Latino defendants receive may be contingent on the relative size of the minority population (Bontrager et al., 2005; Johnson, 2005; Ulmer & Johnson, 2004; Weidner et al., 2005).

This research, however, has almost exclusively focused on blacks and Latinos by examining the size of the black population (Fearn, 2005; Kautt, 2002; Ulmer, 1997; Ulmer & Johnson, 2004) and the size of the Latino population (Feldmeyer & Ulmer, 2011; Feldmeyer et al., 2015; Wang & Mears, 2010a, 2010b, 2015). Research has yet to examine if minority threat can be extended to other racial and ethnic groups, such as American Indians.

The minority threat perspective may be applied to American Indians for several reasons. First, American Indian population size has grown by 1.1 million between 2000 and 2010, an increase of 26.7 percent compared to the total US population growth of just 9.7 percent (US Census Bureau, 2010). The growth of the American Indian population, according to Blalock (1967), may be perceived as a danger or threat to the dominant group—in this case, the white majority. Second, only 22 percent of American Indians are living on reservations or off-reservation trust lands, indicating that more than 70 percent live in cities and rural areas (US. Census, 2011). Moving away from reservations and integrating into mainstream metropolitan areas suggests that American Indians have the potential to reshape cities and compete for resources (e.g., education, housing, and employment), which may elicit negative perceptions from the majority population that American Indians threaten to overwhelm already limited goods and resources. Third, common stereotypes about American Indians imply that they are lazy freeloaders who live off the federal government, benefit from “super citizen” status, and acquire certain advantages and resources that are off limits to other groups (e.g., per capita aid, housing,

healthcare, education, and food assistance) (Amodio & Devine, 2006; Burke, 2009; Miheuah, 1996; Tan, Fujioka, & Lucht, 1997). Unsubstantiated misconceptions such as these may elicit concerns that American Indians exhaust economic resources, and place undue strain on limited governmental resources. Taken together, these beliefs suggest that the majority population may hold the minority group (e.g., American Indians) responsible for exacerbating negative economic conditions, and engender prejudicial behavior as a result (Quillian, 1995). In fact, the majority population may believe their own wealth and economic status are in danger and, therefore, take action to protect them through stricter policies and harsher sanctions.

In sum, it seems plausible that American Indians will receive harsher sentences than whites, and possibly, even harsher treatment than other minority groups, such as Latinos and blacks. With American Indian population size on the rise, they may compete for jobs, housing, and other economic resources. American Indians may be regarded as a liability, overextending limited resources, and in turn, they may be considered a danger to the status of white America. Because American Indians are one of the most impoverished minority groups in America and suffer from incomparable social and economic disadvantage (Perry, 2006; Snipp, 1992), they may be especially susceptible to the effects of minority threat. It is therefore important to examine if the minority threat perspective can be extended to American Indians. In this dissertation, minority threat perspective will be used to explain how American Indian population size affects sentence outcomes.

Data

Data for this dissertation are from the Federal Justice Statistics Program Data Series and the US census. The Federal Justice Statistics Program Data Series contain information collected from a number of data sources, including the Administrative Office of the US Courts and the US Sentencing Commission. Data collected from both of these agencies are used in this dissertation. These data report detailed information on federal offenders who were processed between the fiscal years 1994 and 2012. They are suitable to answer my research questions for several reasons. First, the data include a large number of American Indian defendants which allows for meaningful findings related to American Indian sentencing patterns. Following the lead of recent sentencing literature (Franklin, 2013; Ulmer & Bradley, 2018), I focus the analysis on federal districts where a large number of American Indian defendants were processed, thus, 31 districts will be included in the analysis. Second, the data are unique in that they include rich information that is relevant to understanding how American Indians are sentenced in the federal court system compared to individuals of other races, including but not limited to: sociodemographic information (e.g., age, race, gender, education, and family ties), offense severity, criminal history, reasons for sentence departures, and weapon use. This data set also includes a wide array of sentencing-related outcomes, including charge reductions, pretrial detention, and sentence severity. Third, the data contain multiple decision points and are longitudinal, spanning 18 years, thus allowing me to assess how American Indian defendants are treated across multiple decision points and over time. Due to the nature of the research questions and the wealth of data sources that I am able

to examine, the proposed questions will be answered using a range of statistical modeling strategies.

In sum, the fundamental aim of this dissertation is to add to criminological and criminal justice research by examining questions that are especially inclusive of American Indians, to examine how American Indians are treated in federal courts, and by broadening existing theoretical sentencing explanations, moving beyond what prior research has studied.

Organization

I organize the remainder of this dissertation into four chapters. Chapter Two addresses the first study, which investigates whether cumulative disadvantages are more pronounced for American Indian defendants than other racial and ethnic groups. In particular, I examine whether American Indian defendants are treated more harshly than white, black, Latino, and Asian defendants. Drawing from the focal concerns perspective, I investigate multiple decision points: presentence detention, charge reduction, guideline departures (substantial assistance and downward departures), and sentencing.

Chapter Three focuses on the second research question, which assesses whether disadvantages against American Indians increased over time. I draw from the focal concerns perspective and investigate the decisions for federal guideline departures (substantial assistance and downward) and sentencing. I also conduct cross-level interactions between race and ethnicity and sentencing year to assess the trends in racial and ethnic disparities across the study time frame.

Chapter Four addresses the final study, which examines the role of social context in the treatment of American Indian defendants. That is, I draw from the racial threat theory and examine three outcomes (substantial assistance departures, downward departures, and sentence length) to assess the effect of American Indian threat on sentence severity.

Finally, Chapter Five concludes with an in-depth summary and discussion where I highlight the dissertation's important findings from Chapters Two, Three, and Four for theory and practice as well as significant policy implications. I also provide directions for future research.

CHAPTER 2: EXAMINING CUMULATIVE DISADVANTAGES IN THE SENTENCING OF AMERICAN INDIAN DEFENDANTS

Overview

Prior research has consistently documented that minorities are overrepresented at all stages of the criminal justice system (see Baumer, 2013; Ulmer, 2012). In fact, non-white defendants—predominately blacks and Latinos—are more likely than whites to be arrested, detained, prosecuted, convicted, and harshly sentenced (American Civil Liberties Union, 2014; The Sentencing Project, 2013). In an effort to understand why these disparities persist, scholars and practitioners have examined the impact of “cumulative disadvantages”—referring to potential biases in the treatment of minorities at early decision points (e.g., pretrial detention) and the significance of these decisions at subsequent decision points (e.g., sentencing) (see Baumer, 2013; Bushway & Forst, 2013; Kutateladze, Andiloro, Johnson, & Spohn, 2014; Rehavi & Starr, 2012; Spohn, 2009; Stolzenberg, D’Alessio, & Eitle, 2013; Sutton, 2013; Ulmer, 2012; Wooldredge, Frank, Goulette, & Travis, 2015; Zatz, 1987; see also Kurlychek & Johnson, 2019). Notably, cumulative disadvantage research has focused on blacks and to a lesser extent Latinos; little attention, however, has been given to American Indians and the biases and inequalities they encounter in the criminal justice system.¹ Investigating the treatment of American Indian defendants is important because it broadens our understanding of how

¹ Scholars indicate that the use of the terms American Indian, First Nations Peoples, Indian, Indigenous, Indigenous Peoples, Native, and Native American have been used interchangeably when referring to Indigenous peoples from North America. Therefore, they are used synonymously throughout this manuscript, however, the main term used is American Indian (Bird, 1999; Calloway, 2008; Yellow Bird, 1999). I also acknowledge that the majority of these references to the descendants of first inhabitants of the Americas are considered *labels* and *counterfeit identities* that were placed upon them (see Yellow Bird, 1999).

this minority group is treated, brings their experiences with the criminal justice system to the forefront, creates meaningful space to theorize on said experiences, and, more importantly, adds to the extant literature in revealing *why* American Indians are disproportionately represented across the criminal justice system (see Nielson & Silverman, 2009; see also Ulmer & Bradley, 2019). Further, it is imperative to examine cumulative disadvantages against American Indians in particular because it exposes deficiencies in the criminal justice system, its actors, and more importantly, raises issues of legitimacy. For these reasons, and to address this research gap, this chapter investigates the experiences of American Indian offenders in comparison to offenders of other races and ethnicities, and assesses whether they are subjected to cumulative disadvantage across successive stages of the criminal justice system.

In particular, this study aims to understand a link between being American Indian and cumulative disadvantages, which is essential and contributes to sentencing research for several reasons. First, empirical accounts of racial disparity in judicial decision-making too often exclude atypical minority (e.g., Asian, Middle Eastern, and American Indian) defendants, and have primarily focused on black and Latino offender populations (for an examination of studies that do consider non-black and non-Latino defendants see Franklin, 2013; Johnson & Betsinger, 2009; Kutateladze et al., 2014; Ulmer & Bradley, 2018; see also Ulmer & Bradley, 2019). Second, data for this study are drawn from the Federal Justice Statistics Program (FJSP), collected and designed by the Urban Institute and the Bureau of Justice Statistics (BJS). The data are unique, comprehensive, and

include diverse information about American Indian defendants processed through the federal criminal justice system (e.g., sociodemographic characteristics, offense severity, criminal history, and a number of sentence-related outcomes), and thus are suitable for answering my research questions. Third, a focus on American Indian defendants broadens the current perspective and discourse on how non-traditional minority defendants are processed and treated. Investigating cumulative disadvantages against American Indians permits a meaningful examination of criminal punishment for American Indians across several key decision points.

Theoretical Foundation

Research that examines the influence of race/ethnicity on court-room decision-making has largely been guided by the focal concerns perspective. The focal concerns framework maintains that critical decisions meted out by courtroom actors (e.g., bail, incarceration, and sentence length) are guided by three defendant-driven aspects, otherwise known as focal concerns: blameworthiness, community protection, and practical concerns and constraints (Steffensmeier, 1980; Steffensmeier et al., 1993; Steffensmeier et al., 1998; Ulmer, 1997). *Blameworthiness* indicates that court actors consider the culpability and level of harm caused by the offender, which may be drawn from victimization history and legally relevant factors such as offense type. *Community protection* investigates any potential threat a defendant may pose to his or her respective community, which is largely based on the propensity to recidivate. *Practical concerns and constraints* weigh the social costs of sentencing an offender to prison and also

consider courtroom organization, such as how courtroom actors interact with one another (Steffensmerier et al., 1993; Steffensmeier & Demuth, 2001; Steffensmeier et al., 1998; Johnson, 2003; Ulmer & Johnson, 2004).

In particular, when each focal concern is considered for decision-making and criminal punishments, race and ethnicity play a role in the process. This may be the case because each proposition in the focal concerns perspective is intrinsically connected to stereotypes and courtroom outcomes are largely guided by discretion. The myriad of negative stereotypes associated with people of color influence the treatment they receive from criminal justice actors. For example, people of color are often negatively depicted, and characterized by stereotypes that typecast them as hostile, violent, dangerous, predators, and prone to criminality (see Beckett & Sasson, 2000; Holmes et al., 2008; Mann et al., 2006; Spohn & Beichner, 2000; Unnever & Cullen, 2012; Welch, 2007; Welch et al., 2011). Further, according to the focal concerns perspective, court actors bound by time constraints and limited information make quick decisions that are mainly guided by extra-legal characteristics such as race and ethnicity (see Albonneti, 1987, 1991; Steffensmeier et al., 1998), and may feel justified in allocating harsher sentences toward minorities. In other words, harsher punishments are rationalized by court actors who believe that minorities are blameworthy and likely culpable of the crime(s) committed, threatening, and an immediate danger to the community. Consequently, preconceived ideas about *who* is considered dangerous are formed and reinforced based on a defendant's race and ethnicity (e.g., Johnson, 2005, 2006; Johnson et al., 2008;

Koons-Witt, 2002; Spohn & Holleran, 2000; Steen, Engen, & Gainey, 2005; Steffensmeier et al., 1998; Ulmer & Johnson, 2004). Overall, the focal concerns perspective is one of the leading theoretical perspectives in sentencing research and has garnered much support in the literature (e.g., Baumer et al., 2000; Steffensmeier et al., 1998).

American Indians and the Focal Concerns Perspective

Contemporary decision-making and sentencing literature is primarily concerned with the punishment decisions for blacks and Latinos, and generally ignores how other minority defendants are processed and treated. American Indians may face *even harsher* punishment outcomes relative to other racial/ethnic groups because of the many stereotypes tied to their culture and lifestyle, a general lack of knowledge and information about present-day American Indians, and, most importantly, the historical colonization, oppression, and exploitive tactics aimed at them (see Alvarez & Bachman, 1996; Lieber, 1994; Perry, 2006). With regard to the focal concerns perspective and a tendency to rely on racially-based stereotypical perceptual cues, criminal justice decision makers may view American Indian defendants as blameworthy, dangerous, and prone to recidivate. This is considered to hold true given that familiarity with American Indian culture by mainstream society is limited and few sources of information are made available, aside from *stereotypical* information (see Josey, 2015). Therefore, the general public, courtroom actors included, are forced to rely on outdated and unsubstantiated misconceptions about American Indians. The negative race-based imagery about

American Indians, the negative rhetoric and misinformation perpetuated about their culture, and their ethnic differences (e.g., language and culture) may enter the courtroom environment to influence decision makers and their assessment of each focal concern, thus impacting critical decision points such as sentencing.

In particular, prior research has underscored the relationship between the oppression of American Indians and negative imagery and stereotypes directed at them (see Franklin, 2013; Leiber, 1994; Perry, 2006; Rouse & Hanson, 1991; Ulmer & Bradley, 2018). In the context of the criminal justice system and its actors, negative perceptions and stereotypes of Indigenous defendants may influence how they are perceived, interacted with, and subsequently how they are treated across different stages and various decision points. American Indians may receive disparate treatment for several reasons. First, American Indian communities are severely impoverished, lack resources (legal and non-legal), and are socially isolated (reservation living) (Hunt, Kerr, Ketcher, & Murphy, 2010; Nagel, Ward, & Knapp, 1988; Sandefur, 1989; Tootle, 1996), which scholars have suggested is a direct result of the oppression, forced assimilation and genocidal practices directed at Native communities, and directly contributes to the criminalization of American Indians (Ross, 1998; Ogden, 2006). In addition, scholars have argued that a combination of these factors give way to concentrated poverty, restricted opportunities, limited access to job networks, and detachment from mainstream society (Massey & Denton, 1993; Skogan, 1990; Wilson, 1987). Though much of this research has focused on the challenges faced within black communities, it is applicable to

American Indians because they face many of the same difficulties. Moreover, stereotypes associated with these characteristics include being othered, outsiders to contemporary society, and, as a result, American Indians may be viewed as a danger and a threat.

Therefore, based on these perceptions that may guide *how* courtroom actors exercise discretion toward American Indian defendants, American Indian defendants may be treated more harshly and subjected to biased treatment (Alvarez & Bachman, 1996; Leiber et al., 2007; Perry, 2006; Zatz et al., 1991).

Second, American Indians are largely stigmatized by negative stereotypes about their culture and lifestyle. American Indians have been characterized as savages (i.e., as not modern or as resistant to progress and change), drunk, aggressive, dysfunctional, self-destructive, and violent (see Alvarez & Bachman, 1996; Bachman et al., 1996; Reingle, 2012; Zatz et al., 1991).² American Indian customs and traditions have been homogenized by the larger society, typifying all American Indians as hunters, living in teepees, riding horses, wearing feather headdresses, clothed in buckskin, draped in beads, wearing braids, and wielding bows and arrows (Hirschfelder, Molin, Wakim, & Dorris, 1999). These stereotypes have reduced American Indians to false representations of who they are and depict them as outcasts. To the public, perceptions of American Indians are shaped by these negative stereotypes, offensive representations, and damaging imagery.

For instance, the normalcy of using mascots to portray American Indian culture in collegiate and professional sports (e.g., Washington Redskins, Chief Wahoo of the

² Historically, American Indians have been viewed as standing in the way of progress and societal expansion. This too has categorized them as outsiders who may be viewed as dangerous and threatening (Prucha, 1984).

Cleveland Indians, etc.) demonstrates a lack of knowledge about American Indians and communicates a passiveness about their culture and lifestyle. The mascots depict imagery that would otherwise be considered overtly racist if applied to another racial or ethnic group, yet are largely accepted by mainstream society as honoring American Indians and their culture. Examples of these images include mascots wearing stereotypical American Indian regalia (e.g., beads, headdresses, bows, and arrows), football spectators wearing headdresses (e.g., the Kansas City Chiefs) and imitating the tomahawk chop and war chant (e.g., the Florida State University Seminoles), and cartoon-like caricatures of American Indians used as team logos (e.g., the Chicago Blackhawks). Depicting American Indians in this way perpetuates harmful stereotypes and miseducates the public about American Indian culture and their way of life (Hart, 2011; Pewewardy, 1991; Wolburg, 2006; see also Rouse & Hanson, 1991). Fryberg et al. (2008) suggest that these types of depictions do not honor Native people, and instead do more to constrain them because they act as “powerful social representations,” given that Native people are otherwise absent or invisible from mainstream society altogether (Pewewardy, 1995). Since the above illustrations are the *only* depictions that the media portrays of Native people, the public, and specifically, courtroom actors have little information to draw from. As a result, courtroom actors may resort to biased stereotypes stemming from the above imagery and one-sided representations of American Indians to make important courtroom decisions.

Overall, damaging stereotypes, offensive representations, and preconceived notions about *who* and *what* American Indians represent may lead them to be perceived as more blameworthy, dangerous, and threatening. As a result, American Indians may face more severe punishment at all stages of the criminal justice system relative to other minority groups.

Cumulative Disadvantage and Sentencing

Racial disparity in sentencing decisions and punishment outcomes has been well established in the literature. More specifically, sentencing research has argued that sentencing decisions are affected by extra-legal factors (e.g., age and gender) and social context (Baumer, 2013, Mitchell, 2005; Spohn, 2000, 2015; Ulmer, 2012; Zatz, 2000). Still, race and ethnicity appear to be predictors. Prior sentencing research that has examined racial disparity has mainly investigated the final decision point (i.e., sentencing) (Johnson, 2003; Spohn et al., 1981; Spohn & Holleran, 2000; Steffensmeier et al., 1998; Zatz, 1984), yet scholars have underscored the importance of thoroughly assessing how various racial and ethnic groups are treated across *multiple* stages of the sentencing process. In doing so, a comprehensive understanding of prejudicial treatment may be established. Doing so also provides a stronger argument for the presence of biases and disadvantages in the criminal justice system, and calls into question its legitimacy overall. To this end, contemporary scholarship has investigated the prevalence of racial disparities by examining cumulative disadvantages—biased treatment at early decision points (e.g., pretrial detention) and the accrued impact of these biases at later decision

points (e.g., sentencing outcomes)—focusing especially on how biases are contingent on the race and ethnicity of the defendant (see Baumer, 2013; Bushway & Forst, 2013; Kutateladze et al., 2014; Rehavi & Starr, 2012; Spohn, 2009; Stolzenberg et al., 2013; Sutton, 2013; Ulmer, 2012; Wooldredge, 2012; Wooldredge et al., 2015; see also Hagan, 1974; Zatz, 1987; see also Kurlychek & Johnson, 2019).

In particular, a small number of studies have explicitly investigated cumulative disadvantages against minority defendants. The majority of this research has found evidence suggesting that minority defendants experience cumulative disadvantages compared to white defendants. Notably, this literature focuses almost exclusively on the disadvantages faced by blacks and Latinos. Specifically, recent studies focus on the commonly researched black-white differences, while others examine the black-white-Latino differences. For example, Schlesinger (2005) examined the indirect effect of pretrial detention on sentencing decisions, suggesting that cumulative disadvantages were linked to pretrial detention and subsequently sentencing outcomes. Spohn (2009) examined the impact of pretrial detention on sentence severity among federal drug offenders, and found that pretrial status significantly differed for white versus black defendants, thus concluding that cumulative disadvantages against black male defendants were present—black males were more likely to receive longer sentences because of pretrial detention. Shermer and Johnson (2010) found that extralegal factors (i.e., race, age, and gender) impacted charging decisions and subsequently influenced sentencing outcomes. In addition, Rehavi and Starr (2012) tracked defendants from arrest through

sentencing, finding that black defendants were given harsher initial charging decisions by prosecutors and subsequently received longer sentences. Similarly, Sutton (2013) and Stolzenberg et al. (2013) found cumulative disadvantages against black defendants. The former found that black defendants who were detained were more likely to receive a prison sentence than were similarly situated white defendants. The latter found that race effects were significant on the sentencing decisions (incarceration and sentence length), and had an overall cumulative effect.

More recently, Kutateladze and colleagues (2014) examined the disadvantages against black, Latino, *and* Asian defendants in New York County. They found that blacks and Latinos, compared to whites, fared worse with respect to the decisions for pretrial detention, receiving a custodial plea offer, and incarceration. Conversely, for the aforementioned decisions, Asian defendants were treated less punitively than other racial and ethnic groups. Wooldredge et al. (2015) examined cumulative disadvantages against black defendants in terms of prosecutorial and judicial decision-making outcomes (e.g., bond amounts, pretrial detention, and nonsuspended prison sentence). They found that black defendants experienced significant cumulative disadvantages with respect to indirect race effects on pretrial detention, bond amounts, and prison sentences. Spohn, Brennan, and Kim (2018) examined racial and ethnic disparities for female offenders in federal courts, and examined whether crime type moderated the effect of race and ethnicity. Using a path model, they found that Latina females were given harsher sentences compared to white females. This was the case because Latina females were

more likely to be detained before sentencing and also were less likely to receive substantial assistance departures.

To my knowledge, only one study has examined whether American Indians experienced cumulative disadvantages. Specifically, Rodriguez (2010) investigated the cumulative effect of race and ethnicity in juvenile court outcomes, finding that white youth were treated more favorably than their black, Latino, *and* American Indian counterparts. In fact, similar to previous cumulative disadvantage research, Rodriguez (2010) found that preadjudication detainment was directly linked to harsher juvenile outcomes (e.g., less likely to have a petition dismissed and more likely to be removed from the home). Although Rodriguez (2010) has significantly advanced scholarship, it is important to further investigate cumulative disadvantages against nontraditional minority defendants, such as American Indians, who are given less attention in the sentencing literature and whose experiences with the criminal justice are too often left in the background.

Hypotheses

Following the aforementioned discussion, I develop several hypotheses about American Indian disadvantage in federal courts. More specifically, I hypothesize that American Indians will be more likely to experience outcome-specific disadvantages as well as cumulative disadvantage, thus receiving worse dispositions and more severe sentences than white, black, Latino, and Asian offenders.

Hypothesis 1: American Indian defendants will be more likely than similarly situated defendants of other races and ethnicities to experience outcome-specific disadvantages at individual stages of criminal case processing.

Hypothesis 2: American Indian defendants will be more likely than similarly situated white defendants to experience cumulative disadvantages across combinations of more punitive criminal case processing outcomes.

Data and Methods

Data

For this study I use the Federal Justice Statistics Program (FJSP) data series, maintained by the Urban Institute and the Bureau of Justice Statistics (BJS), and accessible to researchers through the Inter-university Consortium for Political and Social Research (ICPSR). The FJSP contains detailed information about suspects and defendants collected from various federal agencies, including the Administrative Office of the US Courts (AOUSC) and the US Sentencing Commission (USSC). Within each dataset, the files contain unique identifiers that track defendants across different stages of the federal justice system. For the current study, I link the AOUSC and the USSC data, resulting in a dataset that tracks defendants from prosecution (e.g., charge reduction) through final sentence disposition.³ The AOUSC collects information on prosecutorial decision-making and charging behaviors for cases charged in federal district courts. More specifically, these data report up to five filing charges as well as five terminating charges and are used to analyze charge reduction. The USSC data contain detailed information, including but not limited to, sociodemographic information (e.g., race/ethnicity, age, gender, and

³ See Kelly (2012) for a complete explanation of how agency datasets are linked together.

education), case processing details (e.g., offense severity, criminal history, and reason for sentence departure), and a wide array of sentencing-related outcomes (e.g., pretrial detention and sentence severity). Linked together for the most recent five years of data that I obtained (2008-2012), the AOUSC and the USSC data report comprehensive information on federal offenders who were processed between the fiscal years 2008 and 2012. In particular, these data contain rich information that is relevant to understanding how American Indian offenders are processed in the federal justice system compared to individuals of other races and ethnicities.

The analysis is limited to cases sentenced within the 89 US federal districts, excluding foreign territories (see Johnson et al., 2008 and Ulmer et al., 2011).⁴ Following the lead of recent sentencing literature that has examined American Indians defendants (Franklin, 2013; Ulmer & Bradley, 2018), the analysis is restricted to federal districts where a considerable number of American Indians were processed⁵, and thus 31 districts are included in the analysis.⁶ I also exclude federal immigration cases because they are processed differently (see Doerner & Demuth, 2010; Hartley & Tillyer, 2012; Johnson et al., 2008), and limit the analysis to US citizens given that the focus of my research is on

⁴ The following districts were removed for the analysis: Puerto Rico, Guam, the Virgin Islands, North Marina Island, and the District of Columbia.

⁵ District-level summary statistics indicate that on average, across years and districts, 25% of districts have 7 or fewer American Indians and 50% have 2 or fewer American Indians. Because it seems that 7 is a natural breaking point, I use districts that have 7 or more American Indian defendants for the analysis.

⁶ I include the following districts Alaska, Arizona, Colorado, Idaho, Iowa North, Kansas, Michigan East, Michigan West, Minnesota, Montana, Mississippi South, Nebraska, Nevada, New Mexico, New York North, North Carolina East, North Carolina West, North Dakota, Oklahoma East, Oklahoma North, Oklahoma West, Oregon, Pennsylvania Mid, South Dakota, Texas West, Utah, Washington East, Washington West, Wisconsin East, Wisconsin West, and Wyoming.

American Indians, all of whom are United States citizens. Moreover, cases that were sentenced prior to the US v. Gall/Kimbrough decision were deleted from FY2008. By doing so, it ensures that any observed racial disparity would not be attributed to this decision. After applying these exclusion criteria, there were 37,171 cases for analysis of pretrial detention, 36,445 cases for analysis of charge reduction, 34,238 cases for analysis of guidelines departure, and 34,238 cases for analysis of sentence length.

Dependent Variables

The dependent variables are 1) pretrial detention, 2) charge reduction, 3) federal guideline departures and 4) sentence length.⁷ First, *pretrial detention* indicates whether a defendant was detained prior to sentencing, and is measured as a binary outcome (1 = yes; 0 = no). Second, *charge reduction* is defined as a reduction in charges between the filing charges and the terminating charges, and is measured as a binary outcome (1 = yes; 0 = no). More specifically, the AOUSC reports up to five filing charges and five terminating charges. Similar to Shermer and Johnson (2010), to create the charge reduction variable, I identify the filing charge with the greatest statutory severity and compare it to the terminating charge with the greatest statutory severity. Charge reduction

⁷ In this study, I depart from prior sentencing research that has typically estimated two separate models—one for incarceration and another for sentence length (see Steffensmeier et al., 1993). In doing so, I follow more recent scholarship and utilize a one-stage model to analyze judicial decision-making. Researchers argue that a one-stage model is a better approach, one that includes sentence length as the outcome and non-incarceration cases as a prison sentence of zero (see Bushway & Piehl, 2001). According to scholars, this approach accounts for the fact that judges consider virtually the same criteria and information when making decisions about incarceration and sentence length (see Bushway & Piehl, 2001; Paternoster, 2011; Starr & Rehavi, 2013), thus including both is unnecessary. However, I acknowledge that not all scholars would agree with this approach. In fact, several studies indicate that prior record is the strongest predictor of prison/no prison, but offense severity is the strongest predictor of sentence length.

is then coded as 1 if the most serious terminating charge is less severe than the most serious filing charge.

Third, prior research has emphasized the importance of including federal guideline departures in federal sentencing analyses (e.g., Albonetti, 1997; Johnson et al., 2008; Johnson & Betsinger, 2009; Franklin, 2013; Mustard, 2001; Steffensmeier & Demuth, 2000). *Federal guidelines departures* are analyzed as a four-category multinomial outcome to analyze the likelihood of receiving each type of departure (upward departure, judge-initiated downward departure, and substantial assistance departure) against the likelihood of receiving no departure, with no departure serving as the omitted category. Upward departure indicates whether a judge sentenced above the guidelines range.⁸ *Downward departure* identifies whether a judge sentenced below the guideline range not because of government request or Booker.⁹ *Substantial assistance* indicates whether a judge sentenced below the guidelines, based on the defendant's willingness to provide information to law enforcement and offer assistance in federal cases.¹⁰

⁸ I keep the upward departure category in the dependent variable. However, consistent with prior research (see Johnson et al., 2008), I only discuss downward departures and do not discuss upward departures since upward departures in federal sentencing are extremely rare.

⁹ Booker refers to the 2005 ruling in *United States v. Booker* which classified the sentencing guidelines to advisory status rather than mandatory. Under this ruling, judges may depart from the guidelines for a number of reasons because the guidelines are no longer legally binding. For example, a judge may depart from the guidelines when an offender offers substantial assistance to prosecution, a defendant voluntarily disclosed the offense, or if the defendants accepted responsibility for the offense, to name a few.

¹⁰ These departures are controlled by the US Attorney, who must file a motion for a downward departure due to substantial assistance.

Fourth, *sentence length* indicates the number of months an offender was sentenced to prison, and is measured as a continuous variable capped at 470 months. Because sentence length is positively skewed, the natural log of sentence length is used (see Bushway & Piehl, 2001; Johnson, 2006; Johnson & Betsinger, 2009; Ulmer & Johnson, 2004). The coefficients for this model can be interpreted as the percent change in the dependent variable that is associated with a 1-unit change in the independent variable. Furthermore, in keeping with prior research, probation cases and other alternative cases are coded as zero months of incarceration (e.g., see Starr & Rehavi, 2013; USSC, 2010) and were added .1 prior to the natural log.

Independent and Control Variables

The main independent variable is race and ethnicity, which is measured by a series of dummy variables for white, black, Latino, Asian, and American Indian. In the models examining outcome-specific disadvantages at individual stages of criminal case processing, American Indian is used as the reference category. However, to assess cumulative disadvantages against American Indians, I use white as the reference category.

I control for a range of extra-legal factors, including age, gender, number of financial dependents, and education level. *Age* is a continuous variable measured in years, which captures a defendant's age at the time of sentencing.¹¹ *Gender* is measured

¹¹ Although prior research typically includes a measure of age-squared in the analysis to test for potential nonlinearity in this effect, researchers indicate that age-squared does not have an effect on the analysis overall (Steffensmeier et al., 1995; Shermer & Johnson, 2010). I have assessed this possibility and found that the squared term is not statistically significant, and therefore is not included in the analysis.

as a binary variable (1 = male; 0 = female). *Number of financial dependents* is measured as a continuous variable, which captures a defendant's number of financial dependents.¹² *Education level* is measured using three dummy variables: high school degree, some college, and college degree and higher, holding less than a high school degree as the reference category.

Legally relevant factors are also controlled for in the analysis. *Criminal history* score is included and is based on the United States Sentencing Commission 6-point scale, which rates a defendant's prior criminal history score from 1 to 6 (6 indicating a higher score, or more criminal history points). *Offense type* is measured using five dummy variables, which include firearm offense, violent offense, property, fraud, and other type of offense, holding drug offense as the reference category. In addition, when controlling for pretrial detention and charge reduction, I include *offense severity* which is measured using the AOUSC data to capture the most serious filing offense—severity ranges from 0 to 11. Using the AOUSC data to measure offense severity was necessary in order to capture the seriousness of the initial charges filed. Moreover, the model for charge reduction also includes a control for *accept responsibility*, which is measured as a dummy variable to indicate whether an offender received two- or three-guidelines level sentencing discount for acceptance of responsibility (1 = accept responsibility; 0 =

¹² In line with prior research, missing data for this variable are coded as zero (see Johnson & Betsinger, 2009, p.1059).

otherwise).¹³ Accept responsibility is also included in the final two models for guidelines departures and sentence length, along with controls for multiple convictions, presumptive sentence, and trial. *Multiple convictions* is a binary variable that captures whether a defendant was convicted of multiple offenses (1 = multiple; 0 = otherwise). *Presumptive sentence* is included, which combines the 43-point offense severity scale with the 6-point criminal history scale and accounts for the minimum number of months of incarceration as recommended by the federal sentencing guidelines and mandatory minimums. Presumptive sentence, capped at 470 months, is log transformed with the constant of .1 added. *Trial* is controlled for and is captured using a dummy variable indicating whether an offender was convicted through bench or jury trial (1 = trial; 0 = pled guilty). Finally, I control for variation in policy and practice changes across years by including dummy variables for sentencing year, using 2008 as the reference year.

It is important to note that *presentence detention* is included as a control when *charge reduction* is predicted. Also, *charge reduction* and *presentence detention* are included as controls when *departure types* and *sentence length* are predicted.

Furthermore, *departure types* are included as controls when *sentence length* is predicted. This is done to account for biases that may occur when examining multiple discretionary points. In particular, some decision points (i.e., charge reductions and pretrial detention) occur well before later decision points (e.g., departure types and sentence length), and

¹³ I follow prior research (Shermer & Johnson, 2010) and include acceptance of responsibility in the charge reduction model. I acknowledge that multicollinearity may be an issue, however, to ensure that it was not a problem I ran correlation diagnostics. The correlation between acceptance of responsibility and trial is .65, which is below the standard of .7 for multicollinearity to be an issue. Furthermore, I found the results remain identical after removing acceptance of responsibility from the model.

should therefore be included as controls when analyzing these subsequent outcomes.

Table 1 provides the descriptive statistics for dependent, independent, and control variables.

Table 1. Descriptive Statistics for Merged AOUSC and USSC Federal Sentencing Data, FY2008—FY2012

	<i>N</i>	Mean	SD
Dependent Variables			
Pretrial Detention	37,171	0.64	0.48
Charge Reduction	36,445	0.16	0.36
Guidelines Departure			
Substantial Assistance Departure	34,238	—	—
Downward Departure	34,238	—	—
Ln sentence length	34,238	2.74	2.47
Independent Variables			
American Indian (reference)*		0.11	0.31
White		0.48	0.50
Black		0.25	0.43
Latino		0.17	0.38
Asian		0.02	0.13
Male		0.83	0.38
Age		36.07	11.90
Dependents		1.37	1.68
No High-School Diploma (reference)		0.30	0.46
High-School Graduate		0.41	0.49
Some College Education		0.23	0.42
College Graduate and Above		0.06	0.24
Criminal History		2.64	1.81
Accept Responsibility		0.93	0.25
Ln Presumptive Sentence		3.87	1.10
Drug Offense (reference)		0.38	0.49
Firearm Offense		0.19	0.39
Violent Offense		0.10	0.30
Property Offense		0.03	0.18
Fraud Offense		0.11	0.31
Other Offense		0.18	0.39
Offense Severity		8.11	2.68
Multiple Counts		0.19	0.39
Trial		0.04	0.20

ABBREVIATIONS: Ln = natural logarithm; SD = standard deviation

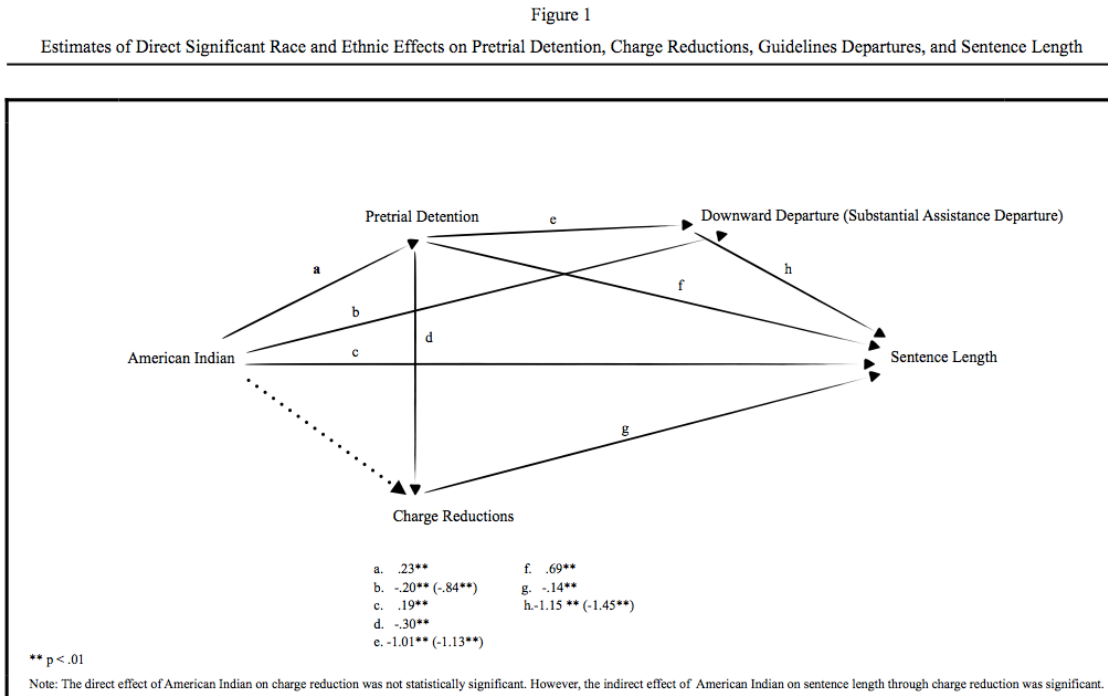
*The referent category is American Indian, however, white is used as the reference category in the cumulative disadvantage model to highlight cumulative disadvantages against American Indians.

Analytic Strategy

To investigate whether cumulative disadvantages are more pronounced for American Indian defendants than defendants of other races and ethnicities, the analysis proceeds in two stages. The first stage of the analysis, addressing hypothesis 1, estimates a series of regression models to investigate the direct effects of a defendant's race/ethnicity at each decision point (i.e., presentence detention, charge reduction, guideline departures, and sentence length). The second stage of the analysis assesses hypothesis 2 and examines cumulative disadvantages (the influence of early decision points on the outcome of later decision points).¹⁴ Following the lead of Wooldredge et al. (2015), I estimated a series of path models and tested the indirect effects of a defendant's race/ethnicity. According to Wooldredge et al. (2015, p.202), "Path models treat the outcomes for the first stage of the analysis as both endogenous and lagged endogenous variables in the same model," thus permitting the assessment of *indirect* race effects. "The direct race effects depicted were derived by controlling for the aforementioned legally relevant effects on each outcome. Indirect race effects represent the product of all mediating paths separating a defendant's race [and ethnicity] from a specific outcome" (p. 202). Ultimately, the results from both stages of the analysis, conducted in STATA 13, capture the direct *and* indirect race effects experienced by American Indian defendants throughout criminal case processing decisions. In other words, cumulative disadvantages account for the *total* effects, which is the combination of direct and indirect effects.

¹⁴ Following the lead of prior sentencing research, I employ listwise deletion to handle missing data (e.g., Albonetti, 1997; Doerner & Demuth, 2010).

Similar to Wooldredge et al. (2015), the total effects of a defendant’s race on each decision point were examined as the combination of direct and indirect effects of race through possible mediators for each outcome.¹⁵ See Figure 1 for an illustration of the direct and indirect race effects.¹⁶



In addition, prior sentencing research has underscored the importance of controlling for variation across districts when examining punishment decisions (see Johnson et al., 2008; Johnson & Betsinger, 2009; Shermer & Johnson, 2010;

¹⁵ “The term ‘total effect’ is used to reflect the sum of direct and indirect effects of a defendant’s race/ethnicity controlling for all of the legally relevant factors included in the models estimated for the first part of the analysis” (Wooldredge et al., 2015, p. 203).

¹⁶ Wooldredge et al. (2015) explain the presence of multiple mediating effects, and some that appear in multiple “chains.” I follow their lead. There are several mediating effects with some of these effects appearing more than once in different “chains.” For example, the mediating effect of presentence detention appears in three chains linking race to sentence length (race to presentence detention to sentence length; race to presentence detention to charge reduction to sentence length; race to presentence detention to guideline departures to sentence length).

Steffensmeier & Demuth, 2000). I employ this method as well and include a series of district dummy variables to account for any significant variation in sentencing patterns across districts. The standard errors for district are also clustered in order to correct for otherwise underestimated standard errors due to correlated residual errors within districts. Because this paper focuses on individual-level racial disparities, this analytic approach is appropriate and parsimonious (Johnson & Betsinger, 2009, p. 1063).

Results

Outcome-Specific Racial and Ethnic Disadvantage

To test the first hypothesis—whether American Indians experienced outcome-specific disadvantages at various decision points (i.e., pretrial detention, charge reduction, guidelines departures, and sentence length)—a series of multivariate models that include relevant independent and control variables were estimated. The results for each decision point (dependent variables) are displayed in Table 2. To start, review of Model 1 (*pretrial detention*) suggested that compared to American Indians, whites, Latinos, and Asians were *less likely* to be detained prior to sentencing. Specifically, the statistically significant and negative coefficients for white ($b = -.23$, $SE = .07$, $p \leq .001$), Latino ($b = -.12$, $SE = .07$, $p \leq .10$), and Asian ($b = -.38$, $SE = .14$, $p \leq .01$) defendants indicate that being white, Latino, or Asian significantly decreases the likelihood of pretrial detention as compared to American Indians.¹⁷ With respect to Model 2 (charge reduction), the race and ethnicity variables did not meet statistical significance. Model 3 (guidelines departures) presents

¹⁷ I believe the use of a .10 p-value is warranted given the limited sentencing research on American Indian defendants, and highlights the potential for the American Indian racial category to influence sentencing decisions. See also Mears, Wang, and Bales (2014) for prior research that incorporates a .10 p-value.

the effect of an offender's race and ethnicity on federal departure outcomes—upward, downward, substantial assistance, with no departure as the omitted category. Inspection of Model 3 suggests that race and ethnicity were not statistically significant in affecting whether a defendant received a downward departure. However, whites ($b = .84$, $SE = .25$, $p \leq .001$), blacks ($b = .48$, $SE = .26$, $p \leq .10$), Latinos ($b = .58$, $SE = .26$, $p \leq .05$), and Asians ($b = .60$, $SE = .35$, $p \leq .10$) were more likely to receive departures for substantial assistance in comparison to American Indians. Finally, review of Model 4 (sentence length) suggested that white, black, Latino, and Asian defendants all received significantly shorter sentences, relative to American Indian defendants.¹⁸

¹⁸ My findings related to trial are not consistent with prior research (see Johnson, 2019). I found that defendants who went to trial were more likely to receive *shorter* sentences, whereas extant literature suggests the opposite. Defendants who exercise their right to a trial are consistently given longer sentences. My alternative findings may be due to the fact that the analysis was limited to districts with a considerable number of American Indians. As such, perhaps in these districts federal judges may be more cautious about harshly sentencing Native defendants following a trial in order to avoid unwarranted negative publicity given that trial cases seem to draw more attention than guilty pleas. In addition, “trials might present the opportunity for the court to see and sympathize with [Native] defendants as complex individuals, rather than as racially-based one dimensional stereotypes (see Ulmer, Eisenstein, & Johnson, 2010, p. 585).

Table 2. Regression Models Predicting Pretrial Detention, Charge Reductions, Guideline Departures, and Ln Sentence Length

Measures	Pretrial Detention		Charge Reductions		Guideline Departures		Ln Sentence Length			
	<i>b</i>	SE	<i>b</i>	SE	<i>b</i>	SE	<i>b</i>	SE		
Intercept	-1.50***	.20	-7.27***	.29	-.99**	.35	-3.01***	.41	-1.80***	.14
White	-.23***	.07	-.03	.07	.20	.13	.84***	.25	-.19**	.06
Black	-.08	.08	-.12	.10	-.00	.12	.48+	.26	-.17**	.07
Latino	-.12+	.07	.07	.08	.16	.16	.58*	.26	-.15**	.05
Asian	-.38**	.14	-.09	.16	.14	.16	.60+	.35	-.31*	.13
Male	.49***	.05	-.20**	.07	-.31***	.05	-.50***	.08	.30***	.05
Age	-.01***	.00	.00	.00	.00	.00	-.01***	.00	-.01***	.00
Dependents	-.05***	.01	.01	.01	-.01	.01	.06***	.01	-.01*	.01
High-School Graduate	-.27***	.06	-.02	.04	-.01	.03	.13**	.05	-.04+	.02
Some College Education	-.43***	.06	-.08	.05	.02	.04	.28***	.08	-.09*	.03
College Graduate and Above	-.57***	.09	-.18*	.09	.12+	.07	.27**	.10	.03	.06
Criminal History	-.60***	.03	-.03	.02	-.10***	.02	-.13***	.02	.04**	.01
Accept Responsibility	—	—	.32***	.10	.14	.20	1.12***	.21	-.17***	.03
Ln Presumptive Sentence	—	—	—	—	.36***	.03	.79***	.06	1.39***	.03
Firearm Offense	.39***	.10	1.43***	.20	-.01	.13	-1.04***	.10	-.18*	.07
Violent Offense	1.09***	.09	1.64***	.17	-.15	.21	-1.53***	.18	-.07	.07
Property Offense	-.49***	.13	2.08***	.25	-.07	.23	-.80***	.24	-.34***	.07
Fraud Offense	-.43***	.13	2.11***	.15	-.03	.18	-.31+	.17	.03	.09
Other Offense	.09	.09	1.82***	.13	.35+	.21	-1.12***	.15	-.17**	.06
Offense Severity	.15***	.02	.48***	.02	—	—	—	—	—	—
Multiple Counts	—	—	—	—	-.18***	.03	-.33**	.11	.07**	.03
Trial	—	—	—	—	-.14	.21	-3.95***	.58	-.29***	.04
Pretrial Detention	—	—	-.30***	.05	-1.02***	.03	-1.13***	.07	.69***	.06
Charge Reduction	—	—	—	—	.02	.08	.07	.10	-.14***	.03
Downward Departure	—	—	—	—	—	—	—	—	-1.16***	.05
S.A. Departure	—	—	—	—	—	—	—	—	-1.45***	.13
Block of Year Dummies	—	—	—	—	—	—	—	—	—	—
Block of District Dummies	—	—	—	—	—	—	—	—	—	—
Pseudo R	0.264		0.126		0.156		0.661			
N	36,717		36,445		34,238		34,238			

NOTES: The referent category is American Indian, however, white is used as the reference category in the cumulative disadvantage model to highlight cumulative disadvantages against American Indians; R-squared is used in the Ln sentence length model.

ABBREVIATIONS: Ln = natural logarithm; SE = standard error; S.A. = substantial assistance

References = American Indian, No Departure, Less than High-School Graduate, Drug Offense, 2008, and District 6.

+*p* ≤ .10; **p* ≤ .05; ***p* ≤ .01; ****p* ≤ .001

Overall, the results from the outcome-specific analysis provide support for my prediction that American Indian defendants are more likely than similarly situated defendants of other races and ethnicities to experience outcome-specific disadvantages at certain stages of criminal case processing. Support for Hypothesis 1 emerged for the pretrial detention and sentence length decision points, and for guidelines departures, namely substantial assistance departures. While race-group differences were found, the above analysis alone was incapable of representing whether American Indians experienced cumulative disadvantages. To capture possible cumulative disadvantages against American Indians, per Wooldredge et al. (2015), I assess *indirect* and total race effects on dispositions and outcomes via pretrial detention, charge reductions, guidelines departures, and sentence length. The second stage of the analysis examines cumulative disadvantages against American Indians.

Cumulative Disadvantages against American Indians

To test the second hypothesis—whether American Indians experienced cumulative disadvantages—a series of path models was estimated.¹⁹ The results are displayed in Table 3, indicating the *total*, *direct*, and *indirect effects* of a defendant’s race and ethnicity on each decision point.²⁰ The *total effects* are the sum of the direct and indirect racial and ethnic effects. The *direct effects* are the effects of an offender’s race

¹⁹ In this stage of the analysis, white is the reference category in order to assess cumulative disadvantages against American Indians.

²⁰ The indirect effects in Table 3 are products of the coefficients along any one chain linking race/ethnicity to each decision point. For instance, paths (a) and (d) in Figure 1 represent the chain from American Indian to charge reduction via pretrial detention. The indirect effect of -0.07 in Table 4 is the product of (a) 0.23 and (d) -0.30. “Three-path chains often seem much weaker than two-path chains because the first indirect effect is dampened by two mediators instead of only one” (Wooldredge et al., 2015, p. 214).

and ethnicity on each outcome. The *indirect effects* are the effects of a defendant's race and ethnicity on pretrial detention, charge reductions, guideline departures, and sentence length through the previous stages (e.g., pretrial detention, charge reductions, and guideline departures prior to sentence length). In Figure 1, I presented the indirect effects of a defendant's race and ethnicity on the likelihood of pretrial detention, charge reductions, guidelines departures, and sentence length.²¹

²¹ Due to the complicated nature of the data and for ease of interpretation, both direct *and* indirect effects were not displayed. Rather, only the significant direct effects were depicted.

Table 3. Total, Direct, and Indirect Effects of a Defendant's Race and Ethnicity on Pretrial Detention, Charge Reductions, Guidelines Departures, and Sentence Length, N = 36, 717a

Effects	Pretrial Detention		Charge Reductions		Guideline Departures				Ln Sentence Length	
	American Indian		American Indian		American Indian				American Indian	
	b	SE	b	SE	b	SE	b	SE	b	SE
Total Effect	.23***	.05	-.03	.06	-.44***	.08	-1.10***	.11	2.61***	.28
Direct Effect	.23***	.05	.03	.06	-.20***	.05	-.84***	.09	.19***	.03
Total Indirect	—	—	-.07***	.02	-.23***	.05	-.26***	.06	2.42***	.28
Indirect Via										
Pretrial Detention	—	—	-.07***	.02	-.23***	.05	-.26***	.06	.16***	.04
Charge Reduction	—	—	—	—	.00	.00	.00	.00	-.00	.01
Pretrial Detention and Charge Reduction	—	—	—	—	-.00	.00	-.00	.00	.01***	.00
Downward Departure	—	—	—	—	—	—	—	—	.23***	.06
S.A. Departure	—	—	—	—	—	—	—	—	1.21***	.13
Pretrial Detention and Downward Departure	—	—	—	—	—	—	—	—	.27***	.06
Pretrial Detention and S.A. Departure	—	—	—	—	—	—	—	—	.38***	.09
Charge Reduction and Downward Departure	—	—	—	—	—	—	—	—	-.00	.00
Charge Reduction and S.A. Departure	—	—	—	—	—	—	—	—	-.00	.01
Pretrial Detention, Charge Reduction, and Downward Departure	—	—	—	—	—	—	—	—	.00	.00
Pretrial Detention, Charge Reduction, and S.A. Departure	—	—	—	—	—	—	—	—	.01	.00

NOTE: a. white is the reference category
 ABBREVIATIONS: Ln = natural logarithm; SE = standard error; S.A. = substantial assistance
 ***p<.01

Results for pretrial detention are similar to findings from prior research, revealing the important role that pretrial detention seems to play for minority defendants, particularly when assessing cumulative disadvantages (see Demuth & Steffensmeier, 2004; Kutateladze et al., 2015; Spohn, 2009; Wooldredge et al., 2015). Specifically, the direct effect of the American Indian dummy on pretrial detention was statistically significant, as well as the indirect effect of the American Indian dummy on nearly each decision point (charge reduction, guidelines departures, and sentence length) *via* pretrial detention. This finding suggests that for American Indians, the likelihood of receiving pretrial detention considerably influences later decision points.

Moving on to charge reductions, I find that the direct effect of the American Indian dummy on the likelihood of receiving a charge reduction was nonsignificant. It is important to note, however, that while the effect of the American Indian dummy for charge reduction failed to meet statistical significance, the *indirect* effect of American Indian on the likelihood of receiving a charge reduction mediated by pretrial detention was statistically significant ($b = -.07$, $SE = .02$, $p \leq .01$). This finding highlights the critical role pretrial detention seems to play in determining subsequent decision points—in this case, charge reduction—for American Indians.

Turning to the analysis of federal guidelines departures, I find that the total, direct, *and* indirect effects of a defendant's race and ethnicity on the odds of receiving a downward departure for American Indians was statistically significant. Each effect (total, direct, and total indirect) included a negative coefficient, suggesting that compared to

whites, American Indians were less likely to receive a downward departure. Further, the *indirect effect* the American Indian dummy has on the likelihood of receiving a downward departure mediated by pretrial detention was negative and statistically significant ($b = -.23$, $SE = .05$, $p < .01$). Thus, the findings associated with downward departures indicate that cumulative disadvantages were present and *against* American Indian defendants. The results for substantial assistance departures reveal similar findings. In particular, the total, direct, *and* indirect effects the American Indian dummy has on the odds of receiving a substantial assistance departure were statistically significant and negative. Moreover, the *indirect effect* the American Indian dummy has on the likelihood of receiving a substantial assistance departure mediated by pretrial detention was negative and statistically significant ($b = -.26$, $SE = .06$, $p < .01$). Again, the findings associated with substantial assistance departures indicate that cumulative disadvantages *against* American Indian defendants were present. It is important to note that the statistically significant indirect effects for both downward *and* substantial assistance departures is driven *only* by the indirect effect of the American Indian dummy on guideline departures through pretrial detention, because the indirect effect of the American Indian dummy through charge reductions was not statistically significant.

Lastly, the final decision point—logged sentence length—uncovered interesting findings for American Indian defendants. The results indicate that American Indians do indeed experience cumulative disadvantages in comparison to similarly situated white offenders. More specifically, the results for sentence length show that the total ($b = 2.61$,

SE = .28, $p < .01$), direct ($b = .19$, SE = .03, $p < .01$), and indirect ($b = 2.42$, SE = .28, $p < .01$) effects of the American Indian dummy were statistically significant. In fact, the indirect effect of the American Indian dummy on sentence length was mediated by six links—pretrial detention, both guideline departures, pretrial detention and charge reduction, pretrial detention and downward departure, and finally, pretrial detention and substantial assistance departure—revealed statistically significant findings. These findings demonstrate that American Indians experience cumulative disadvantages across combinations of more punitive criminal case processing outcomes. To emphasize, the first pathway—the indirect effect of the American Indian variable on sentence length through pretrial detention—indicates that American Indian defendants were more likely than others to be detained prior to trial and, as a result, received *longer* sentences. The second and third pathway—the indirect effect of the American Indian variable on sentence length through downward as well as substantial assistance departures—indicates that American Indians received *longer* sentences because they did not receive a downward or substantial assistance departure prior to sentencing. The fourth pathway—the indirect effect of the American Indian variable on sentence length through pretrial detention *and* charge reduction—suggests that American Indians were more likely to receive *longer* sentences because they were detained prior to sentencing and if they did not receive a charge reduction. The fifth pathway—the indirect effect of the American Indian variable on sentence length through pretrial detention *and* downward departure—indicates that American Indians received *longer* sentences because they were detained

prior to sentencing and they did not receive a downward departure. The sixth pathway—the indirect effect of the American Indian dummy on sentence length through pretrial detention *and* downward departure—suggests that American Indians received *longer* sentences because they were detained prior to sentencing and they did not receive a substantial assistance departure. In short, the primary takeaway suggests that American Indians who received pretrial detention were less likely to be given federal guidelines departures, and thus, received significantly *harsher* sentences. Taken together, the above findings suggest notable cumulative disadvantages against American Indian defendants compared to white defendants, providing substantial support for the second hypothesis.

Discussion and Conclusion

The current study investigated disadvantages experienced by American Indian defendants in United States federal courts using data from the Federal Justice Statistics Program Data Series. In particular, the purpose of this research was to examine whether American Indians, in comparison to other racial and ethnic groups, were more likely to be disadvantaged at several stages in criminal case processing—the decisions for pretrial detention, charge reductions, guidelines departures, and sentence length. Although racial disparity has been extensively analyzed in the criminal case processing literature and, more recently in the cumulative disadvantage literature, prior literature typically excludes American Indians in the analysis. To address this research gap, I investigated whether American Indians were more likely than similarly situated defendants of other races and ethnicities to experience outcome-specific disadvantages at individual stages of criminal

case processing (hypothesis 1). In addition, I examined cumulative disadvantages for American Indian defendants and assessed whether American Indians were more likely than similarly situated white defendants to experience cumulative disadvantages across combinations of more punitive criminal case processing outcomes (hypothesis 2).

The findings revealed some support for Hypothesis 1 and American Indian defendants were more likely to experience outcome-specific disadvantages. That is, American Indians were *more likely* to be detained, *less likely* to receive federal guideline substantial assistance departures, and *more likely* to be given lengthier sentences compared to similarly situated white, black, Latino, and Asian offenders. In addition, this study found compelling support that American Indians experience cumulative disadvantages (Hypothesis 2). The direct and indirect effect of the American Indian dummy on the final decision point (sentence length) mediated by pretrial detention provided the strongest support for significant disadvantages against American Indians. In short, two-path chains where pretrial detention was included were statistically significant (e.g., pretrial detention and charge reduction), and served to support the prediction that American Indians were cumulatively disadvantaged. However, three-path chains were nonsignificant (e.g., pretrial detention, charge reduction, and downward departure). This fact is unsurprising because “three-path chains often seem much weaker than two-path chains because the first indirect effect is dampened by two mediators instead of only one” (Wooldredge et al., 2015, p. 214).

Several implications can be derived from this study. First, the focal concerns perspective has dominated the sentencing and criminal case processing literature since its introduction, yet its application to racial and ethnic disparity has mainly been investigated in differences between white and blacks, and more recently Latinos. Therefore, it is unknown if the findings and implications examining the focal concerns perspective can be generalized to American Indian defendants. This research indicates that American Indians fared significantly worse than their minority counterparts in terms of each individual decision examined in this study and they experienced cumulative disadvantages when compared to their white counterparts. These findings provide compelling support for the focal concerns perspective and its application to American Indian defendants.

In addition, the research presented here draws attention to the idea that additional minority groups *must* be included when assessing disparities in the justice system, specifically how federal court actors perceive these groups. Excluding nontraditional defendants of color like American Indians precludes a comprehensive understanding of the nuances associated with punishment patterns and decision making, and thus undermines our understanding of how *other* minorities are treated and processed in the justice system. Limited attention to American Indians in sentencing literature is especially troubling considering their unique position in society, particularly so given that racial and ethnic characteristics often impact how court actors perceive a defendants' dangerousness and culpability.

Second, the current study is important in highlighting the disadvantages faced by American Indian defendants, and it also emphasizes the need for more research focusing on this particular minority group. For instance, although multiple decision points were examined, it is necessary to investigate additional outcomes determined even earlier in the sentencing process such as the ability to make bail and hire a private attorney, and to examine how these decision points may affect cumulative disadvantages for American Indians. Further, extant scholarship has highlighted the important role that social context plays in the sentencing process, particularly so when examining extralegal factors (e.g., race, ethnicity, and gender disparities). This notion is critical to the examination of American Indians because, like other minority groups, American Indians tend to be clustered in a limited number of federal districts. In addition to social context, future research may not only consider including American Indians, but also examining within-group differences among them. That is, like other minority groups (e.g., Latinos and Asians), American Indians tend to be homogenized, while in actuality they vary considerably in terms of region, historical treatment, language, and overall cultural experiences. They also vary in terms of socioeconomic, social, and political standing (e.g., larger tribes like the Navajo Nation versus smaller tribes like the Western Shoshone). Moreover, future research involving American Indians should also parse out the differences in treatment and punishment outcomes for rural versus urban American Indians, perhaps by supplementing current quantitative research with qualitative approaches as well.

In conclusion, sentencing literature that examines racial and ethnic disparity has surged in the last several decades. However, it remains an important issue that there is a lack of examination and understanding, in general, about American Indians' contact with the criminal justice system. This issue highlights the fact that American Indians are understudied, underserved, and underrepresented in criminological research, a significant oversight due to their growing representation in the federal courts (Ross, 1998). As a result of this oversight, policymakers are often equipped with little information about the disadvantages American Indians face throughout criminal case processing, cumulative or otherwise. The findings from this study suggest that lawmakers should focus on reducing disparities in the criminal justice system by specifically examining the potential for biases at *each* decision point. In addition, policymakers may want to focus resources on the overwhelming economic disparity faced by American Indian communities because researchers have long considered the detrimental effects of socioeconomic inequality, particularly for communities of color and how the imbalance in economic gain translates to the potential for social injustices (Western, 2006; Wilson, 1987). By improving economic conditions for American Indians, perceptions (stereotypes) about them may improve, perhaps leading to balanced punishment outcomes for American Indians.

CHAPTER 3: EXAMINING AMERICAN INDIAN DISADVANTAGE OVER TIME

Overview

Minority defendants generally receive harsher punishments and sentencing outcomes than similarly situated whites (see Baumer, 2013; Mitchell, 2005; Spohn, 2000; Ulmer, 2012; Zatz, 2000). More specifically, these reviews suggest that compared to white defendants, black and Latino defendants are likely to receive more severe sentences. In light of this trend in the literature, sentencing research has focused more on blacks and Latinos and the differential treatment they experience, paying less attention to other minority groups. Although these studies have made significant contribution to extant sentencing research, supplemental investigations are needed that examine the treatment and experiences of *other* racial and ethnic groups. Further examination of disparity in the sentencing process is important because current sentencing research has made the claim that Latinos are *now* the *most* disadvantaged minority group (Doerner & Demuth 2009; Steffensmeier & Demuth 2001; Light, 2014). However, sentencing research rarely incorporates other minority groups in the analysis, such as American Indians (except see Johnson & Betsinger, 2009; Franklin, 2013 for examples). Therefore, we do not know the full scope of American Indian disadvantage in terms of sentencing outcomes, and whether American Indians are treated differently than white, black, *or* Latino defendants. Thus, American Indians may be *even more* disadvantaged in sentencing outcomes than their Latino and black counterparts.

The inattention to American Indians in federal sentencing research is concerning for several reasons. First, blacks and Latinos are characterized as being socially disadvantaged and research suggests that this may contribute to the likelihood of contact with the criminal justice system (Western, 2006; Wilson, 1987). However, research also suggests that American Indians are one of *the most* socially disadvantaged groups (Perry, 2006; Poupart, 2002; Snipp, 2002). Thus, along this line, it is reasonable to expect that American Indians are likely to come in contact with the criminal justice system and face disparity in the process similar to or *even worse* than those faced by blacks and Latinos. In addition to being socially disadvantaged, American Indians are negatively stereotyped in a number of ways (e.g., dangerous and violent) (see Alvarez & Bachman, 1996; Bachman et al., 1996; Powers, 2006; Reingle, 2012; Zatz et al., 1991)—which, may increase the likelihood of them receiving harsher treatment and punishment decisions in the sentencing process.

Second, between the 2000 and 2010 census, the American Indian population increased by one million (26.7 percent), and American Indians who reported being American Indian in combination with another race increased by nearly 40 percent (US Census Bureau, 2010). These statistics suggest that the American Indian population is growing which could potentially increase their likelihood of contact with the criminal justice system and its actors, which may simultaneously increase any existing negative perceptions about American Indians. To highlight this point, from 2009 to 2013 the number of American Indian defendants in federal custody increased by roughly 27

percent (USSC, 2013) and, research maintains that American Indians are grossly overrepresented in US federal courts (Ross, 1998). Third, because American Indians are left in the background of sentencing research at the federal level, little information can be drawn about the American Indian experience and American Indian criminality—accordingly, theory and policy regarding American Indians and federal sentencing is limited.

Fourth, only a small number of studies have moved beyond the traditional black-white and Latino-white focus to examine the treatment and decision making patterns for American Indian defendants (e.g., Alvarez & Bachman, 1996; Franklin, 2013; Ulmer & Bradley, 2018; Wilmot & DeLone, 2010). This body of research demonstrates that American Indian defendants experience sentencing disparities at different levels, are disproportionately represented compared to white defendants, and, overall, are treated differently. Thus, incorporating American Indians in sentencing research has significantly advanced our understanding, yet more studies are needed because many questions remain. For instance, current federal sentencing research has yet to account for the long-term punishment trends for American Indian defendants. Therefore, we do not know whether over time sentencing disparities have increased *or* decreased.

To address these changes and add to the literature, this study will examine American Indian disadvantage over time by reviewing sentencing decisions longitudinally as opposed to the traditional approach of using cross-sectional analysis. As such, I employ the focal concerns perspective and assess whether disparities have

increased over time for American Indian defendants compared to white and other racial and ethnic groups (i.e., black, Latino, and Asian and defendants).

Theoretical Foundation

Disparity and punishment outcomes in sentencing studies has mainly been linked to the focal concerns perspective (Steffensmeier et al., 1998). According to the focal concerns perspective, courtroom officials (e.g., judges) base critical punishment and sentencing decisions on their assessments of offender *blameworthiness* (e.g., level of harm caused by the offender) and their desire for *community protection* by meting out punitive sentencing outcomes to dangerous offenders (e.g., likelihood of recidivating). Also under the focal concerns perspective, courtroom officials are focused on *practical concerns and constraints*, suggesting that courtroom actors are concerned with sentencing decisions and their practical consequences (e.g., social costs) (Steffensmeier et al., 1998). One issue in making sentencing decisions is that courtroom actors (judges in particular) are uncertain about the outcomes of cases, and often operate on limited information (Albonetti, 1991). Thus, besides legal and offense related attributes, courtroom officials may also take into account extralegal factors such as race and ethnicity. In doing so, courtroom actors lean on what is termed “perceptual shorthands” to make critical sentencing decisions. Perceptual shorthand is used to determine whether an offender deserves to be punished, their level of dangerousness, and whether they pose a threat (Albonetti, 1991). Although courtroom actors are guided by legal components, research suggests that perceptual shorthand assessments are largely based on the

assumption that courtroom actors also consider cues, prior experiences, prejudices, limited stereotypical information (e.g., social class and race and ethnicity), and other attributions to draw conclusions (Bridges & Steen, 1998; Engen et al. 2003; Hawkins, 1981; Spohn & Holleran, 2000; Steffensmeier et al., 1998; Ulmer & Johnson, 2004). In sum, these assessments are subjective, and may engender unwarranted disparity for minority defendants (Johnson et al., 1998).

Moreover, each component in the focal concerns paradigm is tied to information that is directly related to gross generalizations and stereotypes about the offender. As such, this approach may be especially problematic for minority defendants. Courtroom actors are afforded considerable discretion when making decisions, and it is conceivable to suggest that harmful assumptions about certain races and ethnicities may negatively influence the treatment they receive from courtroom actors and officials conflated by the fact that these groups lack resources to alter the narrative. For example, blacks have been portrayed as dangerous, aggressive, irresponsible, violent, and criminal (Gibbs, 1988; Tittle & Curran, 1988; Steffensmeier & Demuth, 2000), and Latinos have been habitually linked to drugs, crime, and labeled as lazy (Chavez, 2013; Healey, 1995; Roman, 2000; Steffensmeier & Demuth, 2000)—all of which are *negative* and *harmful*. As such, research highlights the association between these gross misrepresentations and harsher sentencing outcomes for black and Latino defendants (for reviews see Baumer, 2013; Mitchell, 2005; Spohn, 2000, 2015; Ulmer, 2012; Zatz, 1987, 2000). Taken together, preconceptions that are formed around a defendant's race and ethnicity expose them to

damaging unsubstantiated characterizations which falsely label them (e.g., *more* dangerous and *more* blameworthy), and could lead to disadvantage in the sentencing process (e.g., Johnson, 2005, 2006; Johnson et al., 2008; Koons-Witt, 2002; Spohn & Holleran, 2000; Steen, Engen, & Gainey, 2005; Steffensmeier et al., 1998; Ulmer & Johnson, 2004).

American Indians and the Focal Concerns Perspective

Under the focal concerns perspective, it is assumed that American Indians may face disparate treatment similar to their other minority counterparts. In particular, American Indian communities are largely stereotyped in a negative manner, just like black and Latino communities—which the focal concerns perspective posits may influence decision makers and their assessment of each focal concern (Steffensmeier et al., 1998). However, American Indian defendants may be *even more* disadvantaged than other minority groups because of *how* they are typecast and perceived by the larger society. A number of stereotypes have been formulated in relation to American Indian communities, labeling them as savages, drunks, emotionless, violent, and aggressive (see Alvarez & Bachman, 1996; Bachman et al., 1996; Powers, 2006; Reingle, 2012; Zatz et al., 1991). In addition to these misrepresentations, a general lack of knowledge exists about contemporary American Indians, their way of life, and their cultural experiences, except for romanticized stereotypical information (Josey, 2015). In the meantime, American Indian defendants may be treated more harshly by western institutions (e.g., the criminal justice system) because scholars suggest that characterizations about

American Indians have been institutionalized *and* directly linked to years of colonization, oppression, forced assimilation, and exploitive tactics (see Alvarez & Bachman, 1996; Lieber, 1994; Perry, 2006; Poupart, 2002).

In this light, American Indians might be considered more dangerous, more culpable, and in response, courtroom actors may feel justified in meting out tougher punishments toward American Indian defendants. Specifically, armed with limited information, courtroom actors may utilize perceptual shorthands to make key decisions concerning American Indians—prejudging American Indian defendants as blameworthy and likely to recidivate. Therefore, to ensure community protection courtroom actors may distribute harsher treatment and punishments decisions to American Indian defendants. However, a glaring problem with this approach is that most information about Native communities is derived from stereotypical, unsubstantiated, and outdated misconceptions about who they are. This is conflated by their cultural and ethnic differences such as language and traditional practices. Collectively, these circumstances may enter the courtroom environment, influence decision makers, their assessment of each focal concern, and ultimately, impact critical decision points (e.g., incarceration and sentencing).

Moreover, American Indian defendants may be treated more harshly in the sentencing process for three reasons. First, research has underscored the social disadvantages faced by American Indian communities (Hunt et al., 2010; Nagel et al., 1988; Sandefur, 1989; Tootle, 1996). These social ills (e.g., poverty and social isolation)

have been linked to the historical maltreatment of American Indians (e.g., genocide and forced assimilation) (Perry, 2006; Poupart, 2002; Snipp, 1992; Steinman, 2012), as well as American Indian criminality (Poupart, 2002; Ross, 1998). In addition, several scholars have noted that social disadvantages overlap to produce concentrated disadvantage, joblessness, social isolation, limited access to positive social networks, and a number of negative community outcomes (Massey & Denton, 1993; Sampson & Wilson, 1995; Skogan, 1990; Wilson, 1987). However, the experiences of black communities have predominately been the focus of this research. These experiences and associations may also be generalizable to American Indian communities because they deal with many of the same strains—reservations are typically far removed from mainstream society creating conditions of extreme isolation and reduced access to employment and other resources. These conditions may also promote criminality, and in the public’s mind reinforce negative stereotypes about the individuals living in these disadvantaged communities. In the context of the focal concerns perspective and American Indian defendants, courtroom actors may draw from these negative stereotypes that characterize American Indian communities when making important sentencing decisions. Courtroom actors may consider American Indian defendants to be threatening, repeat offenders, who pose an immediate danger to the community at large, thus warranting harsher sentencing decisions (Alvarez & Bachman, 1996; Leiber et al., 2007; Perry, 2006; Zatz et al., 1991).

Second, little information is known about the contemporary experiences of American Indian communities. Native scholars maintain, several mischaracterizations

persist about American Indians that are transmitted to the larger society (e.g., violent, drunk, self-destructive, resistant to western progress) (see Alvarez & Bachman, 1996; Bachman et al., 1996; Powers, 2006; Prucha, 1971; Reingle, 2012; Zatz et al., 1991). Further, there are more than 500 federally recognized tribes across the United States, however, American Indian cultural practices and experiences have been coalesced. In the public's mind, American Indians share the same cultural customs and traditions (see Hirschfelder et al., 1999), but in reality, Native tribes are culturally distinct, and have been impacted by historical maltreatment to different degrees (Poupart, 2003). Nevertheless, research underscores the relevance of cultural distinction in deciding punishment severity and dangerousness (Black, 1976; Steffensmeier & Demuth, 2000), and because American Indian communities are culturally and spatially far removed from mainstream society they may be viewed as too culturally dissimilar from the mainstream. Thus, American Indian defendants could be perceived as blameworthy and deserving harsher punishments.

Third, according to the US Census (2010), the *multiple*-race American Indian and Alaska Native population rose significantly since 2000 (an increase of 39%), whereas the American Indian and Alaska Native *alone* population increased almost twice as fast as the total US population from 2000 to 2010 (roughly 18%). These numbers suggest that the American Indian population size is noticeably increasing. Therefore, as the American Indian population size increases, negative perceptions regarding their culture, lifestyle, and who and what they represent might also increase. The focal concerns perspective

indicates that court actors are forced to rely on limited information regarding a defendant's character, their likelihood of recidivating, and level of seriousness. Courtroom actors are likely to base critical decisions about defendant blameworthiness, culpability, dangerousness, and practical concerns and constraints using extra-legal attributes (e.g., race and age) to inform their decisions (Ulmer & Johnson, 2004). This approach could prove especially detrimental for American Indians who have historically been viewed negatively, coupled by the fact that several negative stereotypes have been tied to their culture and lifestyle.

The relationship between Indian nations and the US federal government has been challenging, and characterized American Indians in a seemingly negative manner. Although federal laws have been implemented to protect Indian nations through countless treaties and agreements, federal Indian laws have varied significantly since their inception—including overt practices by the US federal government to destroy tribal organizations, and even Indigenous peoples (see Getches, Wilkinson, Williams, & Fletcher, 2011). Thus, from a historical perspective American Indians have been viewed as a problem to the federal government, and who need to be controlled by federal institutions like the Bureau of Indian Affairs (see Chambers, 2014; Fixico, 2007). Taken together, the relationship between American Indians and the federal government highlights the extreme marginalization of Indigenous peoples. The focal concerns perspective suggests that social marginalization may be directly linked to assigning blame and culpability.

In Light's (2014) discussion of citizenship status to evoke negative perceptions from those in power, he draws on Black's (1976) work to make the argument that because non-citizens are socially marginalized and culturally dissimilar, they are more likely to be viewed as deviant and deserving of punishment. In keeping with this argument, American Indians may also be characterized in a similar manner as non-citizens. American Indians lie far outside of the social structure, reservations have been strategically removed from mainstream society and lack certain resources, and American Indian customs and traditions are considered culturally foreign to the larger society (e.g., language and ceremonial practices). The argument is made that "outsiders" are likely to be treated more punitively compared to those who are considered "cultural insiders" (Light, 2014, p. 455; see also Black, 1976). Thus, courtroom actors may be more likely to view American Indians as outsiders who represent something *different* from the social norm. This difference, combined with their status as a socially marginalized group whose population size is steadily on the rise, may exacerbate preexisting negative perceptions about American Indians, and may characterize them as blameworthy and deserving of harsher treatment and punishment.

In sum, false depictions and misrepresentations about American Indian communities characterize them as outsiders, who should be feared, and who may be dangerous, which is reinforced in the public's mind—including courtroom officials who draw on past experience, prejudice, and stereotypes to make important decisions (Albonetti, 1991; Steffensmeier et al., 1998). Collectively, this suggests that American

Indians may expect to confront disparity and more punitive sentencing outcomes, especially as the size of the American Indian population increases.

Longitudinal Research

Little attention has been given to *time* in the sentencing process (for exceptions see Hofer, 2007; Light, 2014; Light et al., 2014), and instead sentencing research has mainly focused on the importance of *place* (e.g. Britt, 2000; Feldmeyer & Ulmer, 2011; Johnson, 2006; Johnson et al., 2008; Ulmer & Johnson, 2004). However, research suggests that *alongside* place (district contexts), time period may play an equally influential role in determining decisions for criminal punishment (Light, 2014). Notably, examining sentencing outcomes over time (longitudinally) is important because it might uncover disparities and trends (negative or positive) that would otherwise be missed if a single time frame is investigated. This might be particularly important when investigating the influence of race and ethnicity because scholars have highlighted the prominent role that a defendant's race and ethnicity play in the sentencing process, calling for researchers to "monitor historical variation in the effects of defendant social statuses and contextual factors on sentencing" (Ulmer, 2012, p. 31). Further, it is argued that where disparity based on race and ethnicity is concerned, over time treatment and sentencing decisions have grown subtle, indirect, and institutionalized (see reviews Spohn, 2000; 2015; Zatz, 1987, 2000). This suggests that we might see a negative trend in American Indian disadvantage over time. That said, the research on sentencing disparity concerning

American Indians may be improved by integrating longitudinal analysis to detect any negative *or* positive trends over time throughout the federal sentencing process.

The significant role of race and ethnicity in the sentencing process has been highlighted across a number of reviews (see Baumer, 2013; Mitchell, 2005; Spohn, 2000; Ulmer, 2012; Zatz, 2000). The aforementioned scholarship drew from seminal research to make conclusions, expose trends, and has been critical in elevating the narrative that minority defendants are typically the recipients of harsher treatment than their white counterparts regarding criminal punishment outcomes (e.g., sentence length decision). Specifically, this research highlights a disturbing trend in the literature that, on average, white defendants can expect to receive more lenient sentences than similarly situated minorities. However, it is important to recognize that most of these studies were done using cross-sectional analysis. In contrast, a body of work exists that highlights the importance of using a longitudinal approach when examining sentencing outcomes (e.g., federal sentencing guidelines) and the impact that *time* may have on sentencing decisions (for example see Griffin & Wooldredge, 2006; Kim et al., 2016; Koons-Witt, 2002; Light, 2014; Light et al., 2014; Ulmer et al., 2011a, 2011b; Starr & Rehavi, 2013). Overall, the findings support cross-sectional analysis by uncovering the presence of racial and ethnic disparity over time in the criminal justice system. Although these studies have spotlighted how discrepancy may fluctuate relative to time, the fact is that too few sentencing studies have utilized longitudinal analysis. Accordingly, additional research is needed to expose any disadvantage and sentencing trends (negative or positive), especially empirical

studies that include *other* minority defendants such as American Indians and disadvantages they may experience at the federal level.

Accordingly, this chapter highlights the importance of employing a longitudinal approach to investigate American Indian disadvantage over time and across several key sentencing decision points. To my knowledge there has been no study that examines American Indian disadvantage over time. With this in mind, we do not know whether a trend (negative *or* positive) emerges for American Indians defendants. Instead, in line with extant research, scholars have mainly concentrated on blacks and Latinos, compared to whites when examining longitudinal trends for disparity (see Light, 2014 and Light et al., 2014 for example). Thus, over time American Indian defendants may experience a *negative* trend in punishment similar to other groups.

Current Study

In this chapter, I predict that disparities have increased over time for American Indian defendants compared to defendants of other races and ethnicities. Data and Methods

Data and Methods

Data

For the current study, I focus on sentencing outcomes in federal courts. Individual-level sentencing data come from the USSC's Standardized Research Files for fiscal years 1994 to 2012, thus the study time frame covers 19 years. The USSC data contain detailed information, including but not limited to, sociodemographic information

(e.g., race/ethnicity, age, gender, and education), case processing details (e.g., offense severity, criminal history, and reason for sentence departure), and a wide array of sentencing-related outcomes (e.g., pretrial detention and sentence severity). These data contain rich information that is relevant to understanding whether disparities for American Indian defendants may be stable over time compared to individuals of other races and ethnicities.

The analysis is limited to cases sentenced within the 89 United States federal districts, excluding foreign territories.²² Further, following the lead of recent sentencing literature that has examined American Indians defendants (Franklin, 2013; Ulmer & Bradley, 2017), the analysis is restricted to federal districts where a considerable number of American Indians were processed (7 or more),²³ thus 31 districts are included in the analysis.²⁴ I also limit the analysis to United States citizens given that the focus of my research is on American Indians, all of whom are United States citizens.²⁵

Dependent Variables

²² The following districts were removed for the analysis: Puerto Rico, Guam, the Virgin Islands, North Marina Island, and the District of Columbia.

²³ District-level summary statistics indicate that on average, across years and districts, 25% of districts have 7 or fewer American Indians and 50% have 2 or fewer American Indians. Because it seems that 7 is a natural breaking point, I use districts that have 7 or more American Indian defendants for the analysis.

²⁴ These districts include Alaska, Arizona, Colorado, Idaho, Iowa North, Kansas, Michigan East, Michigan West, Minnesota, Montana, Mississippi South, Nebraska, Nevada, New Mexico, New York North, North Carolina East, North Carolina West, North Dakota, Oklahoma East, Oklahoma North, Oklahoma West, Oregon, Pennsylvania Mid, South Dakota, Texas West, Utah, Washington East, Washington West, Wisconsin East, Wisconsin West, and Wyoming.

²⁵ Immigration cases were removed from the analyses.

The main dependent variables of interest are 1) federal guideline departures and 2) sentence length.²⁶ First, prior research has emphasized the importance of including federal guideline departures in federal sentencing analyses (e.g., Albonetti, 1997; Johnson et al., 2008; Johnson & Betsinger, 2009; Feldmeyer & Ulmer, 2011; Franklin, 2013; Mustard, 2001; Steffensmeier & Demuth, 2000). *Federal guidelines departures* are analyzed against the likelihood of receiving no departure; more specifically, I examine downward departure and substantial assistance departures.²⁷ Federal judges may give defendants sentence reductions well below the minimum recommended sentence under different circumstances. Specifically, *downward departure*, a dichotomous variable, identifies whether a judge sentenced a defendant below the guideline range, not because of government request or Booker.²⁸ *Substantial assistance departure* indicates whether a judge sentenced below the guidelines, based on the defendant's willingness to provide

²⁶ In this study, I depart from prior sentencing research that has typically estimated two separate models—one for incarceration and another for sentence length (e.g., Steffensmeier et al., 1993). In doing so, I follow more recent scholarship and utilize a one-stage model to analyze judicial decision-making because doing so accounts for the fact that judges consider virtually the same criteria and information when making decisions about incarceration and sentence length (see Bushway & Piehl, 2001; Paternoster, 2011; Starr & Rehavi, 2013), thus including both is unnecessary. However, I acknowledge that not all scholars would agree with this approach. In fact, several studies indicate that prior record is the strongest predictor of prison/no prison, but offense severity is the strongest predictor of sentence length.

²⁷ Johnson and Betsinger (2009, p. 1062) indicate that, “Downward and substantial assistance departures follow different procedural and legal protocols (e.g., the latter require a motion from the US Attorney),” and to compare against the traditional methodological approach of running a multinomial model, Johnson and Betsinger also ran separate logistic regressions comparing downward departure with no departure and substantial assistance departure with no departure. In doing so, they found no key differences to their findings. I follow this approach and perform the analysis running separate logistics regression models. For additional examples that have analyzed departures using logistic regression see Kempf-Leonard & Sample, 2001; Kramer & Ulmer, 2002; Spohn & Fornango, 2009; Spohn & Brennan, 2011; Stacey & Spohn, 2006.

²⁸ Booker refers to the 2005 ruling in *United States v. Booker* which classified the sentencing guidelines to advisory status rather than mandatory. Under this ruling, judges may depart from the guidelines for a number of reasons because the guidelines are no longer legally binding. For example, a judge may depart from the guidelines when an offender offers substantial assistance to prosecution, a defendant voluntarily disclosed the offense, or if the defendants accepted responsibility for the offense, to name a few.

information to law enforcement and offer assistance in federal cases, and is coded as 1 if defendants provide said assistance to authorities.²⁹

Second, *sentence length* is used to assess the number of months an offender was sentenced to prison, and is measured as a continuous variable capped at 470 months. Because sentence length is positively skewed, the natural log of sentence length is used (see Bushway & Piehl, 2001; Johnson, 2006; Johnson & Betsinger, 2009; Ulmer & Johnson, 2004). Furthermore, in keeping with prior research, probation cases and other alternative cases are coded as zero months of incarceration (e.g., see Johnson & Betsinger, 2009; Kim, Spohn, & Hedberg, 2015; Starr & Rehavi, 2013; USSC, 2010), and were added .1 prior to the natural log.

Independent and Control Variables

The main independent variable at the individual-level is race and ethnicity, which is measured using a series of dummy variables for American Indian, black, Latino, and Asian; holding white as the reference category. I control for a range of offender-related factors, including age, gender, number of financial dependents, and education level. *Age* is a continuous variable measured in years, which captures a defendant's age at the time of sentencing. *Gender* is measured as a binary variable (1 = male; 0 = female). *Number of financial dependents* is measured as a continuous variable, which captures a defendant's number of financial dependents.³⁰ *Education level* is measured using three dummy

²⁹ These departures are controlled by the US Attorney, who must file a motion for a downward departure due to substantial assistance.

³⁰ In line with prior research, missing data for this variable are coded as zero (see Johnson & Betsinger, 2009, p.1059).

variables: high school degree, some college, and college degree and higher, holding less than a high school degree as the reference category.

Legal factors are also controlled for. First, *offense type* is measured using five dummy variables, which include firearm offense, violent offense, property, fraud, and other type of offense; holding drug offense as the reference category. Second, *multiple counts of conviction* is measured as a binary variable that captures whether a defendant was convicted of more than one count (1 = multiple convictions; 0 = otherwise). Third, *presumptive sentence* is included, which combines the 43-point offense severity scale with the 6-point criminal history scale and accounts for the minimum number of months of incarceration as recommended by the federal sentencing guidelines and mandatory minimums. Presumptive sentence, capped at 470 months, is log transformed after the constant of .1 is added. Fourth, *criminal history* score is included and is based on the USSC 6-point scale, which rates a defendant's prior criminal history score from 1 to 6 (6 indicating a higher score or more criminal history points).³¹ Fifth, *trial* is controlled for and is captured using a dummy variable indicating whether an offender was convicted through bench or jury trial (1 = trial; 0 = pled guilty). Sixth, *accepting responsibility* captures whether a defendant shows remorse and is measured as a dummy variable to indicate whether an offender received two- or three-guidelines level sentencing discount for acceptance of responsibility (1 = accepting responsibility; 0 = otherwise).

³¹ Prior research in federal sentencing has incorporated both the offenders' final criminal history scores and the presumptive sentence because both are key components and independently influence the decision making process (e.g., Albonetti, 2002; Johnson et al., 2008; Shermer & Johnson, 2010).

Last, to observe any trends in punishment within the study time frame (across 19 years), a measure for time is included at level 2 and ranges from 1 to 19. Table 4 provides a summary of the descriptive statistics for dependent, independent, and control variables.

Table 4. Descriptive Statistics for Sentence Length and Guidelines Departures Longitudinal Models

	<i>N</i>	Mean	SD
Dependent Variables			
Substantial Assistance Departure	136,225	0.19	0.39
Downward Departure	136,288	0.08	0.26
Ln sentence length	142,185	2.60	2.55
Independent Variables			
<i>Level 1 - Individual</i>			
American Indian		0.11	0.31
White (reference)		0.47	0.50
Black		0.23	0.42
Latino		0.17	0.38
Asian		0.02	0.12
Male		0.82	0.38
Age		35.03	14.46
Dependents		1.56	4.59
No High-School Diploma (reference)		0.32	0.47
High-School Graduate		0.39	0.49
Some College Education		0.22	0.42
College Graduate and Above		0.06	0.23
Ln Presumptive Sentence		3.79	1.17
Criminal History		2.56	1.82
Pretrial Detention		0.52	0.50
Accept Responsibility		0.91	0.29
Multiple Counts		0.20	0.40
Trial		0.05	0.22
Drug Offense (reference)		0.41	0.49
Firearm Offense		0.14	0.35
Violent Offense		0.12	0.32
Property Offense		0.05	0.22
Fraud Offense		0.11	0.31
Other Offense		0.16	0.36
<i>Level 2 - Time</i>			
Sentencing Year		11.42	5.20
American Indian x Year		1.20	3.88
White x Year (reference)		5.25	6.60
Black x Year		2.66	5.48
Latino x Year		2.09	5.02
Asian x Year		0.18	1.56
<i>Level 3 - District</i>			
		62.80	23.83

ABBREVIATIONS: Ln = natural logarithm; SD = standard deviation

Analytic Strategy

To investigate whether disparities against American Indian defendants increased over time, I employ multilevel model techniques because multilevel models highlight the fact that defendants are nested within sentencing year and district court (see Light, 2014 for a more detailed explanation) and this approach is consistent with prior sentencing research examining punishment trends across time (see Light, 2014; Light et al., 2014). In particular, this study incorporates three levels of analysis: *Level 1* includes each sentenced case, *Level 2* contains the sentencing year, and *Level 3* is the district court.³² Incorporating three levels of analysis is consistent with prior sentencing research to observe trends over time (see Light, 2014; Light et al., 2014). Further, the guidelines departure decisions are modeled using hierarchical logistic regression and the logged sentence length is analyzed with hierarchical linear regression.³³

The analysis is proceeded in three stages. The first stage of the analysis estimates unconditional models for the likelihood of departures (substantial assistance and downward) and sentence length to determine the magnitude of between-time and between-district variation in sentencing. Essentially, “these estimates provide useful insights into the relative importance of time period and district contexts in criminal punishment” (Light, 2014, p.461). The second stage of the analysis includes the individual-level, time, and district controls to assess if American Indian defendants are

³² This chapter only accounts for the nesting structure of the data by including the third level—district-level.

³³ Following the lead of prior sentencing research, listwise deletion is employed to handle missing data (e.g., Albonetti, 1997; Doerner & Demuth, 2010).

treated more harshly, net of controls. The third stage includes cross-level interactions between race/ethnicity and sentencing year to examine the trends in racial and ethnic disparities between 1994 and 2012 (see Light et al., 2014). All variables are grand-mean centered, and all models are estimated in STATA 13.³⁴

Results

Unconditional Models

Table 5 reports the results from the unconditional models of federal guidelines departures (substantial assistance and downward)³⁵ and logged sentence length. The results indicate that at level 2 (i.e., sentencing year), approximately 12.4 percent (ICC = .124) of the total variance in the likelihood of substantial assistance departure can be attributed to changes in punishment over time, and an estimated 7.9 percent (ICC = .079) of the total variance in the likelihood of substantial assistance departure is accounted for by differences *between* federal districts. The LR tests for substantial assistance departure show that a three-level model including year at level 2 and district at level 3 is preferred over a simple two-level model in which offenders are nested in districts (chi-square difference = 1527.40, $p = .000$). In terms of downward departures, the results suggest that about 29.3 percent (ICC = .293) of the total variance in the likelihood of downward departure can be attributed to changes in punishment over time, and an estimated 6.0 percent (ICC = .060) of the total variance in the likelihood of downward departure is

³⁴ Using prior research as an example (Kim, Spohn, & Hedberg, 2015; Rabe-Hesketh & Skrondal, 2008), I utilize likelihood-ratio (LR) tests to determine the statistical significance level of the random effects.

³⁵ Similar to Light's (2014), the level 1 random effect can be assumed to have a mean of 0 and a variance of $= \pi^2/3$ when calculating the intraclass correlation (see also Raudenbush & Bryk, 2002).

accounted for by differences *between* federal districts. The LR tests for downward departure show that a three-level model including year at level 2 and district at level 3 is preferred over a simple two-level model in which offenders are nested in districts (chi-square difference = 6225.31, $p = .000$). Further, the analysis for sentence length reveals that approximately 5.3 percent (ICC = .053) of the variance is attributable to the sentencing years (level 2), and 2.6 percent (ICC = .026) of the variance is at the district-level (level 3). The LR tests for sentence length show that a three-level model including year at level 2 and district at level 3 is preferred over a simple two-level model in which offenders are nested in districts (chi-square difference = 2113.91, $p = .000$). Overall, the results in Table 5 show support for claims reported in prior research (see Light, 2014)—that is, examining trends over time should be studied within extant sentencing research as closely as the district context, which has received considerably more attention.

Table 5. Three-Level Hierarchical Unconditional Models of Guidelines Departures and Sentence Length, 1994-2012.

Fixed Effects	Substantial Assistance Departure			Downward Departure			Ln Sentence Length				
	Coefficient	Standard Error	T-Ratio	Fixed Effects Intercept	Coefficient	Standard Error	T-Ratio	Fixed Effects Intercept	Coefficient	Standard Error	T-Ratio
Intercept	-1.61***	0.102	-15.78	Intercept	-3.13***	0.114	-27.46	Intercept	2.59***	0.79	32.69
Random Effects	Variance	Standard Deviation	ICC	Random Effects	Variance	Standard Deviation	ICC	Random Effects	Variance	Standard Deviation	ICC
Level-1 Individual	3.29a	—	—	Level-1 Individual	3.29	—	—	Level-1 Individual	6.18	2.49	—
Level-2 Year	0.168	0.409	12.4	Level-2 Year	1.09	1.04	29.3	Level-2 Year	0.176	0.420	5.3
Level-3 District	0.298	0.546	7.9	Level-3 District	0.278	0.527	6.0	Level-3 District	0.170	0.413	2.6
Log likelihood		-62510.462				-31699.607				-331781.71	
N		136, 225				136, 288				142, 185	

NOTE: a. Intraclass correlations for substantial assistance and downward departures are based on the following assumptions: level 1 random effect has a variance =

ABBREVIATIONS: Ln = natural logarithm

NOTES: Statistical significance of random effects not shown.

***p < 0.001

Time Trends

Models 1 and 2 in Table 6 report the multilevel logistic regression results for substantial assistance departures and downward departures, respectively. For both decisions, I follow Light (2014) and report first the overall trends in punishment over time (Model 1) and then the trends in racial/ethnic disparities over time (Model 2). More specifically, Model 1 includes all individual-level controls, year, and district, and Model 2 includes the same predictors with the addition of the cross-level interactions between race/ethnicity and sentencing year.

Table 6. Three-Level Hierarchical Logistic Regression Models of Guideline Departures, 1994–2012

Fixed Effects	Substantial Assistance Departures				Downward Departures			
	Model 1		Model 2		Model 1		Model 2	
	<i>b</i>	SE	<i>b</i>	SE	<i>b</i>	SE	<i>b</i>	SE
<i>Level—1 Offender</i>								
American Indian	-.80***	.04	-.80***	.04	-.05	.04	-.11*	.05
Black	-.19***	.02	-.18***	.02	-.02	.03	.00	.04
Latino	-.31***	.03	-.32***	.03	.12***	.03	.09*	.04
Asian	-.15*	.07	-.12+	.07	-.28**	.11	-.27*	.12
Male	-.36***	.02	-.37***	.02	-.34***	.03	-.34***	.03
Age	-.01***	.00	-.01***	.00	.00***	.00	.00***	.00
Dependents	.01***	.00	.01***	.00	-.00	.00	-.00	.00
High-School Graduate	.11***	.02	.11***	.02	-.05+	.03	-.05+	.03
Some College Education	.19***	.03	.19***	.02	-.01	.03	-.01	.03
College Graduate and Above	.19***	.04	.19***	.04	.26***	.05	.26***	.05
Criminal History	-.11***	.01	-.11***	.01	-.00	.01	-.00	.01
Accept Responsibility	1.13***	.05	1.13***	.05	.06	.05	.05	.05
Ln Presumptive Sentence	.65***	.01	.66***	.01	.05***	.01	.05***	.01
Firearm Offense	-.97***	.03	-.96***	.03	.52***	.04	.51***	.04
Violent Offense	-1.44***	.04	-1.44***	.04	.35***	.04	.34***	.04
Property Offense	-.72***	.06	-.72***	.06	-.09	.07	-.10	.07
Fraud Offense	-.35***	.03	-.34***	.03	.17***	.05	.17***	.05
Other Offense	-.91***	.03	-.90***	.03	.27***	.04	.27***	.04
Multiple Counts	-.19***	.02	-.20***	.02	-.27***	.03	-.27***	.04
Trial	-2.91***	.13	-2.92***	.13	.05	.07	.05	.07
Pretrial Detention	-.57***	.02	-.58***	.02	-.44***	.03	-.44***	.03
<i>Level—2 Time</i>								
Sentencing Year	.44	.02	.31	.04	1.06	.05	1.06	.05
Interactions by Time								
American Indian X Year	—	—	.02*	.01	—	—	-.02**	.01
Black X Year	—	—	.02***	.00	—	—	-.01	.01
Latino X Year	—	—	.03***	.00	—	—	-.01	.01
Asian X Year	—	—	-.01	.01	—	—	-.01	.02
<i>Level—3 District</i>								
District	.55	.07	.60	.08	.55	.10	.55	.10
Intercept	-1.80***	.10	-1.80***	.11	-3.05***	.12	-3.05***	.12
Log Likelihood	-50361.676		-50326.365		-29384.575		-29379.223	
N	121,616		121,616		121,619		121,619	

NOTES: Statistical significance of random effects not shown.

ABBREVIATIONS: Ln = natural logarithm; S.A. = substantial assistance; SE = standard error; SD = standard deviation

References = White, No Dependents, Less than High-School Graduate, Drug Offense

+*p* ≤ .10; **p* ≤ .05; ***p* ≤ .01; ****p* ≤ .001

Starting with models for substantial assistance departures, review of Model 1 indicates that, compared to whites, American Indians ($b = -.80$, $SE = .04$, $p \leq .001$) were less likely to receive a substantial assistance departure from the years 1994 through 2012. In fact, compared to whites, defendants of all the other races and ethnicities were *less* likely to receive a substantial assistance departure. Turning to Model 2, the interaction term between American Indian and sentencing year is positive and statistically significant ($b = .02$, $SE = .01$, $p \leq .05$). Combining with the main effect associated with the American Indian dummy ($b = -.80$, $SE = .04$, $p \leq .001$), this positive and statistically significant interaction indicates that over time American Indian disadvantage has been reduced. Thus, there is no support for my hypothesis that disparities have increased over time for American Indians with regard to substantial assistance departures. In addition, the cross-level interactions between sentencing year and black ($b = .02$, $SE = .00$, $p \leq .001$) and sentencing year and Latino ($b = .03$, $SE = .00$, $p \leq .001$) are both statistically significant, indicating that over time black and Latino disparity compared to whites, also decreased.

Turning to downward departures, the results for Model 1 indicate that American Indians ($b = -.05$, $SE = .04$) were less likely to receive downward departures compared to white defendants, although the coefficient is not statistically significant. The finding for black defendants is similar. However, the results for Latinos ($b = .12$, $SE = .03$, $p \leq .000$) and Asians ($b = -.28$, $SE = .11$, $p \leq .01$) suggest that Latinos were *more* likely to receive a downward departure than whites, whereas Asian defendants were significantly *less* likely

to receive a downward departure compared to whites. It is important to note that these findings are contrary to prior sentencing research overall; however, see Johnson and Betsinger (2009) for similar findings regarding Latino and Asian defendants. The expectation is that, on average, Asians may receive more lenient treatments (typically in comparison to white defendants), thus they should be more likely to receive a downward departure, whereas Latinos may receive stricter treatment and they should be less likely to receive a downward departure. The findings presented here do not support this expectation and possible explanations as to why are discussed in the discussion and conclusion. Further, Model 2 examines the interaction between race/ethnicity and sentencing year. The cross-level interaction effect between American Indian and sentencing year is statistically significant ($b = -.02$, $SE = .01$, $p \leq .01$). Given the main effect associated with the American Indian dummy in Model 2 ($b = -.11$, $SE = .05$, $p \leq .05$), the interaction between American Indian and sentencing year suggests that the disparity against American Indians when compared to whites has increased over time with regard to downward departures. Therefore, I did find support for my hypothesis regarding downward departures.

I turn now to the sentence length analysis. Model 1 in Table 7 indicates that American Indian defendants received considerably longer sentences compared to whites from 1994 through 2012. In particular, relative to whites, American Indians ($b = .19$, $SE = .02$, $p \leq .001$) and Latinos ($b = .04$, $SE = .01$, $p \leq .001$) received longer sentences, whereas Asians ($b = -.13$, $SE = .03$, $p \leq .001$) received shorter sentences. The coefficient

for black defendants was not statistically significant. Review of Model 2 in Table 7 shows that the cross-level interaction between American Indian and sentence year is negative and statistically significant ($b = -.01$, $SE = .00$, $p \leq .01$). Given that the main effect of the American Indian dummy is positive and statistically significant, the negative and statistically significant interaction between American Indian and sentence year suggests that sentence length disparities against American Indians significantly decreased over time. Thus, support for my hypothesis was not found with regard to the sentence length decision.

Table 7. Three-Level Hierarchical Linear Models of Ln Sentence Length, 1994–2012

	Model 1		Model 2	
	Ln Length		Ln Length	
Fixed Effects	<i>b</i>	SE	<i>b</i>	SE
<i>Level—1 Offender</i>				
American Indian	.19***	.02	.20***	.02
Black	.02	.01	.02	.01
Latino	.04***	.01	.04***	.01
Asian	-.13***	.03	-.13***	.03
Male	.33***	.01	.33***	.01
Age	-.00***	.00	-.00***	.00
Dependents	.00	.00	.00	.00
High-School Graduate	-.04***	.01	-.04***	.01
Some College Education	-.10***	.01	-.10***	.01
College Graduate and Above	-.14***	.02	-.14***	.02
Criminal History	.05***	.00	.05***	.00
Accept Responsibility	-.06**	.02	-.06**	.02
Ln Presumptive Sentence	1.26***	.00	1.26***	.00
Firearm Offense	-.19***	.01	-.19***	.01
Violent Offense	.01	.01	.01	.01
Property Offense	-.33***	.02	-.33***	.02
Fraud Offense	-.14***	.02	-.13***	.02
Other Offense	-.34***	.01	-.33***	.01
Multiple Counts	.17***	.01	.17***	.01
Trial	-.05*	.02	-.06*	.02
Pretrial Detention	.69***	.01	.70***	.01
Downward Departure	-1.03***	.02	-1.03***	.02
S.A. Departure	-1.18***	.01	-1.18***	.01
<i>Level—2 Time</i>				
Sentencing Year	.26	.01	.10	.01
Interactions by Time				
American Indian X Year	—	—	-.01**	.00
Black X Year	—	—	.01	.00
Latino X Year	—	—	-.01	.00
Asian X Year	—	—	.01	.01
<i>Level—3 District</i>				
District	.12	.02	.12	.02
Intercept	3.08***	.03	3.10***	.03
Log Likelihood	-210256.26		-210198.64	
<i>N</i>	121,616		121,616	

NOTES: Statistical significance of random effects not shown.

ABBREVIATIONS: Ln = natural logarithm; S.A. = substantial assistance; SE = standard error; SD = standard deviation

References = No Dependents, Less than High-School Graduate, Drug Offense

+*p* ≤ .10; **p* ≤ .05; ***p* ≤ .01; ****p* ≤ .001

Discussion and Conclusion

The goal of this study was to examine disadvantages over time against American Indians. This study highlights that although racial disparity has been reviewed at length in the sentencing literature, extant scholarship generally omits American Indian defendants from the analysis. Furthermore, current sentencing research sparsely incorporates longitudinal analysis. To address these research gaps, I examined whether disadvantages against American Indians in sentencing outcomes increased over time. More specifically, using data from the Federal Justice Statistics Program Data series, I investigated the sentencing of American Indian defendants over time from 1994 to 2012 in United States federal courts.

The findings did not show sufficient support for the hypothesis that disparities against American Indians increased over time. In particular, regarding substantial assistance departures, I found a decreased trend in American Indian disparity—that is, from the years 1994 through 2012 American Indian disparity in receiving substantial assistance departures has been reduced. The findings were also significant for blacks and Latinos, suggesting that over time there was a trend reducing minority disparity compared to whites in substantial assistance departures. Regarding downward departures, I found that, compared to whites, disadvantages against American Indians *increased* over time. In addition, I found that Latino defendants were *more likely* to receive a downward departure and Asian defendants were *less likely* to receive a departure. The extant research generally indicates that Latinos are less likely to receive lenient sentences

(Light, 2014; Light et al., 2014; Kutateladze et al., 2014; Steffensmeier & Demuth, 2000; Ulmer et al., 2011a, 2011b), whereas Asians are more likely to receive lenient sentences, either comparable to white defendants or even more favorable outcomes than whites (Everett & Wojtkiewicz, 2002; Kutateladze et al., 2014). Perhaps my counter-intuition findings associated with Latinos and Asians are attributed to the sample size; Asians made up a small portion of the sample, even smaller than American Indians. In addition, because the analysis was limited to districts with a considerable number of American Indians, some Latino and Asian defendants may have been excluded from the analysis—districts with a higher number of American Indians may have fewer Latino and Asian defendants. Moreover, in terms of Latino defendants, Johnson and Betsinger (2009) speculate that the strong Latino effects for downward departures may have more to do with early disposition “fast track” departures, particularly in districts located in the Southwest (see also USSC, 2003). Johnson and Betsinger (2009, p. 1064) state, “it is difficult to isolate fast-track departures from other downward departures because they are not reported consistently across districts, but the high percentage of downward departures for [Latino] offenders is consistent with the use of these types of disposition”.

Even with these findings, Latino defendants received *longer* sentences and Asian defendants received *shorter* sentences compared to white defendants. Last, the findings for the sentence length decision also showed insufficient support for my hypothesis. American Indians received longer sentences compared to whites, however the statistically significant cross-level interaction effect between American Indian and sentencing year

revealed that from the years 1994 through 2012 the trend in American Indian disparity decreased. That is, over time disadvantages for American Indians decreased and the likelihood of receiving a longer sentence than whites decreased over time. Thus, the finding with regard to sentence length failed to show support for the hypothesis.

Overall, the findings for substantial assistance and sentence length did not show support for the hypothesis and therefore did not show strong support for the focal concerns perspective, however I did find support in the downward departure decisions. More specifically, given that over time disadvantages against American Indians *decreased* for substantial assistance and sentence length, when making sentencing decisions, court actors may not lean on perceptual shorthands or stereotypes to negatively categorize American Indians as more culpable, blameworthy, and/or a danger to the community. In fact, recent research speculates that American Indian defendants may experience leniency and “positive discrimination” from criminal justice actors based on a “Big Crow”³⁶ effect—that is, because American Indian defendants face unique conditions and circumstances such as living on isolated reservations and other harsh living conditions they may be viewed as *less* blameworthy and receive leniency as a result (Jeffries & Bond, 2012; see also Ulmer & Bradley, 2017). However, it should be noted that while the interaction terms failed to yield the expected results, the findings for downward departures and at the *individual*-level were consistent with prior research. The

³⁶ See *United States v. Big Crow* (1990). According to Tredeau (2011), in the Eighth Circuit a defendant named Big Crow was given a downward departure after it was determined that certain factors warranted trumping the mandatory guideline policy indicating it was generally inappropriate to base sentencing decisions on particular extralegal characteristics. For example, employment history, community ties, and numerous attempts to overcome a disadvantaged background of violence and poverty having grown up on the Pine Ridge reservation in South Dakota were considered.

findings for downward departures suggest an increase in disparity over time, and findings at the individual-level indicate that American Indians did in fact experience disparate sentencing outcomes compared to white defendants (see Franklin, 2013), which lends support to the focal concerns paradigm that stereotypes about American Indians and their community may engender harsher sentencing practices. Additional research is needed to disentangle these results. A probable explanation may be that over time the margin of disparity may be growing smaller. That is, over time disparities for American Indians, though still present, may be subsiding.

The findings presented in this study provide several directions for future research. First, future research should supplement quantitative inquiry with qualitative exploration to more closely examine the attitudes and decision-making processes of court officials when making decisions about American Indians. This might entail interviewing law enforcement officials, prosecutors, and judges to examine various viewpoints and discretionary decisions to provide a more comprehensive understanding of *how* American Indians are treated and processed (e.g., political standpoints and perceptions of American Indians). Second, future studies may want to further investigate the sentencing of American Indians by diversifying our understanding of them. More specifically, similar to Asians and Latinos, American Indians are classified as one group, however there are variations among them (e.g., tribal affiliations and rural versus urban Indians), and as such, their interactions with criminal justice actors may vary widely. Examining these within-group differences would enhance our understanding of the way American Indians

are treated in the criminal justice system. Third, longitudinal research is needed that includes various measures at the district-level such as caseload, crime rate, and trial rate. The current study only accounted for the nested structure of the data at the district-level, but future scholarship may benefit from assessing how district-level variables affect longitudinal patterns for American Indians.

In conclusion, although I did not find support for my hypothesis that disparities for American Indians would increase over time in substantial assistance departures and sentence length, there was evidence of disadvantage against American Indians over time with downward departures *and* at the individual-level. This finding supports the fact that more knowledge is needed that investigates our understanding of American Indians within the criminal justice system as compared to whites and other minority groups. Despite a departure from overt discriminatory and racially based practices across the criminal justice system, sentencing research continues to find that racially-based disparities persist (see Baumer, 2013; Mitchell, 2005; Spohn, 2000; Ulmer, 2012; Zatz, 2000). For example, research suggests that similar to blacks and Latinos, compared to their numbers in the general population American Indians make up a disproportionately large portion of those in federal prisons. In particular, in states with a large American Indian population, Indians are considerably overrepresented in the criminal justice system (Sakala, 2014; see also Ross, 1998). Extant research also indicates that anti-American Indian biases are present in the criminal justice system, most of which have stemmed from negative perceptions (see Alvarez & Bachman, 1996; Leiber et al., 2007, Perry,

2006; Zatz et al., 1991). Ultimately, American Indians are one of the most disadvantaged groups, facing considerable social and economic barriers. Moreover, research has linked socioeconomic inequality with the proclivity to experience disproportionate injustice at each stage of the criminal justice system. Highlighting these linkages and especially the barriers that many American Indians face may reduce sentencing disparities and improve overall perceptions about American Indians. As further inquiry is developed to better understand American Indians and their interactions with the criminal justice system, research should be disseminated to policymakers and lawmakers to better serve the American Indian community, and reduce the prevalence of any discriminatory practices they face.

CHAPTER 4: AMERICAN INDIAN THREAT AND FEDERAL SENTENCING

Overview

Several studies have examined the influence of social context on sentencing outcomes (e.g., Britt, 2000; Fearn, 2005; Feldmeyer, Warren, Siennick, & Neptune, 2015; Helms & Jacobs, 2002; Johnson, 2005, 2006; Johnson et al., 2008; Kautt, 2002; Kim, Wang, & Cheon, 2018; Steffensmeier & Demuth, 2000; Ulmer & Johnson, 2004; Wooldredge, 2007), and found that at the federal level extralegal characteristics, such as race/ethnicity and gender, shape the way courtroom actors make decisions. Although studies have investigated minority population size and punitive sanctions, additional studies are needed (see Ulmer, 2012). That is, research is needed that broadens the current discussion and considers other minority groups, such as American Indians who are one of the fastest growing minority populations. Specifically, the American Indian population grew in size by over 26 percent since the 2000 census (by more than 1.1 million) (US Census Bureau, 2011). Also, similar to other minority groups who are clustered in select regions (e.g., Latinos in the Southwest), American Indians are largely concentrated in just 15 states (e.g., Alaska, New Mexico, and Arizona), which means their presence is pronounced in only a handful of federal districts. This fact suggests that investigations are warranted to determine how American Indians are treated across federal courtroom districts. However, federal sentencing research that focuses on ecological contexts have given little attention to American Indian populations (see Ulmer & Bradley, 2018 for an exception).

Moreover, extant literature on the influence of district contexts and racial and ethnic disparity has significantly advanced the literature. Several scholars have concluded that district composition matters and may heavily influence decision making practices (see Ulmer, 2012). However, our understanding of district context and disparity may be significantly improved by exploring districts that have large minority populations who are often left out of sentencing research, such as American Indians. To my knowledge, only one study has examined American Indian disadvantage and district context by investigating tribal-federal justice relationships. They found that American Indian defendants were treated in different ways than other defendants, but not necessarily more harshly (see Ulmer & Bradley, 2018). The fact that *one* study has included American Indian population context and disadvantage is problematic because American Indians are hardly studied in criminal justice and criminology research. As a result, limited information is available about their experiences, how they are treated compared to their similarly situated white, black, and Latino counterparts, whether they elicit perceptions of threat, and if they do, are they more likely to be granted stricter penalties in sentencing. The aforementioned study did not investigate the racial threat perspective. Along this line, theory and policy implications regarding American Indians are considerably restricted, and more research is needed. However, the research that has looked at racial and ethnic disparity maintains that the impact of district composition is staggering, yet only *one* study has examined American Indian social context and sentence disparity.

Thus, the purpose of this paper is to extend social context and racial threat research by examining sentences for American Indian defendants in federal courts and how sentences may be shaped by the American Indian population contexts of federal court districts. To do so, I draw information from a number of data sources and assess three separate questions: (1) whether American Indian threat is positively associated with punishment severity; (2) whether American Indian threat effects will be stronger than black and Latino threat; and (3) whether the positive association between the relative size of the American Indian population and punishment severity will be more pronounced for American Indian defendants than whites so that the disparity against American Indian defendants will be more pronounced in districts with a larger size of the American Indian population.

Theoretical Foundation

The racial threat theory has dominated social context and sentence disparity research. It posits that community composition (e.g., racial context) influences the treatment that racial minorities are likely to receive from those in power, such as social control agents (e.g., criminal justice officials) (Blalock, 1967). In particular, whites are likely to feel threatened and concerned about the positions of power and privilege they hold, as minority populations increase in size (Blumer 1958; Bobo and Hutchings 1996). Consequently, whites may feel threatened because as racial groups rise in numbers, they may also increase in power, economic gain, and hold more political strength—which, taken together means racial groups are in a better position to compete with whites for

power and status (Blalock, 1967). Thus, in order to prevent minorities from gaining control, to preserve their own social positions, and to minimize the perceived threat, whites are likely to employ social control tactics aimed at the growing minority population (Eitle, D'Alessio, & Stolzenberg 2002; Kent & Jacobs 2004, 2005; Liska, 1992). The criminal justice system is believed to be a form of social control across minority communities (Alexander, 2012; Blalock, 1967; Liska, 1992), and as a result, communities of color can expect to face more punitive crime control policies (Alexander, 2012).

Moreover, economic and political status are the main areas of concern where minorities may pose a significant threat to the white majority (Blalock, 1967). According to Blalock (1967), the dominant group is forced to compete—economically and politically—with the subordinate group, creating tension. And, in order to limit the perceived threat posed by the growing racial group, the white majority is likely to respond with biased and discriminatory actions, using social control tactics to uphold their dominant position of power and privilege (see Bobo & Hutchings, 1996; Bridges & Crutchfield, 1988; Eitle, D'Alessio, & Stolzenberg, 2002; Johnson, 2005; Johnson et al., 2008; Liska, 1992; Sampson & Laub, 1993; Ulmer & Johnson, 2004). Along this line, similar to black and Latino populations, American Indian defendants may be subject to harsher sentencing practices as they grow in size and seemingly pose a threat to the white majority regarding economic, political, and social gains.

Racial Threat and Sentencing

Research shows support for the racial threat theory, though most studies focus on black populations (Britt, 2000; Fearn, 2005; Helms & Jacobs, 2002; Kautt, 2002; Ulmer, 1997; Ulmer & Johnson, 2004), or more recently Latino populations (Feldmeyer & Ulmer, 2011; Feldmeyer et al., 2015; Wang & Mears, 2010a, 2010b, 2015). Little attention has been given to other racial and ethnic groups such as American Indians. Racial threat arguments suggest that to white majorities, minority outsiders (such as American Indians) are perceived as a threat, economically and politically. The supposed threat grows to a heightened concern as the minority group grows in size and competes for economic and political power, eliciting social control responses from the dominant group (Blalock, 1967). Studies that have investigated the application of racial threat theory have been in line with the racial threat arguments regarding imprisonment, sentence length, federal guidelines departures, and incarceration (for examples see Bridges and Crutchfield, 1988; Johnson, 2005; Johnson et al., 2008; Myers & Talarico, 1987; Ulmer & Johnson 2004; Weidner, Frase, & Schultz, 2005). Specifically, Johnson et al. (2008) examined federal guidelines departures and found that districts with greater black and Latino populations were *less likely* to grant more lenient downward departures. However, other studies found mixed results or no connection between the size of the minority population and harsher sentencing outcomes (see Britt 2000; Fearn, 2005; Helms & Jacobs, 2002; Kautt, 2002; Stolzenberg, D'Alessio, & Eitle, 2004; Ulmer, 1997; Ulmer & Johnson, 2004; Weidner & Frase, 2003).

Undoubtedly, the above research has advanced our understanding of social context and punitive sanctions. However, a significant oversight is the investigation of racial threat theory as it applies to *other* racial and ethnic groups, such as American Indians. Under the above assumptions, the racial threat perspective may apply to American Indian communities for several reasons. First, the American Indian population is steady rising compared to the general population (US Census Bureau, 2011). In the meantime, according to Blalock's (1967) argument, American Indians may pose a threat to the white majority as they increase in size. Second, upwards of 70 percent of American Indians have moved away from reservations and have integrated into cities and rural areas (US Census Bureau, 2011). Thus, American Indians are competing for resources (e.g., housing, jobs, and economic) in these areas, and may shift the overall population demographic. Together, these factors might elicit negative responses from the white majority (e.g., social control in the form of harsher sentencing practices).

Third, on the one hand, common stereotypes about American Indians imply that they are lazy freeloaders who live off the federal government, benefit from “super citizen” status, and acquire certain advantages and resources that are off limits to other groups (e.g., per capita aid, housing, healthcare, education, and food assistance) (Amodio & Devine, 2006; Burke, 2009; Miheuah, 1996; Tan, Fujioka, & Lucht, 1997).

Unsubstantiated misconceptions such as these may elicit concerns that American Indians exhaust economic resources, and place undue strain on limited governmental resources. As a result, the majority population may hold American Indian communities responsible

for furthering economic strains, and promote prejudicial behavior as a result (Quillian, 1995). In fact, the majority population may believe their own wealth and economic status are in danger and, therefore, take action to protect themselves through stricter policies and harsher sanctions.

On the other hand, research suggests that American Indian communities are socially and economically disadvantaged (Perry, 2006), even though a strong public perception is that American Indian communities are actually wealthy—particularly, those tribes that own a casino and receive a portion of the proceeds (Mihe-suah, 2013; McLaurin, 2012). In the public’s mind there seems to be an association between “Native casinos, Native wealth, and other “advantages” to being Native” (McLaurin, 2012, p. 69). These false misconceptions may enter the courtroom and impact sentencing decisions in districts that have larger American Indian population contexts. In fact, Native scholars highlight the fact that hostility exists around the idea of Indian wealth (Deloria, 2004), which according to Blalock (1967) and racial threat arguments, may engender stricter treatment and social control tactics. Against this backdrop, we might expect to see that in districts with a greater American Indians population, American Indian defendants will face stricter sentencing outcomes. Perhaps too, we might expect to see that American Indian threat will be more pronounced than black and Latino threat. And that, punishment severity and the relative size of the American Indian population will be more pronounced for American Indian defendants than whites so that the disparity against American Indian

defendants is more pronounced in districts with a larger size of the American Indian population.

Hypotheses

In this chapter, I develop several hypotheses about minority threat and its effect on how American Indians are treated in federal courts. The first hypothesis maintains that American Indian threat, as measured by American Indian population size, will be positively associated with punishment severity (Hypothesis 1). The second hypothesis contends that American Indian threat effects will be stronger than black and Latino threat (Hypothesis 2). In other words, while blacks and Latinos may be perceived as threatening, American Indians may be viewed as *more* threatening than blacks and Latinos. For the third hypothesis, I anticipate that the positive association between the relative size of the American Indian population and punishment severity will be more pronounced for American Indian defendants than whites so that the disparity against American Indian defendants will be more pronounced in districts with a larger size of the American Indian population (Hypothesis 3).

Data and Methods

Data

The current study focuses on sentencing outcomes in federal courts. Thus, individual-level sentencing data are derived from the USSC's Standardized Research Files for fiscal years 2008 to 2012. Detailed information related to sociodemographic information (e.g., race/ethnicity and education), case processing details (e.g., offense

severity and reason for sentence departure), as well as a variety of sentencing-related outcomes are included in the USSC data.

I limit the analysis to cases sentenced within the 89 US federal districts, not including foreign territories³⁷. Moreover, in line with extant sentencing literature that investigates the sentencing of American Indians defendants (Franklin, 2013; Ulmer & Bradley, 2017), I limit the analysis to federal districts where a sizable number of American Indians were processed,³⁸ and also restrict the analysis to US citizens because my research is focused on American Indians, all of whom are US citizens.³⁹ Thus, the analysis includes 31 districts.⁴⁰

I gather contextual-level data from a number of sources. First, I aggregated USSC case-level sentencing data to federal districts to construct district-level case composition and caseload variables. Second, I extracted county-level data of American Indian, black, and Latino residents from the 2010 US Census, and aggregated the data to the district-level. Third, I obtained county-level crime rates from the Uniform Crime Report (UCR), and aggregated the data to the district-level. Once aggregated I used district identifiers to

³⁷ I removed the following districts: Puerto Rico, Guam, the Virgin Islands, North Marina Island, and the District of Columbia.

³⁸ District-level summary statistics indicate that on average, across years and districts, 25% of districts have 7 or fewer American Indians and 50% have 2 or fewer American Indians. Because it seems that 7 is a natural breaking point, I use districts that have 7 or more American Indian defendants for the analysis.

³⁹ Immigration cases were removed from the analyses.

⁴⁰ I include the following districts: Alaska, Arizona, Colorado, Idaho, Iowa North, Kansas, Michigan East, Michigan West, Minnesota, Montana, Mississippi South, Nebraska, Nevada, New Mexico, New York North, North Carolina East, North Carolina West, North Dakota, Oklahoma East, Oklahoma North, Oklahoma West, Oregon, Pennsylvania Mid, South Dakota, Texas West, Utah, Washington East, Washington West, Wisconsin East, Wisconsin West, and Wyoming.

merge the contextual-level data to unique identifiers in the FJSP. Together, these data contain rich information that is relevant to understanding how social context may affect the treatment of American Indian offenders in the federal justice system compared to individuals of other races and ethnicities.

Dependent Variables

I examine three decision points to investigate American Indian threat: 1) Substantial assistance departures, 2) downward departures, and 3) sentence length.⁴¹ First, the importance of including federal guideline departures in federal sentencing analyses has been underscored in previous sentencing research (e.g., Albonetti, 1997; Johnson et al., 2008; Johnson & Betsinger, 2009; Feldmeyer & Ulmer, 2011; Franklin, 2013; Mustard, 2001; Steffensmeier & Demuth, 2000). I analyze *federal guidelines departures* against the likeliness of not receiving a departure; in particular, downward and substantial assistance departures are examined.⁴² Under varied circumstances, federal judges may give defendants a sentence reduction that is well below the minimum

⁴¹ Extant sentencing research has typically estimated two separate models—one for incarceration and the other for sentence length (e.g., Steffensmeier et al., 1993), however, I depart from this model. Alternatively, my research is guided by recent scholarship which uses a one-stage model to investigate judicial decision-making. This alternative strategy considers the fact that judges take into account nearly the same criteria and information when deterring incarceration and sentence length decisions (see Bushway & Piehl, 2001; Paternoster, 2011; Starr & Rehavi, 2013), thus including both is unnecessary. However, we acknowledge that not all scholars would agree with this approach. In fact, several studies indicate that prior record is the strongest predictor of prison/no prison, but offense severity is the strongest predictor of sentence length.

⁴² “Downward and substantial assistance departures follow different procedural and legal protocols (e.g., the latter require a motion from the US Attorney)” (Johnson and Betsinger, 2009, p. 1062). Thus, Johnson and Betsinger (2009) performed supplementary analysis and ran separate logistic regressions comparing downward departures with no departure and substantial assistance departures to no departure as a means to compare these findings against the traditional methodological approach of running a multinomial model. Employing this alternative analysis, Johnson and Betsinger (2009) found no major differences to their findings. As a result, I utilize this strategy and perform the analysis running separate logistics regression models. See Kempf-Leonard & Sample, 2001; Kramer & Ulmer, 2002; Spohn & Fornango, 2009; Spohn & Brennan, 2011; Stacey & Spohn, 2006, for additional examples that have analyzed departures using logistic regression.

recommended sentence. More specifically, *substantial assistance* suggests whether a judge sentenced below the guidelines, based on the defendant's willingness to provide information to law enforcement and offer assistance in federal cases, and is coded as 1 if a defendant provides said assistance to authorities.⁴³ *Downward departure* identifies whether a judge sentenced below the guideline range, not because of government request or Booker, and is measured as a dichotomous variable.⁴⁴

Second, *sentence length* indicates the number of months an offender was sentenced to prison, and is measured as a continuous variable capped at 470 months. Research suggests that sentence length is positively skewed, therefore the natural log of sentence length is used (see Bushway & Piehl, 2001; Johnson, 2006; Johnson & Betsinger, 2009; Ulmer & Johnson, 2004). In addition, probation cases and other alternative cases are coded as zero months of incarceration and, I add .1 prior to taking the natural log. This modeling strategy is in line with prior sentencing research (e.g., see Starr & Rehavi, 2013; USSC, 2010).

Independent and Control Variables

Individual-level predictors. *Race and ethnicity* is the main independent variable at the individual-level and is measured using dummy variables for American Indian, black, Latino, and Asian, with white as the reference category. I incorporate controls for a

⁴³ These departures are controlled by the US Attorney, who must file a motion for a downward departure due to substantial assistance.

⁴⁴ Booker refers to the 2005 ruling in *United States v. Booker* which classified the sentencing guidelines to advisory status rather than mandatory. Under this ruling, judges may depart from the guidelines for a number of reasons because the guidelines are no longer legally binding. For example, a judge may depart from the guidelines when an offender offers substantial assistance to prosecution, a defendant voluntarily disclosed the offense, or if the defendants accepted responsibility for the offense, to name a few.

number of offender-related factors, including gender, age, education level, and number of financial dependents. *Gender* is measured as a dichotomous outcome (1 = male; 0 = female). *Age* captures a defendant's age at the time of sentencing and is a continuous variable measured in years. I measure *education level* using three dummy variables: high school degree, some college, and college degree and higher, with less than a high school degree as the reference category. *Number of financial dependents* is measured as a continuous variable, which captures a defendant's number of financial dependents.⁴⁵

A number of legally relevant factors are also controlled for. First, I measure *offense type* using five dummy variables, including firearm offense, violent offense, property, fraud, and other type of offense; with drug offense as the reference category. Second, *multiple convictions* captures whether a defendant has had more than one conviction and is measured as a binary variable (1 = multiple convictions; 0 = otherwise). Third, I include *presumptive sentence* which combines the 43-point offense severity scale with the 6-point criminal history scale and accounts for the minimum number of months of incarceration as recommended by the federal sentencing guidelines and mandatory minimums. I log transformed presumptive sentence after the constant of .1 was added, and capped it at 470 months. Fourth, I include *criminal history* score which rates a defendants' prior criminal history score from 1 to 6, with a higher score indicating more

⁴⁵ Missing data for this variable is coded as zero and is in line with prior research (see Johnson & Betsinger, 2009, p.1059).

criminal history points, and is based on the USSC 6-point scale.⁴⁶ Fifth, *accepting responsibility* suggests whether an offender received two- or three-guidelines level sentencing discount for acceptance of responsibility, and is measured as a dummy variable (1 = accepting responsibility; 0 = otherwise).

Further, I also control for *trial* which is captured using a dummy variable indicating whether an offender was convicted through bench or jury trial (1 = trial; 0 = pled guilty). Lastly, dummy variables for sentencing year also are included to control for variation in policy and practice changes across years, with 2008 serving as the reference year.

District-level predictors. At the district-level, the main variables of interest are the *racial and ethnic population size* for American Indian, black, and Latino residents. In particular, district-level percentages are calculated using the 2010 US Census, aggregated from counties to districts.⁴⁷

To ensure the effect of minority threat on punishment severity is not spurious, I control for several variables at the district level. First, I control for *poverty level* which, obtained from the 2010 US Census and aggregated from counties to districts, measures the percentage of district residents below poverty. Second, consistent with prior sentencing research (see Ulmer & Johnson, 2004; Feldmeyer & Ulmer, 2011), a measure

⁴⁶ Prior research in federal sentencing has incorporated both the offenders' final criminal history scores and the presumptive sentence because both are key components and independently influence the decision making process (e.g., Albonetti, 2002; Johnson et al., 2008; Shermer & Johnson, 2010).

⁴⁷ I included the squared term of these measures in the analysis to account for potential nonlinear effects of these measures on sentencing severity. However, the squared terms were not statistically significant. Therefore, they were subsequently removed from the analysis.

for *criminal caseload* is included, generated by dividing the total number of criminal filings by the number of sentencing judges within a given district. Third, I control for *trial rate*, which is measured as the percentage of cases in a district that went to trial. Fourth, a control for *violent crime rate*, obtained from UCR, is included to capture the possibility that higher violent crime rates are associated with harsher punishments (see Britt, 2000). Using the years 2008-2012, district-level crime rates are aggregated from the county level up to the district level and measured as the average number of index crimes per 100,000 people in each federal district. Table 8 provides the descriptive statistics for all the study variables.

Table 8. Descriptive Statistics for Sentence Length and Guidelines Departures Multilevel Models

	<i>N</i>	Mean	SD
Dependent Variables			
Substantial Assistance Departure	37,599	0.17	0.38
Downward Departure	37,599	0.32	0.47
Ln sentence length	37,819	2.74	2.47
Individual-Level Effects (N= 34,238)			
American Indian		0.11	0.31
White (reference)		0.45	0.50
Black		0.25	0.43
Latino		0.17	0.38
Asian		0.02	0.13
Male		0.83	0.38
Age		36.07	11.90
Dependents		1.37	1.68
No High-School Diploma (reference)		0.30	0.46
High-School Graduate		0.41	0.49
Some College Education		0.23	0.42
College Graduate and Above		0.06	0.24
Ln Presumptive Sentence		3.87	1.10
Criminal History		2.64	1.81
Pretrial Detention		0.64	0.48
Accept Responsibility		0.93	0.25
Multiple Counts		0.19	0.39
Trial		0.04	0.20
Drug Offense (reference)		0.38	0.49
Firearm Offense		0.19	0.39
Violent Offense		0.10	0.30
Property Offense		0.03	0.18
Fraud Offense		0.11	0.31
Other Offense		0.18	0.39
District-Level Effects (N= 31)			
Percentage of American Indian Population		5.06	5.98
Percentage of White Population (reference)		74.63	16.10
Percentage of Black Population		4.00	7.69
Percentage of Latino Population		13.21	13.43
Percentage of Poverty		15.16	3.13
Caseload		219.03	185.16
Violent Crime Rate		259.69	125.22
Trial Rate		0.04	0.02

ABBREVIATIONS: Ln = natural logarithm; SD = standard deviation

Analytic Strategy

I employ multilevel modeling techniques to assess the effect of American Indian threat on sentence severity. More specifically, I estimate a series of hierarchical logistic regression models to examine guideline departures—substantial assistance departure and downward departure, and use hierarchical linear regression to investigate logged sentence length. This modeling strategy is suitable for testing the aforementioned hypotheses and is consistent with previous sentencing research that examines individual- and contextual-level factors (see Feldmeyer & Ulmer, 2011; Johnson et al., 2008; Kautt, 2002; Wang and Mears, 2010a, 2010b, 2015). All variables are grand-mean centered, and all models are estimated in STATA 13.⁴⁸

Results

Unconditional Model

Before turning to the analysis testing my hypotheses, I present the results for unconditional models to establish the utility of employing multilevel modeling techniques to answer my research questions. The results for the unconditional models revealed that statistically significant variation was present in substantial assistance departure, downward departure, and logged sentence length models (see Table 9). In particular, the output from the random variance across districts suggested that there was statistically significant variation across districts the log odds of receiving substantial assistance departures (SD = .65, SE = .09) with an intercept of -1.68, downward departures (SD = .

⁴⁸ Using prior research as an example (Kim, Spohn, & Hedberg, 2015; Rabe-Hesketh & Skrondal, 2008), I utilize likelihood-ratio (LR) tests to determine the statistical significance level of the random effects.

59, SE = .08) with an intercept of -.93, and sentence length (SD = .49, SE = .07) with an intercept of 2.75. The Intra-Class Correlation (ICC) was calculated to further demonstrate how the guideline departures and logged sentence length varied across districts.⁴⁹ The calculated ICC for substantial assistance and downward departure was .114 and .097, suggesting that over 11% of the variance in the log odds of substantial assistance and nearly 10% of the variance in the log odds of downward departure were associated with the district where the departure was meted out. In addition, the calculated ICC for sentence length was .040, indicating that 4% of the variance in the logged sentence length was associated with the district where the sentence was meted out. In addition, the LR tests show that models including a random intercept (district) and slope (American Indian dummy) is preferred over a model that includes only the random intercept: substantial assistance (chi-square difference = 469.92, $p = .000$), downward departures (chi-square difference = 519.03, $p = .000$), and logged sentence length (chi-square difference = 2707.29, $p = .000$). Taken together, the above information suggests that a multilevel modeling technique is warranted to analyze sentencing severity in federal courts for American Indians.

⁴⁹ The ICC is relevant in terms of revealing the correlation of the cases within a group. For this analysis, the ICC is the between-district variance divided by the overall variance.

Table 9. Unconditional Models of Guidelines Departures and Sentence Length.

<i>Fixed Effects</i>	Substantial Assistance Departure		Downward Departure		Ln Sentence Length	
	Coefficient	Standard Error	Coefficient	Standard Error	Coefficient	Standard Error
Intercept	-1.68***	0.120	-0.928***	0.109	2.75***	0.090
<i>Random Effects</i>	Standard Deviation	Standard Error	Standard Deviation	Standard Error	Standard Deviation	Standard Error
Level—2	0.652	0.086	0.594	0.078	0.491	0.065
Residual	—	—	—	—	2.42	0.009

ABBREVIATIONS: Ln = natural logarithm

NOTES: Statistical significance of random effects not shown.

*** $p < 0.001$

Hypothesis 1

I begin first by discussing results when assessing the relationship between the population size of American Indians and guidelines departures (see Table 10 and Table 11). Beginning with substantial assistance departures, as shown in Model 1 in Table 10, the percentage of American Indian population was *negatively* associated with the likelihood of receiving a substantial assistance departure ($b = -.03$, $SE = .02$, $p \leq .10$), which is in support of Hypothesis 1.⁵⁰ Furthermore, review of Model 1 suggests a strong racial and ethnic effect to the disadvantage of defendants of color. More specifically, American Indians were *less* likely to receive substantial assistance departures ($b = -.67$, $SE = .16$, $p \leq .000$) compared to white defendants. Black ($b = -.25$; $SE = .04$, $p \leq .000$), Latino ($b = -.26$; $SE = .05$, $p \leq .000$), and Asian defendants ($b = -.22$; $SE = .12$, $p \leq .10$) were also less likely to receive substantial assistance departures relative to white defendants.

⁵⁰ I believe the use of a .10 p-value is warranted given the limited sentencing research on American Indian defendants, and highlights the potential for the American Indian racial category as well social context to influence sentencing decisions. See also Mears, Wang, and Bales (2010) for prior research that incorporates a .10 p-value.

Table 10. Regression Models Predicting Guideline Departures

	Substantial Assistance Departures					
	Model 1		Model 2		Model 3a	
	<i>b</i>	SE	<i>b</i>	SE	<i>b</i>	SE
Individual-Level Effects						
American Indian	-.67***	.16	-.67***	.16	-.63***	.20
Black	-.25***	.04	-.25***	.04	—	—
Latino	-.26***	.05	-.26***	.05	—	—
Asian	-.22+	.12	-.22+	.12	—	—
Male	-.35***	.04	-.35***	.04	-.24***	.06
Age	-.01***	.00	-.01***	.00	-.01***	.00
Dependents	.07***	.01	.07***	.01	.08***	.02
High-School Graduate	.14***	.04	.14***	.04	.09	.06
Some College Education	.26***	.05	.26***	.05	.24***	.07
College Graduate and Above	.19**	.08	.19**	.08	.16+	.10
Criminal History	-.08***	.01	-.08***	.01	-.10***	.02
Accept Responsibility	1.06***	.12	1.06***	.12	1.08***	.19
Ln Presumptive Sentence	.61***	.02	.61***	.02	.46***	.03
Firearm Offense	-1.07***	.05	-1.07***	.05	-1.21***	.08
Violent Offense	-1.47***	.08	-1.47***	.08	-2.04***	.11
Property Offense	-.79***	.14	-.79***	.14	-1.26***	.16
Fraud Offense	-.30***	.06	-.30***	.06	-.73***	.07
Other Offense	-1.32***	.06	-1.32***	.06	-1.68***	.07
Multiple Counts	-.26***	.04	-.26***	.04	-.20***	.06
Trial	-3.88***	.51	-3.88***	.51	-4.35***	1.02
Pretrial Detention	-.62***	.04	-.62***	.04	-.65***	.05
District-Level Effects						
Percentage of American Indian Population	-.03+	.02	-.04	.03	-.04*	.02
American Indian X %American Indian	—	—	—	—	-.01	.02
Percentage of Black Population	—	—	.00	.02	—	—
Percentage of Latino Population	—	—	-.01	.02	—	—
Percentage of Poverty	-.01	.04	-.01	.06	-.00	.04
Caseload	-.00	.00	—	—	-.00	.00
Violent Crime Rate	.00+	.00	.00	.00	.00*	.00
Trial Rate	.76	1.53	.75	1.54	1.66	1.98
Intercept	-1.92***	.14	-1.90***	.13	-1.80***	.14
Random Effects	SD		SD		SD	
Level-2	0.61		0.60		0.56	
American Indian	0.57		0.57		0.57	
Log Likelihood	-13297.074		-13296.917		-6619.5996	
N	34,238		34,238		18,624	

NOTES: Statistical significance of random effects not shown.

a. This model is only conducted for American Indian and white defendants.

ABBREVIATIONS: Ln = natural logarithm; SE = standard error; S.A. = substantial assistance

References = White, No Departure, Less than High-School Graduate, Drug Offense

+*p* ≤ .10; **p* ≤ .05; ***p* ≤ .01; ****p* ≤ .001

Turning to the results for downward departure, as shown in Model 1 in Table 11, I found a *positive* relationship between the population size of American Indians and the likelihood of receiving a downward departure, but the coefficient is not statistically significant. Thus, I did not find support for Hypothesis 1 when examining downward departures. Moreover, percent below poverty was statistically significant ($b = -.09$, $SE = .04$, $p \leq .01$), indicating that defendants sentenced in districts that have higher poverty levels were less likely to receive a downward departure. In addition, the coefficient for American Indian was not statistically significant. In fact, the coefficient for black ($b = -.09$, $SE = .04$, $p \leq .01$) was the only statistically significant racial/ethnic variable, indicating that black defendants were less likely than their white counterparts to receive downward departures.

Table 11. Regression Models Predicting Guideline Departures

	Downward Departures					
	Model 1		Model 2		Model 3a	
	<i>b</i>	SE	<i>b</i>	SE	<i>b</i>	SE
Individual-Level Effects						
American Indian	.12	.11	.11	.11	.11	.11
Black	-.09**	.04	-.09**	.04	—	—
Latino	.02	.04	.02	.04	—	—
Asian	.00	.09	.01	.09	—	—
Male	-.18***	.03	-.18***	.03	-.15***	.04
Age	.00***	.00	.00***	.00	.01***	.00
Dependents	-.02**	.01	-.02**	.01	-.02	.01
High-School Graduate	-.04	.03	-.04	.03	-.03	.04
Some College Education	-.06+	.04	-.06+	.04	-.12*	.05
College Graduate and Above	.06	.06	.06	.06	-.01	.07
Criminal History	-.08***	.01	-.08***	.01	-.09***	.01
Accept Responsibility	-.09	.08	-.09	.08	-.01	.10
Ln Presumptive Sentence	.17***	.01	.17***	.01	.18***	.02
Firearm Offense	.30***	.04	.30***	.04	.41***	.06
Violent Offense	.18***	.05	.18***	.05	.24***	.06
Property Offense	.15+	.09	.15+	.09	.13	.10
Fraud Offense	.08+	.05	.08+	.05	.15***	.06
Other Offense	.64***	.04	.64***	.04	.72***	.05
Multiple Counts	-.08*	.03	-.08*	.03	-.09*	.05
Trial	.09	.09	.09	.09	.18	.12
Pretrial Detention	-.69***	.03	-.69***	.03	-.76***	.04
District-Level Effects						
Percentage of American Indian Population	.02	.02	.02	.02	.03	.02
American Indian X %American Indian	—	—	—	—	.01	.01
Percentage of Black Population	—	—	-.02	.02	—	—
Percentage of Latino Population	—	—	.01	.02	—	—
Percentage of Poverty	-.09**	.04	-.06	.05	-.09**	.04
Caseload	.00	.00	—	—	.00	.00
Violent Crime Rate	-.00	.00	-.00	.00	-.00	.00
Trial Rate	-.98	1.24	-1.04	1.24	-2.78+	1.52
Intercept	-1.11***	.13	-1.09***	.11	-1.02***	.54
Random Effects	SD		SD		SD	
Level-2	0.60		0.55		0.44	
American Indian	0.42		0.42		0.53	
Log Likelihood	-19799.229		-19796.653		-11224.907	
N	34,238		34,238		18,624	

NOTES: Statistical significance of random effects not shown.

a. This model is only conducted for American Indian and white defendants.

ABBREVIATIONS: Ln = natural logarithm; SE = standard error; S.A. = substantial assistance

References = White, No Departure, Less than High-School Graduate, Drug Offense

+*p* ≤ .10; **p* ≤ .05; ***p* ≤ .01; ****p* ≤ .001

Turning now to the results for logged sentence length, as shown in Model 1 in Table 12, I found that the percentage of American Indian population was *negatively* associated with logged sentence length ($b = -.01$, $SE = .00$, $p \leq .05$), thus I did not find support for Hypothesis 1 when investigating sentence length. Moreover, sentence length for American Indian defendants was longer compared to similarly situated white offenders ($b = .10$, $SE = .04$, $p \leq .05$). This suggests that American Indians were considerably disadvantaged in sentence length decisions relative to whites, when holding constant relevant legal and extralegal factors. Similarly, Latino defendants received sentences that were longer compared to whites ($b = .04$, $SE = .02$, $p \leq .10$), whereas Asian defendants received reduced sentences ($b = -.12$, $SE = .06$, $p \leq .05$). The coefficient for black defendants was not statistically significant.

Table 12. Regression Models Predicting Ln Sentence Length

	Model 1		Model 2		Model 3a	
	Ln Length		Ln Length		Ln Length	
Individual-Level Effects	<i>b</i>	SE	<i>b</i>	SE	<i>b</i>	SE
American Indian	.10*	.05	.10*	.05	.11*	.05
Black	.00	.02	.00	.02	—	—
Latino	.04+	.02	.04+	.02	—	—
Asian	-.12*	.06	-.12*	.06	—	—
Male	.30***	.02	.30***	.02	.24***	.03
Age	-.01***	.00	-.01***	.00	-.01***	.00
Dependents	-.02***	.00	-.02***	.00	-.02**	.01
High-School Graduate	-.04*	.02	-.04*	.02	-.02	.03
Some College Education	-.08***	.02	-.08***	.02	-.06*	.03
College Graduate and Above	.03	.03	.03	.03	.09*	.05
Criminal History	.04***	.00	.04***	.00	.05***	.01
Accept Responsibility	-.17***	.04	-.17***	.04	-.22***	.06
Ln Presumptive Sentence	1.39***	.01	1.39***	.01	1.44***	.01
Firearm Offense	-.18***	.02	-.18***	.02	-.27***	.03
Violent Offense	-.07**	.03	-.07**	.03	-.13***	.04
Property Offense	-.34***	.05	-.34***	.05	-.34***	.06
Fraud Offense	.03	.03	.03	.03	.07+	.04
Other Offense	-.17***	.02	-.17***	.02	-.17***	.03
Multiple Counts	-.01***	.01	.07***	.02	.09***	.03
Trial	-.28***	.05	-.28***	.05	-.28***	.08
Pretrial Detention	.70***	.02	.70***	.02	.69***	.03
Downward Departure	-1.18***	.02	-1.18***	.02	-1.33***	.02
S.A. Departure	-1.48***	.02	-1.48***	.02	-1.65***	.03
District-Level Effects						
Percentage of American Indian Population	-.01+	.00	-.01*	.00	-.01+	.00
% American Indian X American Indian	—	—	—	—	.00	.01
Percentage of Black Population	—	—	-.00	.00	—	—
Percentage of Latino Population	—	—	-.00	.00	—	—
Percentage of Poverty	-.01	.01	.00	.01	-.01	.01
Caseload	-.00	.00	—	—	-.00	.00
Violent Crime Rate	.00	.00	.00+	.00	.00	.00
Trial Rate	.76	.63	.63	.64	.50	.85
Intercept	3.13***	.03	3.13***	.03	3.16***	.04
Random Effects						
	SD		SD		SD	
Level-2	0.10		0.10		0.13	
American Indian	0.16		0.16		0.19	
Level-1	1.30		1.30		1.39	
Log Likelihood	-57620.009		-57619.362		-32586.137	
<i>N</i>	34,238		34,238		18,624	

NOTES: Statistical significance of random effects not shown.

a. This model is only conducted for American Indian and white defendants.

ABBREVIATIONS: Ln = natural logarithm; SE = standard error; S.A. = substantial assistance

References = White, No Departure, Less than High-School Graduate, Drug Offense

+*p* ≤ .10; **p* ≤ .05; ***p* ≤ .01; ****p* ≤ .001

Hypothesis 2

I now discuss the results for the second hypothesis, which predicts that the effect of American Indian threat will be stronger than black threat and Latino threat. In Model 2 in Tables 10-12, I include the population size of blacks and Latinos in order to assess if American Indian threat is stronger than black threat and Latino threat. Results indicate that for substantial assistance departures (Model 2 in Table 10), none of the coefficients for percent American Indian, percent black, and percent Latino was statistically significant. Thus, I did not find support for Hypothesis 2 when examining substantial assistance departures. I found similar results for downward departures (Model 2 in Table 11). Specifically, none of the coefficients for percent American Indian, percent black, and percent Latino was statistically significant, therefore I did not find support for Hypothesis 2 when investigating downward departures. Moreover, review of Model 2 in Table 12 indicates that the coefficient for percent American Indian was statistically significant and negatively associated with logged sentence length ($b = -.01$, $SE = .00$, $p \leq .05$); however, percent black and percent Latino were not statistically significant. I found a significant difference between the effect of percent American Indian and that of percent black (chi-square = 4.05, $p = .044$), and I found a statistically significant difference between the effect of percent American Indian and that of percent Latino (chi-square = 4.28, $p = .039$). Ultimately, percent American Indian appears to reduce sentence length, more so than percent black and percent Latino. Thus, I did not find support for Hypothesis 2 when examining sentence length.

Hypothesis 3

The third hypothesis anticipates that the positive association between the population size of American Indians and punishment severity would be *more pronounced* for American Indians than whites.⁵¹ In Models 3 in Tables 10-12, I only include American Indian defendants and white defendants, and include an interaction term between the American Indian dummy and the American Indian population size. The results for substantial assistance departures (Model 3 in Table 10) show that the interaction term between the American Indian dummy and percent American Indian was negative, but not statistically significant. Thus, I found no support for Hypothesis 3. Concerning the results for downward departures (Model 3 in Table 11), the interaction term between the American Indian dummy and percent American Indian was in the expected direction, though not statistically significant. Similarly, the analysis for logged sentence length (Model 3 in Table 12) showed that the interaction term between the American Indian dummy and percent American Indian was not statistically significant. In sum, I did not find support for Hypothesis 3 for any of the sentencing outcomes.

Discussion and Conclusion

The goal of this study was to examine the role of social context in the sentencing of American Indian defendants in United States federal courts. More specifically, although racial disparity has been reviewed at length in the social context literature, extant research generally omits American Indian defendants from the analysis. To

⁵¹ In this stage of the analysis white remains the reference category, however black, Latino, and Asian defendants are removed from the analysis to assess if percent American Indian intensifies punishment severity for American Indian defendants than white defendants.

overcome this knowledge gap, I examined whether the population size of American Indians would be positively associated with punishment severity (Hypothesis 1). I also investigated the effect of American Indian threat in comparison to black threat and Latino threat, predicting that the effect of American Indian threat would be the strongest (Hypothesis 2). Lastly, I investigated whether the positive association between the population size of American Indians and punishment severity would be more pronounced for American Indians than whites (Hypothesis 3).

Some support was found for Hypothesis 1. In particular, the population size for American Indians was significantly and *negatively* associated with substantial assistance departures, indicating that in districts with a large American Indian population, defendants were less likely to receive substantial assistance departures, thus supporting Hypothesis 1. The effect of the population of American Indians on downward departures was *positive*, however, the outcome was nonsignificant. I also did not find support for Hypothesis 1 when examining sentence length decisions. Concerning Hypothesis 2, the results for federal guideline departures showed that population sizes for American Indian, black, and Latino had no statistically significant effects on substantial assistance departures or downward departures. The results for sentence length were similar. Thus, I found no support for Hypothesis 2. Furthermore, I did not find a statistically significant interaction between the American Indian dummy and percent American Indian, indicating that punishment severity is not more pronounced for American Indian defendants than whites. Thus, I found no support for Hypothesis 3.

Overall, the findings from this study showed limited support for the racial threat theory. In particular, I found support for the racial threat paradigm because American Indians were less likely to receive a substantial assistance departure, indicating that the percentage of American Indian population in certain districts shaped whether they were likely to receive a substantial assistance departure. This finding is important because research shows that departures for providing substantial assistance routinely occur and play a major role in the sentencing process (Spohn & Fornango, 2009; see also USSC, 2003). However, my findings for sentence length are opposite to what the racial threat paradigm would predict. Instead, the sentence length finding may lend support to the “Big Crow”⁵² effect, which suggests that American Indians may actually benefit from lenient treatment based on their underprivileged backgrounds (Jeffries & Bond, 2012; see also Ulmer & Bradley, 2017). Given limited to no support for the racial threat theory in this study, additional research is warranted. Investigations are needed that explicitly scrutinize *why* federal sentencing outcomes for American Indians run counter to racial threat predictions. It is interesting to note that the results showed strong support for *individual*-level effects (American Indians were less likely to receive substantial assistance departures and more likely to receive longer sentences compared to whites), and if these results were not attributed to the population size for American Indians, then what is driving these disparities? Additional research is needed to understand how racial

⁵² See *United States v. Big Crow* (1990). According to Tredeau (2011), in the Eighth Circuit a defendant named Big Crow was given a downward departure after it was determined that certain factors warranted trumping the mandatory guideline policy indicating it was generally inappropriate to base sentencing decisions on particular extralegal characteristics. For example, employment history, community ties, and numerous attempts to overcome a disadvantaged background of violence and poverty having grown up on the Pine Ridge reservation in South Dakota were considered.

threat theory may or may not apply to American Indians. For instance, Ulmer (2012, p. 30) suggests that future social context research may want to include “aggregated survey measures of local public racial attitudes when feasible.” Doing so might prove especially useful for American Indian defendants, and may help to explain the findings presented in this study.

In addition to examining theoretical underpinnings, future research is needed that disentangles the role social context plays in federal sentencing and case-processing outcomes for American Indian defendants. First, although prosecutorial discretion research has garnered significant attention in the extant literature, additional studies are needed that include American Indian defendants. Second, the present study was limited to contextual data derived from the USSC, Census, and UCR. Additional measures are necessary to determine other aspects that may impact the processing of American Indian defendants; measures that tap into political liberalism and the way in which court officials view American Indian defendants would be especially useful. Third, future research should include additional decision points such as charge reduction and pretrial detention to examine if racial threat is evident and impacts American Indians.

In conclusion, sentencing scholars have long examined how racial population size may affect sentence severity, employing the racial threat theory to investigate, yet much of this research focuses on black and Latino composition in relation to whites. This study suggests that investigating racial threat as it relates to American Indians warrants further attention. Sentencing research can be improved by incorporating nontraditional racial

groups like American Indians to increase our understanding about perceived American Indian threat, perceptions about American Indians, and punishment decisions aimed at them. Ultimately, employing this inclusive approach would add to the extant literature and offer a better understanding of courtroom processes.

CHAPTER 5: DISCUSSION AND CONCLUSION

Summary of Findings

Sentencing research that incorporates American Indians in the analysis is considerably underdeveloped. Although some studies have done so, American Indians have rarely been the focus of a study. Instead, only a small number of studies have meaningfully examined the treatment of American Indian defendants in United States federal courts (Everett & Wojtkiewicz, 2002; Franklin, 2013; Ulmer & Bradley, 2018; for an overview see Jeffries & Bond, 2012). Against this backdrop, this dissertation strived to contribute to the sentencing literature by performing an in-depth analysis of American Indian defendants. More specifically, I examined three interrelated questions concerning how American Indians are treated and sentenced in federal courts. First, do American Indians experience cumulative disadvantages? Second, is the disadvantage against American Indians consistent over time? Third, does social context have an effect on the sentencing of American Indians? These three questions are addressed in chapters 2-4, respectively.

Altogether, the findings from this study revealed that in federal courts American Indian defendants did experience cumulative disadvantages, the disadvantage against American Indian defendants did not increase over time with the exception of downward departures, and social context had no effect on the sentencing of American Indian defendants except for substantial assistance departures. In particular, the findings from Chapter 2 suggest that American Indian defendants faced disadvantages at some

individual stages compared to white, black, Latino, and Asian defendants. That is, American Indians were *more* likely to be detained prior to trial, were *less* likely to receive substantial assistance departures, and were given *longer* sentences. On the other hand, American Indian offenders were not treated differently than other offenders in terms of charge reductions or judge-initiated downward departures. Further, the findings showed significant cumulative disadvantages against American Indian defendants compared to their white counterparts—that is, American Indian defendants who were detained prior to trial faced disadvantages at later decision points (e.g., charge reduction and guideline departures), with the sentence length decision revealing the strongest support for cumulative disadvantages against American Indians.

The results from Chapter 3 provide little support for my hypothesis that disadvantages against American Indian defendants have increased over time when compared to white defendants. Instead, disadvantages against American Indian defendants seemed to have *decreased* over time with regard to the substantial assistance departure and the sentence length decisions. The only exception is the decision for downward departures, and I found that the disparity against American Indians increased over time with regard to downward departures. In addition, the results from Chapter 4 did not support my first hypothesis that punishment severity is related to American Indian population size. The only exception is substantial assistance departures, and I found that American Indian population size was negatively associated with the likelihood of receiving substantial assistance departures. I found no support for my second hypothesis

anticipating that American Indian threat would be stronger than black threat and Latino threat, and no support for my third hypothesis predicting the positive association between the population size of American Indians and punishment severity would be more pronounced for American Indians.

Theoretical Implications

Focal Concerns Perspective

The main findings of this dissertation provide support for the focal concerns perspective. Notably, a number of empirical studies that investigate the focal concerns perspective have examined the impact of *race* (e.g., black defendants) on sentencing, and a limited number of studies have investigated the impact of *ethnicity*, mostly focusing on Latino defendants (for an overview of the literature see Baumer, 2013; Mitchell, 2005; Spohn, 2000, Ulmer, 2012; Zatz, 2000). However, only a small number of empirical studies have associated the focal concerns perspective with American Indians (for example see Franklin, 2013; Ulmer & Bradley, 2018). Thus, the generalizability of the focal concerns perspective to American Indians is largely unknown.

This dissertation adds to the aforementioned research by finding that American Indian defendants experienced cumulative disadvantages at levels greater than those experienced by their white counterparts, and thus supports tenets outlined in the focal concerns perspective. Specifically, this finding suggests that damaging stereotypes associated with American Indians may lead to harsher treatment and punishment outcomes by negatively influencing courtroom actors, and their assessments of

blameworthiness and dangerousness. That said, I did not find support for the focal concerns perspective when investigating disparity over time (see Chapter 3). The findings in the longitudinal study showed that over time, disparities against American Indian defendants actually decreased, *except* for downward departures. These findings indicate that the application of the focal concerns perspective as presented by Steffensmeier et al. (1998) may pertain to American Indian defendants in more nuanced ways. To demonstrate, my findings might offer support for a theoretical explanation put forth by Jeffries and Bond (2012)—that is, at the federal level, the focal concerns perspective may impact American Indian defendants in one of two ways—*negative discrimination* or *positive discrimination*—otherwise known as the “Big Crow” effect (see also Ulmer & Bradley, 2018).

Specifically, this alternative take on the focal concerns perspective suggests that decision makers at the federal level may assess each focal concern differently, which may impact American Indian defendants in two competing ways, *negative or positive*. Traditionally, the focal concerns perspective would hypothesize that American Indian defendants would be subject to harsher treatment because of damaging stereotypes, deeming them *more* blameworthy and *more* dangerous. Under these circumstances, American Indian defendants may experience *negative discrimination*, which is in line with the focal concerns perspective. Consequently, American Indians may face severe punishments compared to similarly situated white defendants based on characteristics that define them as prone to being criminal, violent, and living in underprivileged conditions.

I found support for the focal concerns perspective through the cumulative disadvantage findings. I also found support for the focal concerns perspective by finding that regarding downward departures, American Indian disadvantage *increased* over time. On the other hand, American Indian defendants may experience *positive discrimination*, which suggests that they may receive favorable treatment (e.g., leniency and reduced sentences) “because of the historical legacy of colonization” (Jeffries & Bond, 2012, p. 7).

Essentially, courtroom actors may perceive American Indian defendants as a product of their disadvantaged circumstance (e.g., historical maltreatment and reservation living), and thus, *less* blameworthy and *less* culpable. This may lead to courtroom actors basing critical sentencing decisions on *these* attributes, resulting in more lenient sentences for American Indian defendants relative to white and non-Indigenous defendants (see Jeffries & Bond, 2012; Ulmer & Bradley, 2018). Positive discrimination under the focal concerns perspective may help to explain why I found American Indian disadvantage *decreased* over time regarding substantial assistance departures and sentence length decisions.

Moreover, the findings regarding the focal concerns perspective warrant further discussion. That is, findings related to sentence disparity for American Indian defendants are heavily contingent on several factors such as the type of decision investigated (e.g., pretrial detention versus sentence length), time period (e.g., cross-sectional versus longitudinal), and social context (e.g., district racial/ethnic makeup versus political composition) (Jeffries & Bond, 2012). Jeffries and Bond (2012) maintain that under the focal concerns perspective, *political* and *social* contexts are highly influential in

determining sentencing decisions for Indigenous defendants. They noted that, “The marginalized position of Indigenous peoples has been of particular political and social significance in Canada and Australia,” in contrast to the US where scholars are more concerned with black criminality and disadvantage (p. 25). This might help to explain the mixed findings for the focal concerns perspective between the cumulative disadvantage study (see Chapter 2) and the longitudinal study (see Chapter 3).

More specifically, the cumulative disadvantage study employed a cross-sectional approach spanning five years, which might speak to the political climate during the study time period (possibly more punitive) and is conflated by the general lack of awareness *or* concern for American Indian social disadvantage by courtroom officials. Jeffries and Bond (2012) stress that in other countries, such as Canada, judges are mandated by law to consider Indigenous status as a mitigating factor in sentencing, whereas sentencing research in the US concerning American Indians is more likely to reveal negative discrimination because no such laws exist. On the other hand, what may be considered positive discrimination in the longitudinal study concerning decreased disadvantage for substantial assistance departures and sentence length decisions may have to do with the number of years examined (18 years total). In terms of political significance, over the course of eighteen years perhaps there might be considerable fluctuation in punitive attitudes and punishment decisions, thus impacting American Indian defendants in both a positive *and* negative manner. Research suggests that criminal courts (federal and state) and decision making patterns are directly impacted by local politics and public opinion

(Carp & Stidham 1996; Helms & Jacobs, 2002; Hughes 1995; Jacob 1995; Mishler & Sheehan 1993). Therefore, it is possible that during the study time frame and in the selected districts, there was a general trend that disparities against minorities were reduced.

Specifically, the positive discrimination findings might suggest that at certain times during these 18 years (FY1994 to FY2012) there was an effort at the federal level to reduce racial disparities, and there was a general trend in federal courts that racial disparities have been reduced overall.⁵³ This is in line with prior research suggesting courtroom actors may be aware of discriminatory trends in sentence outcomes and make calculated efforts to reduce them, such as intentionally granting more lenient sentences (see Beim & Fine, 2007; see also Feldmeyer & Ulmer, 2011). In addition, the positive discrimination findings might lend support to calls for investigating the discretionary power of individual courtroom actors, such as prosecutors (see Ulmer, 2012). Research highlights the important role that prosecutors have and their influence over substantial assistance departures (Johnson et al., 2008; Nagel & Schulhofer's, 1992; Spohn & Fornango, 2009), for which I found a *decrease* in American Indian disadvantage over time. It may be that prosecutors are likely to diminish the prevalence of discrimination in sentencing outcomes given that they hold so much power. Ideally future empirical research will tackle this question as it pertains to American Indian defendants.

⁵³ Although see Chapter 4 for an analysis of the years 2008-2012 where I found evidence of negative discrimination in at least some decision points.

Accordingly, because American Indians experienced disadvantage across various decision points, it is important to emphasize the examination of *multiple* decision points as opposed to a single stage (e.g., sentence length). The importance of employing a cumulative disadvantage approach has been emphasized in prior research (see Baumer, 2013; Kutateladze et al., 2014; Spohn, 2009, 2015; Spohn et al., 1981-1982; Sutton, 2013; Ulmer, 2012; Wooldredge et al., 2015; Zatz, 1985, 1987), and in this dissertation my findings support using a cumulative disadvantage approach. For example, I found that presentence detention exhibited the strongest effect over later sentencing decisions, and was a critical source of disparity against American Indians. It appears that the failure to examine indirect effects through presentence detention would have led to different conclusions. Furthermore, investigating multiple decision points is necessary because I found the strongest support for cumulative disadvantages against American Indians at the final decision point—sentencing; however, I did not find disparity at certain preceding stages (charge reduction). Thus, one may have concluded that American Indian defendants were not treated differently than their white counterparts if only charge reduction had been examined.

Ultimately, a cumulative disadvantage approach is important when examining disparity against American Indian defendants in federal courts because it provides the opportunity to examine how individual stages expose a cumulative disadvantage effect—that is, disparities that may be less apparent at a single stage may uncover apparent disparities when examined collectively.

Racial Threat Theory

Overall, I found limited support for the racial threat theory. In particular, although I found that American Indian population size was negatively related to the likelihood of receiving a substantial assistance departure, it had no effect on the probability of receiving a downward departure *or* lengthier sentences. Moreover, I found no support for my test of the racial threat theory regarding the strength of American Indian threat over black threat or Latino threat, and no support regarding the positive association between the population size of American Indians and pronounced punishment severity for American Indian defendants than whites. I offer two explanations for these findings.

First, my findings may be opposite to racial threat as it applies to American Indians based on federal courtroom actors not perceiving American Indians as a threat, but rather taking a more sensitive approach when making sentencing decisions about them. More specifically, research shows that courtroom actors take into account the political and social costs associated with racial and ethnic sentencing discrimination in districts that have a large minority presence (Beim & Fine, 2007; see also Feldmeyer & Ulmer, 2011). Thus, in districts with a greater number of American Indians, courtroom actors might be aware of the potential for prejudicial sentencing practices directed at American Indian defendants, and therefore avoid sentencing them more harshly since these sentencing decisions might be examined closely.

Second, a possible explanation for the lack of support for the racial threat theory may be that it does not apply to American Indian communities because they do not hold

enough social, political, or economic clout. And, even though the American Indian community may grow in size, the perception of federal courtroom actors may be that American Indians are far too dependent on the US government (politically, economically, and socially) to ever pose a substantial threat. Under this assumption, American Indians may never transcend to positions of power and privilege that are theorized about in racial threat arguments (Blumer, 1958; Blalock, 1967). Poupart (2002) suggests that the current social standing of American Indians stems from years of forced domination and oppression by the federal government and its institutions, such as the federal criminal justice system. In this light, American Indians might not be considered a threat at all, or considered less of a threat than larger Latino and black populations due to power inequalities. However, even with this in mind, I did find some support for American Indian threat. I found the presence of American Indian threat in the decision for substantial assistance departures, implying that perhaps the racial threat theory applies to American Indians in more nuanced ways.

Perhaps the findings regarding American Indian threat can be explained through prosecutorial discretion and the influence prosecutors have over certain sentencing decisions, one being substantial assistance departures—which extant research highlights (Johnson & Betsinger, 2009; Johnson et al., 20008; Spohn & Fornango, 2009). In particular, it may be that in districts with a considerable size of the American Indian population prosecutors overwhelmingly deny American Indians the possibility of downward departures for substantial assistance, even though American Indian defendants

might have information to trade. This is problematic because research shows that substantial assistance departures can produce unwarranted disparity under the federal sentencing guidelines (Mustard, 2001; Spohn, 2005; Spohn & Fornango, 2009). For instance, Spohn and Fornango (2009) examined drug offenses and the likelihood of receiving a substantial assistance departure. They found that extralegal factors (e.g., race) played a role in whether offenders received substantial assistance departures, highlighting the fact that prosecutors were more likely to mitigate the sentences of “sympathetic” or “salvageable” offenders, whether or not defendants had information to trade (Spohn & Fornango, 2009, p. 836). Prosecutors may not perceive American Indian defendants as being *sympathetic* or *salvageable* and thus, American Indians are at the mercy of prosecutorial discretion. This leaves the door open for future research to investigate American Indian threat and social context more closely by possibly including interjudge and interprosecutor information so as to examine disparity in the federal sentencing process.

To conclude, although I did not find strong support for the racial threat theory the findings presented in this dissertation should act as a springboard for future research to further investigate social context and the criminalization of American Indians. For example, additional decision points in the sentencing process may need to be investigated when examining the impact of social context. In particular, future research may want to consider additional decision points such as pretrial detention because doing so may reveal disparities against American Indian defendants. This may be especially true given the

importance of race and ethnicity on pretrial detention in the sentencing process (see Demuth, 2003; Spohn, 2008). Further, future research may want to include survey measures that tap into local public racial attitudes (Ulmer, 2012). Employing this measure may be useful when applied to American Indians because perceptions seem to vary so widely between stereotyping Native tribes as wealthy on one end, and stereotyping Native people as dangerous alcoholics on the other end. These perceptions are conflated by the reality that American Indian communities suffer from high rates of poverty, unemployment, and are disproportionately represented in the federal criminal justice system (Ross, 1998). Last, perhaps more nuanced approaches of investigating racial threat are needed. (see Ulmer, 2012; Wang & Mears, 2010a; 2010b). Prior research has underscored the importance of shifting away from simplistic linear examinations of racial threat and instead shifting toward investigates that examine *dimensions* of threat—for example, whether there are tipping points or changes in threat. Research has begun to address this call (see Feldmeyer & Ulmer, 2011; Wang & Mears, 2010a). This more nuanced approach to racial threat might be salient where American Indian populations are concerned in light of my findings. Ideally, future research will broaden the existing theoretical perspectives to include additional aspects that account for the American Indian experience.

Policy Implications

The findings from this dissertation provide insight into specific directions for policy. First and foremost, policymakers should focus on reducing economic hardships

that many American Indian communities face because doing so may help to alleviate some of the social ills that contribute to American Indian criminality. Reducing economic hardship may also better equip American Indian defendants who come in contact with the criminal justice system and its actors. In fact, recent statistics illustrate the extent of American Indian disadvantage. In 2012, three of the five poorest counties in the United States were located on Indian Reservations (US Census Bureau). And, according to the Bureau of Labor Statistics (2017), compared to other racial and ethnic groups, American Indians have the highest unemployment rate (8.9% in contrast to the 4.9% overall unemployment rate across the US). These statistics may be a direct result of paternalism over Native communities by the federal government, a concept otherwise referred to as “internal colonialism” (see Snipp, 1986a, 1986b, 1992). More specifically, economic disparity in Indian country can be linked to years of failed government policies and practices, as well as tactics involving oppression, genocide, and forced assimilation (Poupart, 2002). Viewed within a historical context, American Indians may not be flourishing economically because of a variety of government controlled factors, such as geographically isolated reservations, the placement of reservations on land that is less fertile, and reservations that are far removed from natural resources such as healthy water supplies (see “The Poverty Cycle,” 2012). In particular, the Indian Law and Order Commission (2013) highlights this fact while also identifying several consequences of overt governmental control:

“Looking deeper still, America’s historical Indian policies, which focused on colonial domination and dispossession, have led to *economic*, social, and political

marginalization within once healthy and self-sustaining Indian nations. The conditions of marginalization have given rise to accumulated feelings of powerlessness, hopelessness, and lack of personal value—that, in turn, lead to substance abuse, anger, and violence. Unless justice responses address these addiction and mental health concerns, little true progress can be made against Indian country crime” (p. 131).

The above statement suggests that derivatives of economic inequality are also detrimental and exacerbate social problems, including poverty, substance abuse, lower graduation rates, mental and emotional instability, and violence—which may lead to a higher likelihood of contact with the criminal justice system (e.g., Krivo & Peterson, 1996; Sampson, 1986, 1987; Sampson & Wilson, 1995; Wilson, 1987). Thus, reducing economic hardships for American Indians may work to curb negative community outcomes, limit their contact with the criminal justice system, and provide American Indian defendants with more options such as hiring a private attorney to advocate for them.

Additionally, research indicates that social factors such as racism and discrimination exacerbate economic hardship, and these factors directly affect American Indian criminalization (Lujan, 2006). Sociologists have highlighted socioeconomic inequality and its detrimental effect on communities of color, finding that disadvantaged communities are more likely to experience social injustices especially in the criminal justice system (Wilson, 1987, 1980; see also Western, 2006). Perceptions and preconceived notions of American Indians may improve *if* the economic attributes that characterize them also improve perhaps leading to balanced treatment and punishment outcomes for American Indian defendants.

Second, numerous factors have contributed to American Indian social disadvantage and contact with the criminal justice system. One such concept is referred to as *historical trauma*, and has yet to be thoroughly considered in criminal justice and criminological research.⁵⁴ Scholars credit historical trauma as shaping the contemporary experiences of American Indians and link historical trauma to a plethora of conditions that many American Indians face at the individual, family, and community level (see BraveHeart, 1995, 2003, 2011; Duran & Duran, 1995; Evans-Campbell, 2008; Poupart, 2002, 2003; Whitbeck, 2004) including involvement with the criminal justice system and its actors (see Randall, 2016). Poupart (2002, 2003) asserts that violence and crime across Native communities is directly tied to historical trauma. In essence, violent actions, criminality, and continued social problems (e.g., alcoholism and physical abuse) are an expression of historical trauma and unresolved grief, “and also symptomatic of the dominant culture’s denial of the harms inflicted upon tribal people and from the invalidation of Indian pain” (p. 89; see also BraveHeart, 1995; BraveHeart and DeBruyn 1996a, 1996b). Poupart (2003) argues against treating Native communities under the umbrella of Western-treatment programs that simply exploit Indigenous “social ills (substance abuse, depression, physical and sexual abuse) as individual pathologies or familial dysfunctions that are detached from Western cultural and historical forces. Such treatment programs, instead, ensure [American Indian] complicity in patriarchal power

⁵⁴ Historical trauma is defined as the “collective and compounding emotional and psychic wounding over time,” which is “multi-generational and is not limited to [one’s individual] life span” (BraveHeart, 1995, p. 6). The basis for conceptualizing historical trauma among Native populations is rooted in accounts of trauma across Jewish Holocaust survivors and their families, as well as Japanese American internment camp survivors and their families (see BraveHeart, 1998, 1999b, 2000; see also Whitbeck et al., 2004).

and further promote [American Indian] disempowerment by denying and invalidating the structural nature of [American Indian] oppression.” (p. 97). Instead, she advocates for the promotion of “consciousness-raising talk,” which pushes for group discussion and critical-thinking about social forces that inform individual Indigenous lives (see also Young, 1994)—a rehabilitative approach that may prove especially useful for American Indians in the criminal justice system, and one that policymakers want to consider implementing for American Indian defendants in the federal criminal justice system.⁵⁵

Reinforcing a cultural approach to understanding and coping with genocide, colonization, oppression, assimilation, loss of culture and identity, and historical trauma may better assist Native communities in interpreting the rudiments of their pain, destructive actions, and offer better coping mechanisms and healing programs. BraveHeart and colleagues have also outlined a historical trauma intervention model that details four major community intervention components: *confronting* the trauma, *understanding* the trauma, *releasing the pain*, and *transcending* the trauma (BraveHeart, 1998; 1999a, 1999b; BraveHeart & DeBruyn, 1998; BraveHeart-Jordan & DeBruyn, 1995). According to Poupart (2003), treatment programs that reinforce “consciousness-raising talk” will do more to *empower* American Indian people and address “cultural *and* individual traumas *and* victimizations” they experience (p. 97), which may drastically

⁵⁵ The process is described by Young (1994, p. 50) as, “the give-and-take of discussion, participants construct an understanding of their personal lives as socially conditioned, constrained in ways similar to that of others by institutional structures, power relations, cultural assumptions, or economic forces. The consciousness-raising group “theorizes” this social account together, moving back and forth between individual life stories and social analysis to confirm and disconfirm both. The members of the group propose interpretations of one another’s life stories as well as propose accounts of the social structures and constraints conditioning those lives, and these proposals are tested through discussion”

reduce contact with the criminal justice system—an institution that seemingly perpetuates historical trauma and the criminalization of American Indians (Randall, 2016).

Third, a glaring issue with the sentencing of American Indian defendants is the obvious discrepancy in punishment decisions at the state and federal level (particularly sentence length). For example, in 2015 the United States Sentencing Commission created the Tribal Issues Advisory Group (TIAG) led by a panel of federal and tribal experts because it was presumed that American Indians faced harsher penalties across Indian Country. The TIAG determined that American Indians, when compared to non-Natives, were more likely to be sentenced above the federal guidelines and less likely to receive a below-range sentence in the federal criminal justice system (USSC, 2016). This dissertation also reported similar findings. Thus, policies should be developed to reduce these disparities against American Indian defendants, given that fairness and impartiality are supposed cornerstones of the criminal justice system. In particular, Droske (2008) identified the Major Crimes Act as a source of disparity for American Indians because American Indians are susceptible to receiving harsher punishments (e.g., longer sentences) under the Federal sentencing guidelines than they would receive under a State jurisdiction in state courts for the same crimes (see also Indian Law and Order Commission, 2013).⁵⁶ Research also suggests that the Major Crimes Act is problematic because it deprives Indigenous people of true tribal sovereignty in that it infringes on

⁵⁶ The Major Crimes Act places certain categories of crimes (e.g., murder, manslaughter, kidnapping, assault, arson, burglary, robbery, felony child abuse and neglect, drug trafficking) under federal jurisdiction in Indian Country if the offender *or* victim is American Indian. The crimes listed would otherwise be adjudicated at the state level.

“traditional tribal governing systems from (formally or informally) dealing with conflicts between members on tribal lands” (Poupart, 2002, p. 149). From a policy perspective, it seems that the Major Crimes Act should be closely reviewed, if not completely overhauled as it pertains to American Indian defendants. Reforming this law may serve to reduce racial disparity in sentencing outcomes across Indian communities, and restore their ability to exercise traditional practices.

Future Directions

The findings from this dissertation provide several directions for future research. First, future sentencing research examining American Indians should investigate preceding decision points. For example, I focused on pretrial detention, charge reduction, federal guideline departures, and sentence length. Additional stages that also warrant scrutiny are the decisions to arrest, make bail, and hire an attorney, to name a few. Taken together, the cumulative effect of being an American Indian across each decision point may prove deleterious for American Indian defendants. To emphasize, an officer’s decision to arrest plays a major role given that law enforcement officials have discretion regarding whom they choose to usher into the federal criminal justice system. Furthermore, American Indian communities are generally impoverished, thus the likelihood of an American Indian defendant making bail *and* hiring an attorney may be fairly low. Collectively, these decisions are relevant to understanding how American Indians are treated in the criminal justice system because socioeconomic status may affect treatment and punishment outcomes at the federal level, which may be captured

through the ability to make bail and hire an attorney (Johnson & Betsinger, 2009; Zatz, 2000).

Second, qualitative research is much needed in sentencing studies. In fact, Baumer (2013) called attention to the need to supplement quantitative analysis with qualitative inquiry in an attempt to specifically disentangle the decision making process and how courtroom actors make critical judgments and decisions (see also Ulmer, 2012). Where American Indians are concerned, Ulmer and Bradley (2018) recently indicated that American Indian communities should be included in future analysis, particularly how American Indians view the operations and practices of federal and tribal law, and the efforts of the federal criminal justice system in general. By integrating a qualitative approach, we may better understand the way in which court actors and officials perceive American Indians and how American Indians view the criminal justice system, which could also directly tap into theoretical underpinnings of the focal concerns perspective as well as the racial threat theory.

A qualitative approach in sentencing research may be ever more critical with the 2016 election of Donald Trump to the US presidency. Although much has been reported about Trump's racist and prejudicial tendencies toward blacks and Latinos, less attention has been given to his rhetoric toward American Indians (LeTourneau, 2018). Beginning in the 2016 election, Trump has repeatedly referred to Senator Elizabeth Warren as "Pocahontas," a pejorative term aimed at Indigenous communities. It is possible that the president's rhetoric and attitude toward the Native community may impact the views and

perceptions of others in power, namely courtroom officials (e.g., judges and prosecutors). Trump's derogatory rhetoric may advance the narrative that passively speaking about Native people in this manner is acceptable, essentially normalizing this language and behavior for the American society. Qualitative research would better tap into and assist in understanding if this is the case. Along this line, future research that examines social context and the treatment of American Indian defendants may also want to include *political conservatism* measures in the analysis. Doing so will provide some understanding of how courtroom actors perceive American Indians, and if there is a correlation between contextual political factors and punitive outcomes for American Indians. More specifically, research shows that the selection of courtroom actors is linked to local politics (Ulmer et al., 2008). Research also highlights the critical role that political context has on courtroom environments and decision-making processes (see Ulmer, 2012), even to the point that political conservatism has been linked to harsher sentencing outcomes in general (Baumer & Martin, 2013; Johnson et al., 2008), and also played a role in engendering sentencing disparities for minority defendants (Helms & Jacobs, 2002; Kim et al., 2018). In this context, including political beliefs and the state of local politics appears relevant and might expose additional disadvantages for American Indian defendants.

Third, future research that examines American Indians in longitudinal studies may want to include district-level measures. Here, I only accounted for the nested structure of the data and did not include district-level measures in the longitudinal analysis (see

Chapter 3). Accounting for district-level factors such as crime rate and trial rate may yield different results, and tap into how these aspects affect sentencing patterns over time for American Indians.

Fourth, as previously mentioned, American Indians are not typically the main focus of sentencing research. When they are studied, American Indians are considered a homogenized group, thus disregarding how American Indians across the United States may differ considerably. To emphasize, there are over 570 federally recognized American Indian and Alaska Native tribes and villages (Bureau of Indian Affairs, 2018), each having its own cultural and historical distinctions. These differences may impact their involvement and treatment with the federal criminal justice system and warrants additional investigation. Furthermore, similar to Asians and Latinos, the within-group differences among American Indians may reveal unique experiences for them that should also be studied in the context of criminal punishment. Along the same line, future sentencing research should also consider additional variations when examining American Indians such as rural versus urban and state versus federal treatment and punishment, because doing so would provide a more comprehensive understanding of how American Indians are treated.

Fifth, moving forward, sentencing research that examines Native populations may want to focus on cultural approaches to understanding American Indian criminalization, and integrate these approaches into empirical criminal justice and criminology research. For example, the literature on historical trauma integrates cultural aspects to help explain

the contemporary American Indian experience, and this research should be incorporated in future research because it might help to explain American Indian criminality. Although historical trauma is a weighted theory that includes multiple layered concepts (e.g., colonization and forced assimilation), the groundwork has been done to tease out these ideas, and preliminary investigations of historical trauma indicate support for the seminal theoretical work put forth by American Indian scholars (see Whitbeck et al., 2004). This research suggests that while support was found for the theoretical underpinnings of historical trauma, more research is needed. In fact, Whitbeck et al. (2004; p. 128) caution, “there is much work to be done to inform policy and treatment. We need to understand specific mechanisms through which thoughts about historical losses affect behaviors and how these thoughts interact with more proximal causes of stress such as economic disadvantage, discrimination, and social problems.” Some of these ideas have been accentuated throughout this dissertation. Furthermore, although limited, studies have revealed that American Indian criminalization is influenced by historical experiences and ongoing instances of racism (see Lujan 2006; Randall, 2016). Thus, there is considerable room in criminal justice and criminology research to broaden our perspectives and awareness about the causes of American Indian criminality, their contact with the criminal justice system, and how they are treated by merging cultural approaches and inquiry with theoretical and empirical research.

In conclusion, this dissertation adds to a growing body of sentencing literature on American Indians and how they are treated and sentenced in federal courts. Collectively,

this dissertation showed that American Indians are subject to differential treatment in federal courts, and their experiences differ from their other racial and ethnic counterparts. Thus, these three interrelated studies suggest that future sentencing research may be improved by investigating multiple decisions points and examining the cumulative disadvantages against American Indian defendants, conflating extant theories with cultural approaches and inquiry related to American Indians, integrating contextual-level and qualitative measurements, and investigating within-group differences between Native tribes and their experiences with the federal criminal justice system. Additionally, research is needed that focuses on how courtroom actors operate, the intricacy of the courtroom environment, and the role they play in the sentencing of American Indian defendants. In doing so, sentencing research would provide a more comprehensive understanding of *how* American Indian defendants are treated and *how* they are impacted by the criminal justice decision making process.

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