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# Punishment in Indian Country: Ironies of Federal Punishment of Native Americans

*Jeffery T. Ulmer and Mindy S. Bradley*

Native Americans are US citizens, but they are also tribal nationals subject to complex and unique criminal jurisdiction arrangements over Indian lands. Tribal nations typically have tribal court jurisdiction over less serious crimes, but for serious crimes the federal justice system often supersedes tribal authority, exposing Native Americans to more severe punishments. In addition, recent federal programs have attempted to foster greater tribal/federal criminal justice coupling. Yet, examinations of criminal punishment of Native Americans are few, and most are outdated and/or of very limited generalizability. We examine the punishment of Native American defendants in federal court, focusing on 28 federal districts with substantial Indian presence. Using recent US Sentencing Commission data, as well as contextual data from the Bureau of Indian Affairs and tribal courts, we focus on differences in the federal sentencing of Native American defendants, and how these differences are conditioned by indicators of tribal-federal criminal justice coupling.

*Keywords* sentencing; federal courts; native Americans; sentencing guidelines

A long and well-developed research tradition exists that emphasizes how marginalized social statuses, such as racial and ethnic minorities and certain gender and age groupings within those minorities (i.e. young males), correlate with more severe punishment in the criminal justice system, and a developing literature examines how contextual features of disadvantage shape punishment outcomes for individuals occupying certain social statuses as well (see reviews

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by Mitchell, 2005; Spohn, 2000; Ulmer, 2012). However, with Native American Indians, in contrast to other groups such as African Americans or Hispanics, there are further issues complicating the typical conceptualization of racial/ethnic disparity and punishment.

Native American tribes have tribal nation status and limited tribal court jurisdiction, but for serious crimes the federal justice system can supersede tribal authority. Specifically, federal courts often process major crimes committed on tribal lands, even those that would otherwise be handled by state courts (Droske, 2008; Franklin, 2013; Pommersheim, 1991). In fact, Native Americans account for a small but increasing portion of federal offenders: According to the US Sentencing Commission, this proportion increased by 27.2% from 2009 to 2013 (United States Sentencing Commission [USSC], 2013). More generally, Native Americans are among the most disadvantaged groups in the US (Perry, 2006; Snipp, 1992). Many Native American communities are beset by high rates of violent crime, much of it connected to alcohol and drugs (Alvarez & Bachman, 1996; Dobie, 2011). Victimization rates among Native Americans are more than twice the national average, and Native Americans have higher imprisonment rates than any other group except African Americans (US Department of Justice, 2004).

More generally, for centuries Native Americans have experienced "internal colonialism" (Snipp, 1986, 1992, p. 366). Internal colonialism refers to a situation in which a more powerful majority physically, socially, and/or culturally isolates an indigenous people, and maintains economically exploitive relations toward that minority (Snipp, 1992; Steinman, 2012).

In many respects, internal colonialism appears to be a particularly apt description for many Indian reservations. They are often located in isolated areas, highly dependent on external sources for goods and services, and their quasi-sovereign political status further isolates them from Euro-American society. (Snipp, 1992, p. 366)

Native Americans are US citizens, but they are also tribal nationals who are subjected to internal colonialist authority across multiple institutional spheres, including criminal justice (Steinman, 2012). These conditions may give the punishment of Native Americans in federal court unique paternalistic and colonizing connotations that do not exist for other types of defendants (Perry, 2006). Yet, examinations of criminal punishment of Native Americans are few, and most are dated, of limited scope, and/or focus only on one sentencing outcome (for a review and exception, see Franklin, 2013).

We examine the punishment of Native American defendants in federal court, focusing on 28 federal districts with substantial Indian presence. We examine the punishment of Native American defendants in federal court, focusing on 28 federal districts with substantial Indian presence. Using recent US Sentencing Commission data, as well as contextual data from the Bureau of Indian Affairs (BIA) and tribal courts, we focus on differences in the federal sentencing of Native American defendants, and how these differences are conditioned by indicators of tribal-federal criminal justice coupling.

## Punishment in Indian Country

A large and long-standing literature examines the relationships between race, ethnicity, and criminal punishment (see reviews by Mitchell, 2005; Spohn, 2000; Ulmer, 2012). Most of this literature is focused on black-white comparisons or, in the last decade and half, black-white-Hispanic comparisons. Indeed, research has largely conceptualized the Native American experience through a racial/ethnic framework (e.g. Alvarez & Bachman, 1996; Franklin, 2013; Leiber, 1994; Leiber, Johnson, Fox, & Lacks, 2007; Rouse & Hanson, 1991; Wilmot & Delone, 2010). This has yielded valuable insights, but is incomplete in capturing the Native American experience with US criminal justice. Steinman (2012, p. 1120) argues that: "... racial [or ethnic] frameworks and analyses, as commonly applied, are inadequate to capture the nature of American Indians' sociopolitical status, experience, and group ties." Instead, critics contend that Native American tribes are better characterized as "captive nations" and internal colonies, necessitating a more political and institutional focus (Snipp, 1986, p. 153). A limitation of existing analyses of Native Americans in US society is not recognizing that while tribes are sovereign nations, they face interlocking power arenas that distinctly reflect "settler colonialism" (Steinman, 2012). Thus, unlike other disadvantaged groups, issues of Native American sovereignty and justice jurisdiction are key areas of contention.

One facet of the interlocking forms of institutional power identified by Steinman (2012) may be US federal district courts' distinctive jurisdiction over Native American criminal defendants. For much of the twentieth century, The US BIA controlled federal reservations' access to services and resources, including the administration of justice (Droske, 2008; Steinman, 2012), and BIA still provides law enforcement and justice services to tribes (<http://www.bia.gov/WhatWeDo/index.htm>). BIA agencies are semi-autonomous local policy makers in control of their own arenas of influence (Steinman, 2012). Thus, the experiences of tribes with formal federal policy are often widely divergent (Steinman, 2012).

Tribes' status as "domestic dependent nations," translates into complicated and often contentious arrangements regarding criminal authority over Indian country (Droske, 2008, p. 728; Pommersheim, 1991; Tredeau, 2011).<sup>1</sup> The key statement establishing federal criminal jurisdiction over crime in Indian Country is the Major Crimes Act of 1885. This act currently grants the federal government jurisdiction over 15 categories of crimes committed by Indians against either Indians or non-Indians in Indian country, and also by non-Indians against Indians in Indian country. These categories include murder, manslaughter, kidnapping,

1. *Indian country* is legally defined as encompassing "(1) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, (2) all dependent Indian communities within the ... United States, and (3) all Indian allotments [where] the Indian title to the allotment still exists" (Droske, 2008, pp. 728–729).

various assaults, arson, burglary, robbery, felony child abuse and neglect, drug trafficking, and others.<sup>2</sup> These are crimes that would typically be under state court jurisdiction if they involved non-Indian offenders. Further complicating jurisdictional matters in Indian country is the 1953 passage of Public Law 280 (PL 280), which placed Indian country criminal jurisdiction for the crimes listed in the Major Crimes Act under *state law* in six states: Minnesota, Alaska, California, Nebraska, Oregon, and Wisconsin (Droske, 2008; Tredeau, 2011). In these six states, crimes that violate federal law committed by Native Americans are, of course, still handled in federal court as with all federal crimes.

PL 280 is criticized by Indian activists and scholars for trampling upon tribal sovereignty, since it originally placed Indian defendants and Indian communities under state jurisdiction without requiring tribal consent (tribal consent was required in a later revision of PL 280), thus failing to recognize tribes' status as domestic sovereign nations (Droske, 2008; Snipp, 1992; Steinman, 2012). At the same time, tribes have also complained that PL 280 resulted in unfunded or underfunded and inadequate law enforcement, presenting the worst of both worlds—a lack of recognition of sovereignty plus inadequate crime control. PL 280 has also been widely criticized for generating considerable confusion about criminal jurisdiction, and stifling the development of tribal courts (Droske, 2008; Gonzales, Schofield, & Schmitt, 2005; Tredeau, 2011).

In sum, federal district courts have sentencing jurisdiction, under the US Sentencing Guidelines, in the following situations (see Droske, 2008, p. 739):

- Cases prosecuted as federal offenses committed by Native Americans in PL 280 “mandatory” states;
- Major Crimes Act offenses committed in Indian country by Native Americans against Native Americans or non-Indians, in all but the six PL 280 “mandatory” states;
- Major Crimes *and* Non-Major Crimes Act offenses committed by Indians in Indian country against non-Indians;
- Crimes by non-Indians against Indians in Indian country.

It is important to recognize that the Major Crimes Act provision of federal jurisdiction over Indian-involved crime in Indian country has long been intended as a recognition of tribal sovereignty, under the Constitutional principle that relations with Indian nations are the federal government's purview, not the states'. Ironically though, while the federal jurisdiction over Indian Country and the Major Crimes Act represent a recognition of tribal sovereignty, they almost automatically expose Native American defendants to much more severe punishments under the US Sentencing Guidelines than they would likely

2. Tribal courts hold exclusive criminal jurisdiction over crimes (mostly misdemeanors) committed by Indians against Indians that are not covered by the Major Crimes Act (Droske, 2008; see also <http://www.law.cornell.edu/cfr/text/25/11.315>).

receive for the same crimes in state courts (see Droske, 2008).<sup>3</sup> Thus, in an ironic twist to the Major Crimes Act's recognition of Indian sovereignty, Native Americans are already at risk for more severe punishments than they would have gotten in state courts if: (a) they were not Indian, and/or (b) they were not subject to federal jurisdiction for crimes that are ordinarily addressed in state courts.

### Sentencing of Individual Native Americans in Federal Court

Only a handful of studies to date have examined punishment outcomes among Native Americans (see review by Jeffries & Bond, 2012). We know of only one that uses data more recent than the year 2000 (Franklin, 2013), and no studies that examine contextual differences between federal courts covering Indian Country. However, an important study by Franklin (2013) examined 2006–2008 federal sentencing data for 28 federal court districts with substantial Native American federal caseloads. In many ways, Franklin's (2013) research lays the groundwork for our study here. Franklin (2013) found that Native Americans in federal court were significantly more likely to be imprisoned compared to whites overall, and Indians were substantially more likely to be imprisoned, and for longer periods, compared to whites when convicted of violent, and to a lesser extent, drug trafficking offenses. Furthermore, he found that young male Native Americans were singled out for particularly severe sentences compared to other groups. The only other published study we found of federal sentencing that included Native Americans, Everett and Wojtkiewicz (2002), also found that Indians were more likely to receive longer sentences relative to whites, especially for violent crimes.

At the state court level, Wilmot and Delone (2010) found that Native Americans received more severe sentencing outcomes in state courts under Minnesota's sentencing guidelines, and that the degree of Native American-white disparity varied by county and offense. Alvarez and Bachman (1996) examined disparities in sentence length received by inmates incarcerated in Arizona state prisons for homicide, sexual assault, robbery, assault, burglary, and larceny. Native Americans who were prosecuted for crimes committed off-reservations (i.e. not in Indian Country) were included in the sample. Controlling for prior felony record and other demographic variables, their crime-specific models found that Native Americans received longer sentences for robbery and burglary, while whites received longer sentences for homicide. Leiber (1994) found that Indian youth received more severe state juvenile court case processing outcomes than white youth, but less severe outcomes than black youth. Leiber et al. (2007) similarly found that Native American youth received more punitive state juvenile justice outcomes than whites and outcomes

3. "Indeed, the majority of federal prosecutions for offenses such as assault, manslaughter, and certain sex offenses are against Native Americans" (Droske, 2008, p. 733; see also USSC, 2013).

similar to African American youth. Feimer, Pommersheim, and Wise (1990) examined sentence lengths among a sample of 602 South Dakota prison inmates in 1985, and found that Native American inmates had longer sentences than white, net of conviction offense or prior record. Some other studies of state court sentencing (Engen & Gainey, 2000; Rodriguez, 2003) included but did not focus on Native Americans in their analyses, and found that Indians were not punished significantly differently from whites. Relatedly, Lockwood, Hart, and Stewart (2015) examined sentencing outcomes among First Nations peoples in Australia and New Zealand, and found that indigenous peoples were more likely to be imprisoned than others, and that the size of this disparity varied between case and court contexts.<sup>4</sup>

In the context of tensions and strains of settler colonialism that characterize relations between Native Americans and larger US society, there are direct links between Native American oppression and negative stereotypes of Indians (Franklin, 2013; Leiber, 1994; Perry, 2006; Rouse & Hanson, 1991). Indians are often stereotyped as disreputable “others,” prone to laziness, alcoholism, and violence (Alvarez & Bachman, 1996; Perry, 2006; Snipp, 1992). “Currently, Native Americans are commonly typified as the ‘drunken Indian’ who is genetically predisposed to alcohol abuse and likely to engage in criminality as a result of intoxication” (Franklin, 2013, p. 314). Some have also argued that negative stereotypes of Native Americans in particular has perpetuated and encouraged anti-Indian criminal justice system bias (Alvarez & Bachman, 1996; Leiber et al., 2007; Perry, 2006; Zatz, Lujan, & Snyder-Joy, 1991). Such “othering” and negative stereotypes may shape court actors’ assessments of Indian defendants in terms of the *focal concerns of sentencing*. The focal concerns model of sentencing argues that subjective definitions of offenders and offenses in relation to three focal concerns of punishment—blameworthiness, protection of the community, and practical constraints—determine punishment decisions (see Kramer & Ulmer, 2009; Steffensmeier, Ulmer, & Kramer, 1998). Both legal and extralegal considerations affect the interpretation and prioritization of these focal concerns through local substantive rationality, that is, individualized, ideologically-driven decision goals and criteria (Savelsberg, 1992; Ulmer & Kramer, 1996). The focal concerns perspective specifies that status-linked attributions and stereotypes potentially shape court decision makers’ assessments of defendant blameworthiness, dangerousness, and/or practical contingencies and constraints, through a perceptual shorthand (Kramer & Ulmer, 2009).

Interpretations of focal concerns could affect the sentencing of Native Americans in federal court in two different ways: what Jeffries and Bond (2012, pp. 225–226) call “negative” and “positive discrimination.” On one

4. Compared to the very small number of studies on Native American sentencing in the US, relatively more studies exist of sentencing disparities affecting indigenous/First Nations peoples in Canada and Australia/New Zealand (Jeffries & Bond, 2012; Lockwood et al., 2015). These studies show mixed results (Jeffries & Bond, 2012).

hand, if negative stereotypes about Native Americans shape federal court actors' interpretation of Indian defendants' relative blameworthiness, dangerousness, or the practicalities of punishment consequences, we would expect them to receive more severe sentences than their white counterparts. Thus, one expectation would be that *Native American defendants receive more severe sentences relative to whites*, due to: (1) attributions about focal concerns that define Indian offenders as crime prone, alcoholic, violent, and/or dysfunctional; and (2) perceptions of Native American communities as disordered, crime ridden, and needing external crime control.

On the other hand, "positive discrimination" may occur, whereby Native Americans might be treated more leniently via the focal concerns of practical constraints and perceptions of reduced blameworthiness (see Jeffries & Bond, 2012). Federal courts may view Indian defendants as less blameworthy, more sympathetic, and as facing distinctive practical difficulties. We call this a "Big Crow" effect, wherein Indian defendants might be seen as *less blameworthy* due to their disadvantaged circumstances. In *United States v. Big Crow* (1990), the Eighth Circuit affirmed the downward departure for the defendant, Big Crow, who grew up on the notoriously violent Pine Ridge reservation and made efforts to overcome the adverse living conditions there. A downward departure was deemed warranted based on Big Crow's employment history, strong community ties, and reservation background, despite the mandatory guideline policy that a defendant's employment record and ties to the community were generally inappropriate sentencing considerations (Tredeau, 2011). The Eighth Circuit has since affirmed the Big Crow approach in cases coming from other reservations.

If the logic of the Big Crow decision becomes diffused throughout other circuits and district courts in Indian country, Native Americans may be more likely to receive more lenient sentences, including judicial downward departures, due to courts' interpreting sentencing's focal concerns in light of harsh conditions on reservations and Indian disadvantage. These conditions might *reduce* the perceived blameworthiness of certain Native American defendants. Relatedly, federal courts might sympathize with the practical situation of Native American defendants due to the ironies of federal jurisdiction over Major Crimes Act offenses. Federal court judges and even prosecutors might feel sympathy for those Native American defendants, whom, but for being Indians, would be prosecuted in state court and would almost certainly face less severe sentences than those provided in the federal sentencing guidelines. Judges, and perhaps prosecutors, might seek to ameliorate what they might see as overly harsh guideline sentences.

### Indian Country Districts: Federal-Tribal Coupling

A focus on individual-level assessments of Native American defendants relative to focal concerns is unlikely to provide an adequate account of Indian punishment in federal courts without considering the larger institutional context of

*organizational coupling* between local and federal justice. Hagan (1989, p. 119) theorized that American criminal justice acts less like an integrated system and more like a set of loosely-coupled organizations that, under normal circumstances, “have a unique capacity to absorb changes in the surrounding political environment.” But under certain circumstances (e.g. policy changes, differences in organizational environments), criminal justice organizations function with greater linkage and interdependence—tighter coupling. This tighter coupling then has consequences for punishment severity and disparity (Hagan, 1989). It is this tribal-federal justice coupling that we propose is important for understanding the sentencing of Native Americans in federal court.

The first possibility is that greater Indian/white disparity should be associated with more salient Indian federal court caseload presence. Here, we are not making a racial/ethnic group threat argument, though that might be germane as well. Rather, we want to highlight greater Indian federal caseload presence, net of Native American population size, as a potential indicator of heightened federal law enforcement and court involvement in Indian Country crime control. For federal court sentencing decisions, we view federal caseload presence, net of Native American population share, as a marker of federal justice activity in Indian Country.

To elaborate, there is evidence that US Attorneys’ Offices and federal judges view the federal system as more effective, and better resourced, than state and local criminal justice for providing high-impact crime control (Miller & Eisenstein, 2005). Federal courts, at least in some districts, might view Native American communities as “wards” of the federal government to be controlled (Franklin, 2013; Tredeau, 2011). If this “wardship” view is common, some federal districts might emphasize tough federal punishment as a mechanism of crime control (through the greater federal capacity for incapacitation and deterrence than state and local punishment) over what federal judges and prosecutors might see as a disorderly and crime-ridden community. The proportion of Native American defendants in a district’s caseload may indirectly indicate levels of serious Indian criminal activity, but it also indicates a heightened level of federal justice involvement in Indian Country. Where cases involving Native American defendants make up a substantial proportion of federal caseloads compared to other groups, those districts’ US Attorney’s Offices may be relatively active (even proactive) in prosecuting crime in Indian Country, and Indian Country crime may be relatively salient to those districts’ judges.

Thus, Native American federal caseload presence should be a marker of federal involvement in Indian Country justice. There are two more direct indicators of federal-tribal coupling. The first is simply whether the federal government has Major Crimes Act jurisdiction in a particular district under PL 280, discussed above. In federal PL 280 jurisdiction districts, the federal system prosecutes and sentence Major Crimes Act offenses, so there is by definition greater federal presence in Indian Country criminal justice than in non-federal PL 280 jurisdiction districts. A second important representation of federal-tribal justice collaboration and integration is tribal participation in the

Tribal Law and Order Act (TLO) program. Enacted on July 2010, the Tribal Law and Order Act appropriated funds to the BIA for public safety and justice programs and to foster tribal-federal justice cooperation and coordination. As of 2012, the DOJ had awarded over 169 of such grants. While the TLO Act increases tribal courts resources and authority, it also contains a host of provisions that foster tribal and federal justice interrelationships (see <https://www.justice.gov/tribal/tribal-law-and-order-act>). These provisions include the appointment of US Attorneys' Office tribal liaisons to foster crime prevention initiatives, and to coordinate (and share, when deemed appropriate) tribal and federal jurisdiction. The TLO also enables the appointment of special Assistant US Attorneys for tribal crime reduction and prosecution, and the cross-designating of tribal prosecutors as Assistant US Attorneys.

Such federal-tribal integration might promote a crime control model for Indian Country, emphasizing not only the provision of federal resources and assistance to tribes, but also meting out tougher federal sentences to incapacitate and deter Native American defendants deemed serious enough to warrant federal prosecution. If so, district courts might give out tougher sentences to Indian defendants where federal justice is more present and integrated in Indian Country justice. Federal courts in such districts might "reward" tribal justice integration with the greater "services" of federal crime control in the form of more severe punishment for Indian offenders, which federal judges and US Attorneys' Offices might see as providing greater deterrence and incapacitation.

Interestingly, districts characterized by greater federal-tribal cooperation and integration might also display a comparatively *greater* use of "substantial assistance" departures and government-sponsored departures from the US Sentencing Guidelines for Indian defendants. These types of Guideline departures are widely-used and well known as prosecutorial tools to leverage informant cooperation with federal law enforcement (for example, fostering testimony against co-defendants) (e.g. Johnson, Ulmer, & Kramer, 2008; Spohn & Forango, 2009; Ulmer, 2005). In districts with more cooperative and integrative tribal-federal justice relations, more aggressive use of these sentencing incentives might be a marker of more active and involved US Attorney's Office investigative efforts in Indian country. Conversely, districts where tribes are less integrated and collaborative might actually exhibit more lenient sentencing for Indians, but also fewer federal prosecutor-initiated Guidelines departures. Such sentencing patterns might be a marker of district courts and US Attorney's Offices that do not exhibit a high level of interest or aggressiveness in Indian country crime control (see Perry, 2006).

We examine two sets of expectations about the effects of Native American status on individual sentencing severity, and three expectations about how indicators of tribal-federal justice coupling condition the sentencing of Indian defendants. At the individual level, one hypothesis is that Native American defendants receive more severe sentences (and fewer downward departures) relative to whites due to negative stereotypes about Indians and their

communities. By contrast, there is the “positive discrimination,” Big Crow effect hypothesis, in which Native Americans are more likely to get downward departures, and more lenient sentences generally.

At the district court level, we hypothesize that three indicators of tribal-federal coupling will be associated with increased sentencing severity for Native Americans. First, Indians should receive more severe sentences where Native American federal caseload share is relatively higher, than where their caseload share is lower. Second, full federal Major Crimes Act jurisdiction under PL280 should be associated with greater sentencing severity for Indians, as should greater TLO grant funding. On the other hand, we also hypothesize that these three tribal-federal coupling measures should be associated with comparatively *greater* use of “substantial assistance” departures and government-sponsored departures from the US Sentencing Guidelines for Indian defendants. These prosecutor-initiated departures are commonly used tools for encouraging informant testimony and other forms of cooperation with law enforcement.

### Data and Methods

To address these issues we use sentencing data from the US Sentencing Commission’s Standardized Research Files. We use cases sentenced in the period from FY 2010 to FY 2012, and contextual data aggregated over 2010 to 2012. Our selection of data years is advantageous, because we capture the near-term aftermath of the 2010 TLO Act. Consistent with previous research, we exclude all immigration offenses because they are handled differently than other Federal crimes (see Hartley & Tillyer, 2012). Because our focus is on the sentencing of Native Americans and its variation in relation to contextual features affecting Native Americans, we also exclude non-US citizens from our analysis (99% of all Native American defendants are US citizens, see USSC, 2013).<sup>5</sup> We include cases sentenced in only those 28 districts with appreciable numbers of Native American defendants, the same districts examined by Franklin (2013).<sup>6</sup>

5. Native Americans defendants in the data are almost all US citizens. More importantly, and the conceptual issues surrounding Indians’ status as both US citizens and also members of domestic sovereign nations form a unique citizenship situation, and there would seem to be no clear analogy relative to defendants who are citizens of other nations. We therefore believe that the most appropriate conceptual comparisons for this analysis are between Native American defendants and other types of defendants who are US citizens. Supplemental models that include non-US citizens in the data produce substantively similar results as those we present here.

6. These 28 districts are included: Alaska, Arizona, Colorado, Idaho, Iowa North, Michigan West, Minnesota, Montana, Mississippi South, Nebraska, New Mexico, New York East, New York North, New York West, North Carolina East, North Carolina West, North Dakota, Oklahoma East, Oklahoma North, Oklahoma West, Oregon, South Dakota, Texas West, Utah, Washington East, Washington West, Wisconsin East, and Wyoming.

We also include district-level data matched to approximately the same time period (2010 to 2012). Our district tribal contextual data draws from the 2010 US Census (aggregated from counties to federal district boundaries), Bureau of Justice Statistics *Compendium of Tribal Crime Data* (BJS 2011), and the Bureau of Indian Affairs *Tribal Law and Order Report* (BIA 2012).

## Dependent Variables

Our analysis examines three dependent variables: (1) the likelihood of an imprisonment sentence; (2) the length of imprisonment; and (3) the likelihood of sentencing departure. The first dependent variable is a measure of whether an offender was sentenced to a term of incarceration (1 = yes, 0 = no). The second dependent variable is imprisonment length (capped at 470 months). Since the imprisonment length variable is positively skewed and regression diagnostics indicated problematic standard errors, we follow previous research and use the natural log. Logging the sentence length<sup>7</sup> allows us to more substantively examine the proportional differences in sentence lengths associated with our variables of interest. Third, we examine the likelihood of different kinds of downward departures from the US Sentencing Guidelines: (1) Judge-initiated departures above and below the Guidelines, (2) prosecutor-initiated departures for substantial assistance to law enforcement (under Rule 5K1.1), and (3) Government-sponsored departures below the Guidelines.

## Independent Variables

Our key individual level predictor is a dummy variable for Native American defendants ( $n = 3,453$ ).<sup>8</sup> Other race/ethnic groupings are also measured with dummy variables: African Americans (non-Hispanic,  $n = 8,052$ ), Hispanics (of any race,  $n = 3,284$ ). Due to very low numbers of other race/ethnicity defendants in these districts with high concentrations of Native Americans (e.g. Asian/Pacific Islanders,  $n = 516$ ), others were combined with white non-Hispanic offenders as the reference category ( $n = 23,442$ ).<sup>9</sup> Our analyses focuses

7. The formula for converting  $b$ -coefficients of logged sentence length to % difference is  $((\text{Exp}(b)) - 1) * 100$  for positive coefficients and  $-1((1/\text{Exp}(b)) - 1) * 100$  for negative coefficients (see Kurlychek & Johnson, 2004).

8. This includes a small number of Alaskan Natives (all of which in the Alaska district), as the USSC does not distinguish this group of defendants from Native Americans. We recognize that Alaskan Natives have a somewhat different political and cultural history, and a qualitatively different relationship with the federal government, than Native Americans in the lower 48 states.

9. Supplemental models incorporated "other" race categories. As expected, the effect of this change was trivial. For example, in the model predicting logged sentence length, the Native American x Fed280 interaction effect was .183, with SE = .02 (vs.  $b = .188$ , with SE = .03 in the model presented).

on three key tribal-related contextual variables. The correlations between these contextual variables is presented in the Appendix.

*Native American percentage of federal district caseload.* We view federal caseload presence as a marker of federal justice activity and involvement in Indian Country crime control. To assess the independent effect of Native American caseload share, we control for the *district-level Native American population percentage*.<sup>10</sup>

*Tribal Law and Order (TLO) funding.* We include a measure of funding awarded through the BIA for public safety and justice programs via the TLO Act. As of this writing, over 169 grants to American Indian tribes, Alaska Native villages, tribal consortia, and tribal designees have been awarded, totaling approximately \$87 million. An examination of frequencies revealed meaningful breaks across funding amounts. Specifically, among the 28 districts: nine districts had received \$0 or less than \$1 million, ten districts had between \$1.6 million and \$2.7 million, and the remaining nine districts had received more than \$3 million. In our models, we measure this as funding in millions, divided by 10,000. We then log this variable because of its skewness. In supplemental models, we measured this as logged dollars per Native American per district. Results were substantively similar across these different TLO measures.

*Federal Jurisdiction under PL 280.* Models include whether the federal courts have jurisdiction over Major Crimes Act offenses under Public Law 280 vs. whether states have criminal jurisdiction. Fully federally-integrated districts, where crimes in Indian country are routinely prosecuted in federal courts, are coded as 1; districts in which PL 280 allows for state jurisdiction are coded as 0. It is important to note that PL 280 jurisdiction can vary by district/tribal area<sup>11</sup>—thus, it is appropriate to measure this variable at the district and not the state level of analysis.

### *Legally relevant variables*

We control for several important legally relevant variables. First, we control for the guideline recommended sentence: the minimum months of incarceration recommended by the US Sentencing Guidelines for each case. This variable also incorporates any applied mandatory minimums that “trump” the

10. The correlation between these two measures is .53, suggesting that they are related, but distinct variables.

11. A handful of tribes within some states are not encompassed by PL 280: for example, the Red Lake Band of Chippewa Indians in Minnesota and the Confederated Tribes of Warm Springs in Oregon.

guidelines scores.<sup>12</sup> As with sentence length, we capped the presumptive sentence at 470 months and use the natural log of the variable to correct for skew.<sup>13</sup>

Second, while criminal history is included in the Guideline recommended sentence measure, we examine criminal history as a discretionarily considered but legally relevant variable (Ulmer, Light, & Kramer, 2011).<sup>14</sup> Research has shown that criminal history has important affects beyond the presumptive sentence and may be an important mediator of race/ethnic differences in punishment (see Ulmer et al., 2011, 2016). We view offense type in a similar way—we control for the extent to which discretionary consideration of offense type mediates race and ethnicity effects aside from the role of offense severity in the presumptive sentence. We included a set of dummy variables for offense type (drug, violent, fraud, firearms, property, and other as the reference category). Also, we include the number of conviction counts.

### *Case processing variables*

Our imprisonment and length models include a predictor for whether the defendant received a departure (upward, downward-judge initiated, downward-substantial assistance (5K1), or no departure-*reference*). These departures are also our dependent variables in our models of departure sentences. We also control for mode of conviction (trial = 1, guilty plea = *reference*), and whether the defendant was detained presentencing (1 = detained presentencing), a variable which is highly correlated with pretrial detention/release in Federal court (Reitler, Sullivan, & Frank, 2013).

12. In supplemental models of imprisonment and length, we also controlled separately for whether defendants received a mandatory minimum sentence (we did not control for mandatory minimums in models of departures, since mandatory minimums preclude the possibility of downward departures except for cases receiving the safety valve provision, which are rare in these data). The results of interest do not differ substantively from those we present in our main analyses. Notably, Native Americans receive mandatory minimums at much lower rates than other defendants: 8% of Native Americans receive mandatory minimums in our data, whereas 18% of all other types of defendants do.

13. A constant of .1 is added to all zero values for the presumptive sentence variable but not the sentence length dependent variable, because we want to retain those cases where an offender's presumptive sentence was 0 months but s/he still received a prison sentence.

14. The inclusion of criminal history did not result in problematic collinearity with the presumptive sentence measure (the correlation between logged Guideline minimum and criminal history is .37). Our results regarding Native American defendants are substantively similar in models not controlling for criminal history.

### *Other defendant characteristics*

We include as controls other defendant characteristics; age, gender, and education. Age at time of sentencing is a continuous variable in years. The education of Federal defendants is captured with four separate dummy variables: high school graduates, some college, and college graduates, using less than high school completion as the reference. Gender is a dummy variable, coded as female = 1.

### Analytical Strategy

We use hierarchical linear modeling (HLM) to estimate the effects of individual and district characteristics (Raudenbush & Bryk, 2002). We use hierarchical linear models for logged sentence length, and hierarchical logistic models for imprisonment and Guideline departure outcomes. This strategy is common in sentencing research, where cases are processed within counties or court districts (Ulmer & Bradley, 2006; Ulmer & Johnson, 2004; Weidner, Frase, & Schultz 2005). We estimate hierarchical models to simultaneously examine the influence of district characteristics and individual case level features, particularly Native American status, on punishment outcomes. Models presented are based on full maximum likelihood estimation and standard final estimation of fixed effects. Null models (not shown) confirm significant between-district variance in imprisonment, sentence length and likelihood of downward departures. The intraclass correlation coefficients indicate that level 2 variance accounts for 6.5% of the total variance in sentence length ( $\rho = .0651$ ) and 1.8 and 8.7% of the total variance in downward departures and substantial assistance departures, respectively ( $\rho = .0178$  and  $\rho = .0871$ , based on Snijders and Bosker (1999) procedures for estimating ICC for dichotomous outcomes). There was little district-level variance in likelihood of incarceration ( $\rho = .015$ , Snijders & Bosker [1999]). This is not surprising—the large majority of federal offenders are sentenced to prison.<sup>15</sup>

15. Whether or not analyses of sentencing length outcomes requires controlling for a selection bias for the incarceration decision is a contentious issue in sentencing literature (Bushway, Johnson, & Slocum, 2007). However, the potential for selection bias based on incarceration decision is less problematic for our current models, as over 82% of defendants in the sample are sent to prison. Nevertheless, to ensure the robustness of our prison length findings, we attempted to run our length models both with and without a Heckman two-step correction. We attempted to find exclusion restrictions and estimate an incarceration (selection) model that was substantively different from the sentence length model (this selection model was also more parsimonious than the in/out model presented). This was difficult, since most of the variables predicting imprisonment also predict length, though the size of the effects are often different. The results from the selection-corrected models are not meaningfully different than the ones we present for our coefficients of interest, but these corrected models are much more suspect due to collinearity introduced by the correction procedure. Another option would be to treat incarceration/length as an overall sentencing severity variable subject to left-censoring, and use tobit regression. However, this would prevent us from addressing our central research questions, since tobit is not available in Hierarchical modeling in either HLM or Stata.

It is also possible that different case selection processes exist in non-federal PL 280 districts (where federal courts do not have Major Crimes Act jurisdiction) than in federal PL 280 districts. That is, non-Federal PL 280 district courts would have a different mix of criminal cases involving Native Americans than in the Federal PL 280 districts, since the former do not have jurisdiction over Major Crimes Act offenses. In fact, the caseload in the Federal PL 280 jurisdiction districts exhibits higher mean guideline offense severity levels, and significantly greater proportions of violent and firearms offenses, than the caseload in non-federal PL 280 districts. One would expect this, given that the federal PL 280 districts have jurisdiction over Major Crimes Act offenses that would ordinarily be state-level offenses, such as homicide, robbery, rape, aggravated assault, burglary, child abuse and neglect, etc., as well as illegal gun possession-related and drug trafficking offenses. On the other hand, the mean Native American court caseload share is smaller in Federal PL 280 districts—the Native American caseload share is 8.3% in non-federal PL 280 districts and 2.1% in the Federal PL 280 districts.

We attempt to address this at both the individual case and district levels. At the individual level, we first control for offense type (see above). Then, regardless of offense type or defendant status, each case has a specific guideline recommended minimum sentence that is a product of: (1) the final offense level (incorporating many offense-related factors such as relevant conduct, offense-specific behavior and role, guideline-based sentence enhancements or mitigators), (2) adjustments for any statutory “trumps” (i.e. mandatory minimums) that might apply, and (3) the criminal history score. Thus, even though more Native American defendants are proportionally convicted of violent offenses, for example, each offender is still supposed to be sentenced relative to the recommended guideline minimum, for which we control. At the district level, we address these between-district differences in caseload composition through: (1) group mean-centering our individual-level predictors in our hierarchical models, and (2) including the federal PL 280 jurisdiction variable. Group mean-centering specifies the individual case-level effects in terms of district-specific means, while the federal PL 280 variable captures the differences between the two types of Indian Country jurisdictions.

Our level-1 predictors are thus centered on group (district) means to account for unspecified district variation and express the variation between individual defendants and the means of their district. For example, the average effect of Native American defendant status is expressed as a fixed effect in the regression coefficient. Bauer and Curran (2005) also recommend group-mean centering level-1 predictors (and grand-mean centering level-2) to improve computation and interpretation of the main effects when cross-level interactions are tested, and our models follow this advice. For example, our cross-level interactions involving Native American status and federal PL 280 jurisdiction represent differences between the two types of jurisdiction in their district-specific effects of Native American status on sentencing.

**Table 1** Description of defendants in 28 federal districts, 2010–2012 ( $N = 36,922$ )

	Defendant race/ethnicity			
	Native American ( $n = 3,453$ ) Mean/percent	Black ( $n = 8,052$ ) Mean/ percent	Hispanic ( $n = 3,284$ ) Mean/ percent	White (22,133) Mean/ percent
<i>Independent variables</i>				
Level 1 Predictors				
Offender characteristics				
Age (SD)	32.85 (11.15)	33.55 (9.71)	32.18 (10.40)	38.26 (12.66)
Female	21.21%	13.03%	23.23%	20.60%
Less than hs	41.05%	35.33%	46.32%	14.30%
High school graduate	40.95%	41.00%	37.84%	36.67%
Some college	16.00%	19.67%	13.00%	23.90%
College graduate	2.00%	3.02%	2.00%	9.00%
Case characteristics				
Trial	4.75%	5.12%	2.84%	3.41%
Number of counts (SD)	1.22 (.85)	1.41 (1.53)	1.3 (1.46)	1.43 (2.20)
Detained pre-sentencing	72.00%	72.00%	65.33%	46.30%
Downward departure	17.58%	18.00%	18.13%	22.00%
Gov Spon departure	9.21%	6.00%	6.12%	7.30%
Upward departure	5.91%	2.04%	2.00%	1.91%
Substantial assistance departure	5.02%	23.03%	17.91%	15.14%
Logged presumptive sentence (SD)	3.10 (1.82)	3.83 (1.64)	3.40 (1.58)	2.65 (2.4)
Offense characteristics				
Drug	21.84%	45.00%	59.00%	32.00%
Violent	42.13%	4.00%	2.00%	5.70%
Fraud	8.00%	13.00%	6.00%	21.80%
Firearms	9.02%	27.00%	13.00%	12.44%
Property	3.12%	2.00%	1.00%	2.00%
Other offenses	16.21%	9.23%	18.56%	22.25%
Criminal History (SD)	2.22 (1.53)	3.38 (1.86)	2.28 (1.63)	2.08 (1.72)
Level 2 Predictors				
Percent Native American caseload	7.05 (10.1)	.09	48.00	
Percent Native American population	3.42 (4.3)	.30	17.00	

(Continued)

Table 1 (Continued)

	Defendant race/ethnicity			
	Native American ( <i>n</i> = 3,453) Mean/percent	Black ( <i>n</i> = 8,052) Mean/ percent	Hispanic ( <i>n</i> = 3,284) Mean/ percent	White (22,133) Mean/ percent
Tribal Law Order funding				
Funding in millions	2.29 (2.25)	0	10.79	
Funding in \$10,000s, logged	4.53 (2.04)	0	6.98	
Fed PL 280 jurisdiction	23.02%			
<i>Dependent variables</i>				
Incarcerated total: 82.20%	87.55%	90.01%	86.84%	75.37%
Logged sentence length (SD)	3.46 (1.14)	3.99 (1.06)	3.51 (1.13)	3.34(1.42)

<sup>1</sup>Estimates may not add to 100% due to rounding.

More jurisdictions, and a greater number of Native Americans per jurisdiction, would be ideal. However, studies find that for HLM models with relatively few level-2 units, regression coefficients and variance components are estimated without bias; the regression coefficients and standard errors are estimated accurately (Bell, Morgan, Kromrey, & Ferron, 2010; Maas & Hox, 2005).<sup>16</sup>

## Findings

Table 1 provides the descriptive statistics for our dependent variables and predictors across race/ethnicity. As expected, over 82% of federal defendants received imprisonment.

This includes 88% of Native Americans, 90% of African Americans and 87% of Hispanics and 75% of white and other race defendants. Notably, Native Americans often face federal prosecution for what would be ordinarily be considered

**Table 2** Hierarchical models of imprisonment and prison length

	Model A			Model B	
	In/Out			Sentence length (ln)	
	Coeff	SE	Odds ratio	Coeff	SE
<b>Level 1 Predictors</b>					
Offender characteristics					
Criminal history	.24	.02***	1.27	.04	.00***
Age	-.01	.001***	.99	.00	.00
Female	-.50	.04***	.60	-.21	.01***
High school graduate	-.63	.05***	.53	-.07	.01***
Some college	-.71	.06***	.49	-.09	.01***
College graduate	-.65	.08***	.52	-.09	.02***
Black	-.12	.08	.89	-.05	.01***
Hispanic	-.66	.06***	.52	-.15	.01***
Native American/Indian	-.12	.09	.89	-.15	.01***
Case characteristics					
Trial	.61	.15***	1.84	.23	.02***
Number of counts	.07	.02***	1.07	.02	.00***
Detained pre-sentencing	1.29	.05***	3.63	.24	.01***
Downward departure	-2.33	.07***	.10	-.50	.01***
Govt. spon departure	-2.68	.09***	.07	-.45	.02***
Upward departure	1.88	.31***	6.57	.59	.02***
Substantial assistance departure	-2.38	.08***	.09	-.61	.01***
Presumptive sentence (ln)	.85	.01***	2.34	.64	.00***
Offense characteristics					
Drug	.77	.06***	2.16	.15	.01***
Violent	.44	.12***	1.55	.14	.02***
Fraud	-.10	.06	.90	-.11	.02***
Firearms	-.05	.08	.96	.02	.01
Property	-.13	.14	.88	-.14	.03***
<b>Level 2 Predictors</b>					
% Native American population	-.07	.05	.93	.01	.02
% Native American caseload	.01	.02	1.01	.002	.01
Tribal Law Order funding (logged)	.05	.10	1.05	-.02	.03
Federal PL280 district	-.07	.37	.93	.10	.15
<b>Cross-level interactions</b>					
Native American × % Native Am. caseload	.04	.01***	1.04	.002	.001*
Native American × Fed. PL280 district	-.09	.20	.92	.19	.03***
Native American × TLO funding	-.12	.08	.88	.03	.01**
			N = 36,922		N = 30,056

Notes. All level-1 effects are group mean centered. Level 2 effects are grand mean centered.  
\* $p < .05$ ; \*\* $p < .01$ ; \*\*\* $p < .001$ .

typical violent “street” crimes (see USSC, 2013). While violent offenses make up between 2 and 6% of offenses among other defendants, they represent over 42% of federal convictions among Native American defendants. Interestingly, in these districts, 50% of the convictions for violent offenses and 21% of the drug offenses involved Indian defendants, who make up 9% of our total defendants.

Regarding our key district contextual measures, 23% of Indian defendants were sentenced in districts where federal courts have full Major Crimes Act jurisdiction under PL 280, while 77% were sentenced in districts where states have jurisdiction under PL 280. One quarter of Native American defendants were sentenced in districts in the highest tercile of TLO funding (that is, districts in the top third of TLO funding), 39% were sentenced in districts with medium TLO funding, and 36% in districts in the lowest TLO funding tercile. In absolute amounts, districts averaged about \$2.3 million in TLO funding, and a standard deviation of about \$2.2 million. The average Native American district caseload percentage was about 7%, ranging from a low of .09% to a high of 48%. The district Native American population averaged 3.4%, ranging from .3% to 17%. Interestingly, the district with a 48% Native American caseload only had the 8th largest Native American population among these 28 districts.

### Individual Level Effects

Model A in Table 2 displays the findings from hierarchical logistic models of imprisonment, and hierarchical linear models of logged imprisonment length.

In line with prior federal sentencing research, both legal (including offense type, criminal history, Guideline recommended sentence, number of counts, downward departure, and mode of conviction), case processing (presentence detention, mode of conviction), and extralegal social status factors (such as age, sex, education, and ethnicity), influence all federal defendants’ odds of incarceration and length of sentence. The effects for most individual and case-related variables were consistent across models. Younger offenders, less educated offenders, males, violent and drug offenders, those detained presentencing, and people convicted via trial were more likely to go to prison. With regard to sentence length (Model b in Table 2), the individuals that received the harshest punishments are young offenders, males, violent offenders, those detained presentencing, individuals with multiple counts, and people convicted via trial. Interestingly, and contrary to other recent nationwide analyses of federal sentencing (Fischmann & Schanzenbach, 2012; Starr & Rehavi, 2013; Ulmer et al., 2011; USSC, 2012), in these districts, black and Hispanic defendants were less likely than white and other defendants to be sentenced to incarceration (though the black effect is not statistically significant), and tended to receive shorter sentences. It is likely that these 28 districts, while appropriate for examining Native American sentencing, are atypical in terms of black, white, and Hispanic sentencing.

Table 3 Hierarchical multinomial regression models of guideline departures

	Model A			Model B			Model C			Model D		
	Upward departure			Judge-initiated down. departure			Substantial assistance departure			Govt.-sponsored departure		
	Coeff	SE	Odds ratio	Coeff	SE	Odds ratio	Coeff	SE	Odds ratio	Coeff	SE	Odds ratio
<b>Level 1 Predictors</b>												
<b>Offender characteristics</b>												
Age	.01	.003*	1.01	-.003	.001*	.997	-.01	.001***	.99	.01	.002***	1.01
Female	-.29	.12**	.75	.33	.04***	1.39	.52	.04***	1.68	.16	.07*	1.17
High school graduate	.01	.08	1.01	.05	.03	1.05	.11	.04**	1.12	-.04	.05	.96
Some college	.09	.11	1.09	.14	.04**	1.15	.32	.05***	1.38	.09	.07	1.09
College graduate	-.09	.20	.91	.17	.07*	1.18	.28	.09***	1.32	.27	.10*	1.30
Black	-.23	.11*	.79	-.20	.04***	.82	-.19	.05***	.83	-.06	.07	.94
Hispanic	-.19	.12	.82	-.16	.04***	.85	-.17	.05**	.84	-.13	.07*	.88
Native American/Indian	.53	.12***	1.69	-.30	.06***	.74	-.76	.09***	.47	.14	.09	1.15
<b>Case characteristics</b>												
Trial	-.12	.16	.88	-.11	.07	.89	-5.23	.59***	.01	-1.86	.18***	.16
Number of counts	.04	.01***	1.04	-.02	.01*	.98	-.14	.02***	.87	-.06	.02***	.94
Detained pre-sentencing	.94	.12***	2.56	-1.09	.04***	.34	-1.12	.04***	.33	-1.06	.06***	.35
Presumptive sentence (ln)	.10	.02***	1.11	.57	.01***	1.77	.97	.02***	2.64	.84	.02***	2.32
<b>Offense characteristics</b>												
Drug	-1.01	.12***	.36	-.61	.04***	.54	.89	.06***	2.44	-.86	.07***	.42
Violent	.64	.13***	1.90	-.63	.07***	.53	-.79	.11***	.45	-.47	.10***	.63
Fraud	.26	.13*	1.30	-.20	.05***	.82	.71	.07***	2.03	-.09	.08	.91
Firearms	-.01	.12	.99	-.28	.05***	.76	.04	.07	1.04	-.54	.08***	.58
Property	.20	.23	1.22	-.20	.11	.82	.41	.16*	1.51	-.40	.20*	.67
Criminal history	.01	.02	1.01	-.14	.01***	.87	-.13	.01***	.88	-.04	.02**	.96

Level 2 Predictors												
% Native American population	-.04	.03	.96	-.01	.04	.99	-.01	.06	1.01	-.02	.08	.98
% Native American caseload	.004	.01	1.00	-.02	.01	.98	-.04	.03	.96	-.05	.03	.95
Tribal Law Order funding (logged)	.04	.05	1.04	-.01	.07	.99	.01	.12	1.01	-.004	.16	.999
Federal PL280 district	-.22	.21	.80	-.71	.27*	.49	-.16	.47	.83	-1.75	.62**	.17
Cross-level interaction												
Native Am. × % Native Am. caseload	-.03	.01***	.97	-.002	.01	.999	.02	.01*	1.02	-.02	.008**	.98
Native American × Fed PL 280 district	.12	.23	1.12	.05	.14	1.05	.72	.22**	2.05	.53	.18**	1.70
Native American × TLO funding	.002	.08	1.00	-.06	.05	.94	-.04	.08	.96	-.04	.07	.96
	L1 N = 36,922; L2 N = 28											
	L1 N = 36,922; L2 N = 28											
	L1 N = 36,922; L2 N = 28											
	L1 N = 36,922; L2 N = 28											

Notes. All level-1 effects are centered on group-mean. Level-2 effects are grand-mean centered.  
 \*p < .05; \*\*p < .01; \*\*\*p < .001.

The main effect of Native American status suggest that Native Americans overall have about 12% lesser odds of imprisonment (though this effect is not statistically significant) than whites/other defendants, and about 15% shorter prison terms. However, these main effects mask substantial variation between districts in the sentencing of Native Americans. The standard deviation (.53) of the Indian imprisonment effect variance component shows the Indian imprisonment odds vary between .36 and 1.42 among two thirds of these districts. Similarly, the Indian length effect varies between  $-.26$  and  $-.04$  at plus or minus one standard deviation (.11) of the variance component.

Table 3 shows hierarchical logistic models for the different types of Guideline departures.

In general, the effects of legally relevant, case processing, and defendant status characteristics are similar to and coincide with results found in previous studies of federal Guideline departures (e.g. Anderson & Spohn, 2010; Johnson et al., 2008; Spohn & Fornango, 2009; Ulmer et al., 2011). All of the different types of downward departures are more likely in cases facing more severe presumptive sentences and female offenders. Those with more severe criminal histories are less likely to receive the three types of downward departures, as are those detailed presentence, and those with multiple conviction counts. Those convicted by trial are more likely to receive judge-initiated downward departures, but much less likely to receive the prosecutor-influenced departures (substantial assistance, government sponsored). Drug offenses are much less likely to receive judge-initiated upward departures, and are also less likely to receive the judge-initiated downward ones. Drug offenses also result much more often in prosecutor-initiated substantial assistance departures, as is commonly found (see Spohn & Fornango, 2009). Violent offenses are more likely to receive upward departures and less likely to receive each of the downward departures. Also, African Americans are less likely than whites/others to receive judge-initiated downward departures.

Most notable for our purposes, Native Americans also have .26 lesser odds than whites of receiving judge-initiated downward departures. Indians' odds of the prosecutor-initiated substantial assistance departures are also about half those of whites/others. Meanwhile, Indians are much more likely to get upward departures, with about 1.7 times greater odds compared to whites/others. So, judges appear be less willing to grant Indians downward guideline departures, and much more willing to impose upward departures on them—sentences more severe than the already-tough federal sentencing guidelines. On the other hand, federal prosecutors either may be unable to secure substantial assistance from Native American defendants, or else might be less willing to seek it and reward it with such departures.

The random effects for Indian defendant status on the departure types were significant as well. The standard deviations of the variance components for the Indian variable were: upward departures = .73, judge-initiated downward departures = .36, substantial assistance departures = .58, and government sponsored departures = .66. Clearly, the likelihood of Indians receiving various

Guideline departures, and the forms of differential leniency or severity they represent, varies a great deal between these districts.

### District Level Effects

The district-level predictors do not display any notable influence on the overall sentencing of all defendants. That is, these contextual main effects do not seem to affect overall defendants' imprisonment odds or sentence lengths.<sup>17</sup> This is not surprising, since these contextual factors are specifically relevant to Indian Country offenses. There does seem to be a tendency for districts with full federal jurisdiction over Indian Country (under PL 280) to grant all defendants significantly fewer judge-initiated and government sponsored downward departures. However, we are more interested in the cross-level interactions with Native American status. Supplemental analyses show that these cross-level interactions below *only* characterize the sentencing of Native Americans, and not blacks, Hispanics, or whites.

The federal punishment of Native Americans clearly depends on the characteristics of the district where they are sentenced. First, districts with greater federal caseload presence of Native Americans are more likely to imprison those Indians relative to those with smaller Native American caseloads. The combined significant negative main effect and positive cross-level interaction effects suggest that the relative leniency accorded Native Americans compared to whites/others in odds of imprisonment dissipates substantially in accordance with the size of the Indian presence in districts' courts. Indians' odds of imprisonment increase by .04 for every percentage point increase in the Native American court caseload share. That is, although Native Americans are overall less likely to be sent to prison, their risk of incarceration grows substantially relative to whites/others with the Native American proportion of the caseload. In addition, Native American caseload share is associated with slightly but significantly longer sentences for Indians. Regarding departures, increases in Native American caseload share dampens Indians' odds of upward departures, but also decreases their likelihood of receiving government sponsored downward departures.

Recall that the Federal PL 280 variable is coded so that 1 represents districts where the federal courts have full jurisdiction over Major Crimes Act offenses in Indian Country, and 0 represents districts where state courts have jurisdiction over such offenses in Indian lands, just as with crimes in other communities involving any other defendants. Federal PL 280 jurisdiction is associated with longer prison sentences for Native Americans. Native American

17. Jurisdiction overall caseload size did not significantly affect defendants' likelihood of imprisonment, but was inversely related to sentence lengths. Because of the need for parsimony due to the small number of districts, and because the inclusion of caseload did not substantively affect the finding for the Indian-related contextual variables, we omitted it from our final models.

defendants received approximately 19% longer prison sentences in districts with federal Major Crimes Act jurisdiction than comparable Native Americans where the federal courts do not have such jurisdiction. When they do wind up in federal court, Indians in non-federal PL280 jurisdictions receive significantly shorter prison sentences than their counterparts in federal PL 280 districts.

The substantial assistance and prosecutor-initiated downward departures are much more prevalent for Native Americans where the federal government has Indian Country Major Crimes Act jurisdiction. Even though Native Americans overall are less likely than whites/others to receive substantial assistance departures, Indians are much more likely to be rewarded for substantial assistance to law enforcement in federal jurisdiction districts compared to their counterparts in districts where state courts hold jurisdiction under PL 280. Likewise, Indians are more likely to be granted government-sponsored downward departures in federal Major Crimes jurisdiction districts than their counterparts in non-federal jurisdiction districts. This could represent a reward for other types of cooperation, or could be a means of ameliorating stiff Guideline sentences for those Native Americans seen by prosecutors as deserving. In fact, from the size of these two cross-level interaction effects, Indians are more likely to receive prosecutor-initiated departures, and about equally likely to receive substantial assistance departures, compared to whites/others in these federal jurisdiction districts.

TLO Act funding does not significantly condition the imprisonment odds of Native Americans, but it is associated with increased Indian prison terms. Each increase in logged TLO funding (in \$10,000s) increases mean Indian prison sentence terms by about 3%. TLO funding does not appear to condition different types of Guideline departures, however.

In addition to the models discussed above, we examined several other model specifications to check the robustness of our findings. We assessed the cross-level interaction effects we discussed above in models controlling (separately) for Native American poverty and unemployment rates, the number of Native American local jail inmates (aggregated to the federal district level),<sup>18</sup> district violent and property index crime rates, and overall court caseloads. None of these significantly conditioned the sentencing of Native Americans, or substantively altered the cross-level interactions presented. The comparatively small number of districts, 28, at our contextual level of our multilevel models places a premium on parsimony of predictors, so we omit these variables in the models we present.

18. This measure of Native American local jail inmates might be considered an indirect indicator of Native American criminal activity, since the number of Native American jail inmates would reasonably be expected to be correlated with the number of local crimes involving Native American defendants. The fact that the effects for Native American federal caseload share are robust in the face of this Indian jail inmate measure lends support to the idea that the federal caseload share variable partially captures *federal justice involvement* in Indian Country crime, and not merely the amount of Indian crime per se.

We also estimated models that omitted the Native American population variable, and one's that included a cross-level interaction between Native American status and Native American population. In these models, the cross-level interaction effects for Native American caseload share were substantively the same, and retained the same significance levels. Interestingly, we found a negative cross-level interaction effect between Native American population and Native American status. Indians' imprisonment odds decreased as district Native American population share increased, the opposite of the Native American caseload—Native American status interaction. This implied that Native American population share and caseload share are distinct variables.

We also examined an alternative facet of tribal-federal justice system coupling—a dummy variable indicating jurisdictional participation in the Tribal Criminal History Records Improvement Program (T-CHRIP). This program, provided for by the TLO Act, provides grants to tribes to improve data sharing across tribal, state and national criminal records systems. It is thus a notable example of federal-tribal justice coupling in its own right. This T-CHRIP variable performed similarly to the TLO funding measure when substituted in our models. We omit the T-CHRIP variable in our main models because it is highly collinear with our TLO funding measure. In fact, tribal participation in T-CHRIP is a condition for receiving TLO funding.

## Conclusion

Indian tribes have unique status as “domestic dependent nations,” and crime in Indian Country is governed by a “complex intersection of federal, state, and tribal jurisdiction,” with the end result that Native American defendants are often prosecuted under federal rather than state law for serious crimes (Droske, 2008, p. 811). While federal jurisdiction over Indian Country and the Major Crimes Act represent recognition of tribal sovereignty, these automatically expose Native American defendants to more severe punishments under the US Sentencing Guidelines than they would likely receive for the same crimes in state courts (Droske, 2008; Franklin, 2013; Tredeau, 2011). But once Native Americans end up in federal criminal jurisdiction, are they sentenced differently than other types of defendants? If so, is such differential punishment conditioned by important contextual circumstances unique to the Native American situation, such as indicators of the degree of federal-tribal justice coupling?

Clearly, our findings show that Native Americans are sentenced distinctively compared to other defendants in these 28 federal court districts where Native Americans have the greatest presence. Native Americans are not sentenced more harshly overall. Thus, if federal court actors draw on negative stereotypes in a perceptual shorthand to characterize Native Americans relative to the focal concerns of blameworthiness, community protection, and practicality, this does not manifest itself in overall, across-district average imprisonment and its length. We also speculated about a possible “Big Crow” effect,

whereby Indian defendants might be seen as *less* blameworthy due to disadvantaged circumstances and adverse living conditions, and might be more likely than other groups to receive leniency. Our sentence length results were consistent with such a Big Crow effect, but our judicial departure results were not. Rather, Indians were less likely than other types of defendants to receive judge-initiated downward departures, and more likely than others to receive upward departures.

More importantly, individual-level patterns, and individual case and defendant-level explanations, are not the whole story. Our findings support Hagan's (1989) contention that justice system coupling has consequences for punishment. First, we expected greater Indian caseload presence to be indicative of heightened federal law enforcement and court involvement in Indian Country crime control. Where cases involving Native American defendants make up a substantial proportion of federal caseloads relative to other groups, it is likely that district US Attorney's Offices are relatively active in prosecuting crime in Indian Country, and that Indian crime is relatively salient to the court. We found partial support for this idea. Native American court caseload share conditioned some forms of sentencing severity for Indians. Where Indians have greater caseload prominence, they face moderately greater imprisonment odds, somewhat longer sentences, and reduced chances at getting government-sponsored downward departures.<sup>19</sup>

It also appears that Indian sentencing differences relative to other defendants seem to reflect two other facets of tribal-federal justice coupling. Federal PL 280 jurisdiction and greater TLO funding both foster longer prison terms for Indians, but Federal PL 280 jurisdiction seems to also relate to greater use of prosecutorial "carrots" in the form of substantial assistance and government sponsored downward departures.

Thus, there is reason to believe that federal-tribal justice system integration fosters tougher overall sentences for Indians (i.e. longer prison terms), compared to comparable Native Americans sentenced in districts with less tribal-federal integration (i.e. no federal Major Crimes jurisdiction, lower or no TLO funding, lower Native American caseload share). Federal courts in such coupled districts might "reward" cooperative tribal justice with the greater "services" of federal crime control in the form of more severe punishment for Indian offenders. Federal court judges and prosecutors might see this as providing greater deterrence and incapacitation in Indian Country. The effects of Native American caseload share, Federal jurisdiction and TLO funding are additive, so it would seem that these forms of tribal-federal coupling combine; the longest prison terms for Indians would occur where federal jurisdiction is

19. In one district, Native Americans make up 48% of defendants, but this district only has the eighth largest Native American population. In this particular district, Native Americans have 2.4 odds of imprisonment (compared to whites), .37 odds of substantial assistance departures, and .49 odds of government sponsored departures. Our findings hold up when this district is removed from the data; the effects become smaller, but remain significant.

complete over Major Crime Act offenses, TLO funding is highest, and Native American caseload share is greatest.

Interestingly, districts characterized by some types of federal-tribal jurisdiction also seem to make comparatively greater use of “substantial assistance” departures and government-sponsored departures from the US Sentencing Guidelines for Indian defendants. In such districts, more aggressive use of these sentencing incentives might be a marker of more active and involved US Attorney’s Office investigative and enforcement efforts in Indian Country. Such departures are routinely used to reward those who inform on or testify against others, or otherwise cooperate with law enforcement (Johnson et al., 2008; Spohn & Fornango, 2009).

Our intriguing findings on the tribal-federal justice coupling could be interpreted in different ways. Districts where federal courts have Major Crimes jurisdiction over Indian Country might see the TLO funding program as an opportunity to secure more collaboration from tribal authorities and to exert more crime control through tougher sentences. Similarly, in districts where federal justice does not have Major Crimes Act jurisdiction (the non-federal PL 280 districts), federal courts and prosecutors may see the TLO program as an opportunity to leverage more engagement and cooperation from tribal authorities, and bring about more crime control through more active federal engagement and more severe punishment for federal offenses. Federal courts and prosecutors in non-federal PL 280 districts may leverage the TLO grant program to engage in selective “impact” prosecutions of specific types of offenses that can be prosecuted under federal as well as state law, such as drug trafficking, gun crimes, or sexual exploitation (see Miller & Eisenstein, 2005). TLO funding might even entail cross-designation of tribal prosecutors as temporary Assistant US Attorneys, as sometimes occurs with state prosecutors outside Indian Country (see Miller & Eisenstein [2005] regarding mechanisms of collaborative, targeted federal-local prosecution efforts).

While our analysis is novel and suggests much further scrutiny of Native American punishment and tribal-federal justice relationships, this study has distinct limitations. Rather than undermining our findings, however, we believe these limitations point the way to important new research directions. First, these findings may not generalize to patterns of sentencing for Indian defendants outside these 28 districts, and the race/ethnicity effects (e.g. for black and Hispanic defendants) are notably different than those found in recent nationwide studies of federal sentencing (Ulmer et al., 2011; USSC, 2012). Second, as with most sentencing research, we have no data on pre-conviction processes, such as arrest, prosecutorial decisions on charging, and plea bargaining processes in which sentencing guideline factors and other variables may be negotiated and manipulated. These factors have been shown to be consequential for federal punishment outcomes in a variety of ways (Fischmann & Schanzenbach, 2012; Shermer & Johnson, 2010). We cannot speak to differences that may exist in how US Attorney’s Offices might charge Native Americans differently than others, how plea negotiations might differ for Indians vs.

other defendants, and how the likelihood of conviction or acquittal by trial might differ for Native Americans.

Most importantly, we have no direct processual data on federal law enforcement practices relative to Native Americans, no direct observational data on the federal/tribal law enforcement nexus (on the federal/state prosecution nexus in general, see Miller & Eisenstein, 2005), and no data on how tribes view this nexus and federal criminal justice efforts. Finally, we do not know how Native Americans are treated in the state courts in our non-federal PL280 districts, where states have more jurisdiction over Indian Country crimes. However, legal structures such as the federal Guidelines and mandatory minimums provide substantially more severe punishment than any state laws, and the law enforcement, investigative, and punitive resources of the federal justice system typically dwarf those of states (Droske, 2008; Miller & Eisenstein, 2005). Native Americans in state courts are therefore highly unlikely to be exposed to as severe punishments as in federal courts.

By uncovering the important conditioning roles of TLO funding and federal jurisdictional variation, both individually and in combination with each other, we have illuminated an important potential site of what Steinman (2012) calls *interlocking institutional power* affecting Native Americans and their sovereignty. Research should extend this study, addressing the limitations we describe above. Qualitative research would be especially valuable for investigating how Native American communities *interpret and respond* to federal jurisdiction and federal coupling. Recall that tribal authorities must actively seek TLO grants. Why do some do so, while others do not? What are tribal authorities' goals in seeking TLO funding, and are these met or violated? What kind of federal/tribal justice relationship do tribes want? Does federal justice jurisdiction over Indian Country and its coupling with local tribes stifle the growth and development of distinctive and alternative tribal approaches to justice?

As Steinman (2012, p. 1121) predicts, "Reproduction of colonial power relations will continue and will be contested." It appears the institutional power of the federal justice system is another arena in which internal colonialism continues, and might be contested. Research is needed that more generally investigates variation in the nature of organizational interactions between federal justice authorities, tribal justice organizations, and tribal communities. Do tribal communities see Federal justice as an externally imposed colonialist force, or alternately as a useful resource in controlling crime on Indian lands? Most likely, many tribal communities confront the irony embedded in tribal-federal justice jurisdiction and coupling, an irony distinctive of internal colonialism. Federal justice might provide desired law enforcement and crime control assistance even as it usurps tribal justice authority and exposes Native Americans to more severe punishment in the federal system.

## Disclosure Statement

No potential conflict of interest was reported by the authors.

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