Chicago-Kent Law Review

Volume 78
Issue 1 *Symposium: Private Law, Punishment, and Disgorgement*

Article 16

April 2003

Removing the Blinders in Federal Sentencing: Cultural Difference as a Proper Departure Ground

Kelly M. Neff

REMOVING THE BLINDERS IN FEDERAL SENTENCING: CULTURAL DIFFERENCE AS A PROPER DEPARTURE GROUND

KELLY M. NEFF*

INTRODUCTION

A Korean-American man who spent the first forty years of his life in Korea pled guilty to bribing an Internal Revenue Service agent, but argued that he should be granted a departure from the United States Sentencing Guidelines ("sentencing guidelines") because his cultural beliefs made him unlike the typical defendant convicted of this crime.[1] He claimed that because of his Korean cultural upbringing he believed the money he gave to the agent was not only lawful, but also socially mandated.[2] The district court refused the departure, stating that the sentencing guidelines denied it the authority to consider the defendant's culture.[3] On appeal, the Third Circuit noted that culture is uncomfortably close to the prohibited sentencing factor of national origin but declined to decide the propriety of culture as a sentencing factor and affirmed the district court's decision on other grounds.[4]

In the Ninth Circuit, a Mexican-American man convicted of illegal reentry argued that the district court abused its discretion by not taking into account the degree of his cultural assimilation to United

* J.D. candidate, Chicago-Kent College of Law, Illinois Institute of Technology, 2003; B.A., English and History, DePaul University, 2000. The author wishes to thank Professor Sarah Harding and Professor Doug Godfrey for their invaluable comments and insight and Jason Braswell, Tracy Cassidy, Daniel Mayerfeld, and Michael Shapiro for their editing, comments, and assistance.

1. United States v. Yu, 954 F.2d 951, 953 (3d Cir. 1992).
2. *Id.*
3. *Id.*
4. *Id.* at 954.

States norms.[5] The Ninth Circuit agreed, noting that it would be "unusual" to punish the defendant to the same extent as others convicted of this crime, sympathizing that the United States contained his family and the only way of life he had ever known. Thus, the Ninth Circuit found that a defendant's degree of assimilation to American culture is relevant in sentencing.[6] Other circuits followed suit.[7] Despite this willingness to consider a defendant's culture when that culture is consistent with American mores, no circuit has stated that a defendant's degree of cultural difference, which might serve to justify or explain a defendant's rationale for committing a particular crime, is an appropriate consideration for district court judges in making sentencing determinations.[8]

Thus, defendants such as the reentry defendant, Lipman, who have assimilated to United States' culture and should know that their actions are illegal, are garnering sympathy from the courts. In stark contrast defendants such as the bribery defendant Yu, who have retained the culture of their native lands, which may reasonably diminish the likelihood that they knew their actions were illegal, are being treated sternly by the courts for their *lack* of assimilation. This Note uses the term "cultural assimilation" to describe claims like Lipman's—the notion that one's degree of assimilation to the United

5. United States v. Lipman, 133 F.3d 726, 729 (9th Cir. 1998).

6. *Id.* at 731.

7. *See* United States v. Rodriguez-Montelongo, 263 F.3d 429 (5th Cir. 2001); United States v. Sanchez-Valencia, 148 F.3d 1273 (11th Cir. 1998).

8. The Seventh Circuit recently attempted to depict the propriety of allowing a cultural difference claim throughout the circuits. United States v. Guzman, 236 F.3d 830, 832 (7th Cir. 2001). It found that the Eighth Circuit had approved the use of cultural considerations as a basis for downward departure, in limited situations, without considering the proscriptions of U.S. Sentencing Guidelines Manual § 5H1.10. *Id.* (citing United States v. Decora, 177 F.3d 676, 679 (8th Cir. 1999); United States v. One Star, 9 F.3d 60, 61 (8th Cir. 1993); United States v. Big Crow, 898 F.2d 1326, 1331–32 (8th Cir. 1990)). These cases, however, do not depict the typical cultural difference claim; rather, all of these situations involved downward departures to defendants of Native American descent based upon a degree of perseverance that the sentencing judge found peculiarly high despite growing up with the struggles and limitations of an Indian reservation. *Decora*, 177 F.3d at 679–80; *One Star*, 9 F.3d at 61; *Big Crow*, 898 F.2d at 1331. This ambiguity will be discussed more, *infra*, in Part II.

The Seventh Circuit also concluded that the Tenth and Second Circuits decided that cultural difference could never be a basis for mitigation. *Guzman*, 236 F.3d at 832 (citing United States v. Contreras, 180 F.3d 1204, 1212 n.4 (10th Cir. 1999); United States v. Sprei, 145 F.3d 528, 536 (2d Cir. 1998)). Again, the support for this proposition is ambiguous. It is not clear that the Tenth Circuit conclusively held that culture could never be a basis for downward departure, and it rejected Contreras' argument, finding that it did not implicate culture, but the forbidden factor of religion. *Contreras*, 180 F.3d at 1212 n.4. Further, *Contreras* has not been cited by any other court, besides the Seventh Circuit, as holding this position. Similarly, the Second Circuit struck down Sprei's departure because it was based upon the forbidden factor of religion, and did not mention or discuss cultural difference in its holding. *Sprei*, 145 F.3d at 536.

States' culture should be a basis for departure for reentry convictions because, unlike those who illegally reenter for economic reasons, their motivation was to be reunited with aspects of their cultural upbringing which can only be found in the United States. This Note employs the term "cultural difference" to describe claims such as Yu's—the notion that certain distinctions between the defendant's minority culture and that of the majority should be a basis for a mitigated sentence.

Yu's district court judge felt that cultural difference could not be a basis for departure, presumably due to proscriptions in the sentencing guidelines.[9] Prior to the enactment of the sentencing guidelines in 1984, federal district court judges were allotted such a wide range of discretion in sentencing that serious injustices were occurring.[10] Criminals with similar crimes and similar histories were not given similar sentences due to the wide discretion enjoyed by judges.[11] In order to minimize these disparities and create uniformity in sentencing, Congress passed the Sentencing Reform Act of 1984[12] and created the Sentencing Commission to develop guidelines for sentencing.[13] While the Supreme Court has affirmed that these guidelines do not usurp all the discretion of a trial judge in sentencing,[14] there are certain factors that are prohibited from sentencing considerations: race, sex, national origin, creed, religion, and socioeconomic status.[15] Consideration of a defendant's cultural difference is not specifically proscribed under the sentencing guidelines; however, many courts have expressed concern that cultural difference is too similar to consideration of prohibited factors, especially race and national origin.[16] This view allows the disparity of treating a defendant who acted in ignorance of American law and in compliance with

9. *Yu*, 954 F.2d at 953.

10. Bruce M. Seyla & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 4 (1991).

11. S. REP. NO. 98-473, at 38 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3220, 3221.

12. 18 U.S.C. §§ 3551–3559 (2000).

13. Koon v. United States, 518 U.S. 81, 92 (1996).

14. *Id.*

15. U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2002).

16. *See* United States v. Guzman, 236 F.3d 830, 833 (7th Cir. 2001) ("[W]e lean to the view that section 5H1.10 of the guidelines does forbid consideration of ethnicity or 'cultural heritage' in the sentencing decision."); United States v. Tomono, 143 F.3d 1401, 1404 n.2 (11th Cir. 1998) ("[C]onsidering any 'cultural differences' attributable solely to a defendant's country of origin comes uncomfortably close to considering the defendant's national origin itself.").

his or her own cultural norms the same as one who committed a similar crime fully aware of the wrongfulness of his or her actions.

Because culture implicates a different set of considerations and norms than do prohibited factors such as race and national origin, courts should distinguish cultural difference and view it as a proper departure ground under the sentencing guidelines. This would still comport with the objective of treating similarly situated defendants in the same manner by further delineating which groups of defendants are similarly situated. A cultural difference consideration would have the effect of treating those whose own culture dictates variant behavior differently than those who have committed the same crime but have been fully enculturated by the values and beliefs of the dominant society.[17] Moreover, allowing a cultural difference claim in sentencing would help eliminate the disparity of lenient sentencing consideration between immigrants more assimilated to American norms and mores and immigrants who have retained their national or ethnic diversity. Considering cultural differences in sentencing would thereby further our nation's ideals of fostering multiculturalism and pluralism by recognizing cultural beliefs and practices of those other than the American majority. Further, allowing departures based upon culture would not compromise the major goals and policies of sentencing, but instead would advance them. Thus, the time-honored tradition of the district court judge considering every defendant as an individual with unique attributes that will "sometimes mitigate, sometimes magnify, the crime and punishment to ensue"[18] is preserved.

This Note explores the injustices that result from the application of rigid, uniform sentences without regard to defendants as individuals whose cultural beliefs and practices may serve as reasonable, legitimate, and just means for mitigation. In Part I, this Note reviews

17. Using culture in this context would aid in "bridg[ing] the gap that currently exists in the law between moral and legal guilt." Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437, 443 (1993).

Professor Gomez also urges the consideration of culture as a mitigating factor in sentencing in situations where "cultural uniqueness peculiar to the offender's race exists and is causally related to the crime" but does not consider the disparity of allowing cultural assimilation claims in sentencing while not allowing cultural difference claim. Placido G. Gomez, *The Dilemma of Difference: Race as a Sentencing Factor*, 24 GOLDEN GATE U. L. REV. 357, 360 (1993). This is due to Professor Gomez's overarching goal of allowing the consideration of *race* in sentencing, especially in situations where the judge learns that in some part of the criminal process the defendant has been subject to racial bias. *Id.* at 385. This Note distinguishes culture from race, and urges that culture should be a proper sentencing consideration.

18. *Koon*, 518 U.S. at 113.

the history and background of the sentencing guidelines. Part II highlights cases in which departures from the sentencing guidelines have and have not been granted based on the culture of the defendant. For purposes of analogy, Part III explores the leading arguments proffered by those who favor use of the cultural defense, with emphasis on examining how a cultural defense furthers the goals of punishment. Part IV of this Note establishes that culture is distinct from prohibited considerations under the sentencing guidelines. It then analyzes how cultural considerations are more applicable to sentencing determinations than as defenses to liability. Finally, this Note illustrates the important policies that a cultural difference factor effectuates: multiculturalism, pluralism, and the goals and policies inherent in criminal sentencing.

I. BACKGROUND AND HISTORY OF THE SENTENCING GUIDELINES

Prior to the Sentencing Reform Act of 1984,[19] a defendant's sentence remained largely within the purview of the federal district court judge, who "enjoyed broad discretion in determining whether and how long an offender should be incarcerated."[20] In principle, a defendant's sentence was determined by three different entities.[21] First, each crime had a predetermined range of sentences determined by Congress.[22] Second, the sentencing judge administered a sentence based upon this range. However, the ranges were often so expansive that the judge was left with almost unfettered discretion in sentencing.[23] This power was based upon the notion that the district court judge had the most intimate knowledge of each individual defendant and thus was most knowledgeable about each person's possibility for "reform or recidivism."[24] The third party that had control of the defendant's sentence was the Parole Commission. A parole officer had the ability to release a defendant prior to the expiration of his or her sentence based upon the officer's character assessment of the defendant.[25]

19. 18 U.S.C. §§ 3551–3559 (2000).

20. *Koon*, 518 U.S. at 92.

21. Mistretta v. United States, 488 U.S. 361, 364–65 (1989).

22. *Id.*

23. *Id.*

24. Glueck, *The Sentencing Problem, reprinted in* THE PROBLEM OF SENTENCING 61–62 (Monrad G. Paulsen rep., 1964).

25. *Id.*

Of the three entities, the sentencing judge was the target of the most criticism. As "offenders with similar histories, convicted of similar crimes, committed under similar circumstances"[26] were given vastly different sentences as a result of the discretion of the sentencing judge, criticisms arose depicting federal sentencing as being "arbitrary and even sadistic,"[27] resulting in sentences based largely upon the judge's emotive character.[28]

As a result of these disparities, Congress passed the Sentencing Reform Act of 1984, creating a commission charged with establishing and maintaining a uniform set of sentencing guidelines.[29] The purposes of the commission are to "provide certainty and fairness" in sentencing and to avoid unreasonable disparities in sentences "while maintaining sufficient flexibility to permit individualized sentences when warranted[.]"[30] The Sentencing Reform Act also permits the defendant or the government to appeal irregularities in applying the guidelines.[31]

In applying the sentencing guidelines, the judge identifies the base level offense of the particular crime.[32] If no special features are present, the judge applies the relevant guidelines.[33] This type of case would be typical of what the Sentencing Commission titles a "heartland" case, embodying what the guidelines describe.[34] If special features are present in the case, it is removed from the heartland of typical cases and the judge must determine whether "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not

26. S. REP. NO. 98-473, at 38 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3220, 3221.

27. Bennett, *The Sentencing—Its Relation to Crime and Rehabilitation*, *reprinted in* THE PROBLEM OF SENTENCING 56, 59 (Monrad G. Paulsen rep., 1964) ("That some judges are arbitrary and even sadistic in their sentencing practices is notoriously a matter of record. By reason of senility or a virtually pathological emotional complex some judges summarily impose the maximum on defendants convicted of certain types of crimes or all types of crimes.").

28. *Id.* at 58.

> The personality of the judge is often a potent factor which can outweigh the more factual data available to him in arriving at a sentencing determination. His emotional reaction when some facet of the crime or the defendant's demeanor strikes a sensitive chord in his personality make-up may bring about a wildly inappropriate sentence.

Id. In addition, sentencing decisions were generally unappealable. *See, e.g.*, Gurera v. United States, 40 F.2d 338, 340–41 (8th Cir. 1930) ("If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute.").

29. United States v. Koon, 518 U.S. 81, 92 (1996).

30. 28 U.S.C. § 991(b)(1)(B) (2000).

31. 18 U.S.C. § 3742(a)–(b) (2000).

32. *Koon*, 518 U.S. at 88.

33. United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993).

34. U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A, introductory cmt. (2002).

adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[35] The feature that took the case out of the heartland must then be examined and characterized as either an encouraged,[36] discouraged,[37] or a forbidden[38] departure ground from the relevant guideline. Although departure grounds have been available since the inception of the guidelines, judges may have felt restricted in issuing departures[39] until the reaffirmation by the Supreme Court of such departures in *Koon*.[40]

II. IMPACT OF THE SENTENCING GUIDELINES ON CRIMINALS WHO HAVE ARGUED CULTURE AS A BASIS FOR DOWNWARD DEPARTURES

*A. Pre-*Koon *Cultural Differences Cases*

Prior to *Koon*, federal courts of appeals did not provide a ready answer as to whether district courts were authorized to issue sentencing departures based upon a defendant's culture. While no court of appeals explicitly held that culture was an inappropriate basis for downward departures, those faced with the question either expressed

35. 18 U.S.C. § 3553(b) (1994). In order to determine whether the factor was taken into consideration by the Sentencing Commission, a federal judge is directed to consider statements from the Sentencing Commission, such as the guidelines, policy statements, and any official commentary. If the factor is not discussed in any official statements of the sentencing guidelines, the federal judge should then issue an appropriate sentence, bearing in mind the purposes of sentencing and the guidelines. *Id.*

36. An encouraged factor is one that "the Commission has not been able to take into account fully in formulating the guidelines." U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2002). If the factor is mentioned in the guidelines, the judge should consider whether the factor is "present to a degree substantially in excess of that which ordinarily is involved in the offense," and if so, a departure may be warranted. *Id.*

37. The guidelines provide features that would not normally take a case out of the heartland and warrant a departure. *See, e.g.*, *id.* § 5H1.1 (defendant's age); *id.* § 5H1.2 (defendant's education and vocational skills); *id.* § 5H1.3 (defendant's mental and emotional condition); *id.* § 5H1.4 (defendant's physical condition); *id.* § 5H1.6 (defendant's family and community ties); *id.* §5H1.11 (defendant's military service, public service, or other good works).

38. Factors which may never take a case out of the heartland include considerations such as race, sex, national origin, creed, religion, and socioeconomic status. *Id.* § 5H1.10. The other prohibited factors include: lack of guidance as a youth and similar circumstances, *id.* § 5H1.12; drug or alcohol dependence, *id.* § 5H1.4; economic hardship from personal, trade, or business financial difficulties, *id.* § 5K2.12; and post-sentencing rehabilitative efforts made by the defendant when resentencing the defendant for the same offense, *id.* § 5K2.19.

39. *See* Frank O. Bowman, III, *Places in the Heartland: Departure Jurisprudence After* Koon, 9 FED. SENTENCING REP. 19, 19 (1996).

40. United States v. Koon, 518 U.S. 81, 92 (1996).

conflicting views[41] or negative views[42] on the use of culture as a mitigating factor.

In 1989 and 1990, the Eighth Circuit released two opinions resulting in conflicting views as to whether culture is an appropriate mitigating factor. First, in *Natal-Rivera,* the Eighth Circuit affirmed a district court's decision to disregard the defendant's culture in sentencing.[43] Natal-Rivera argued that the sentencing guidelines were unconstitutional because they foreclosed the opportunity for her to present evidence regarding her cultural background.[44] She advanced the theory that she was unlike the typical defendant convicted of drug conspiracy and distribution, since her Puerto Rican culture dictated that she follow the orders of her husband, her coconspirator in these crimes.[45] The Eighth Circuit affirmed the constitutionality of the sentencing guidelines and addressed the cultural argument by citing cases as far back as 1836 that deemed culture irrelevant in sentencing and the criminal law.[46] The court noted that it was logical to assume that Congress could prevent considerations of culture as a basis for mitigation in sentencing, but did not answer the question of whether it interpreted Congress as doing so.[47]

At odds with the result in *Natal-Rivera* is the Eighth Circuit's decision in *Big Crow*,[48] released only one year later. In *Big Crow*,[49] the Eighth Circuit affirmed a downward departure due to the defendant's

41. *Compare* United States v. Natal-Rivera, 879 F.2d 391 (8th Cir. 1989) (discouraging cultural considerations in sentencing), *with* United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990) (affirming cultural considerations in sentencing).

42. *See* United States v. Yu, 954 F.2d 951, 954–55 (3d Cir. 1992).

43. 879 F.2d at 392–93. Natal-Rivera and the man she cohabitated with and referred to as her husband were indicted by a grand jury for distribution of cocaine and for conspiracy to distribute cocaine. *Id.* Natal-Rivera pled guilty to one count of distribution, which resulted in a sentence of fifty-one months of imprisonment; her paramour was sentenced to 121 months of imprisonment. *Id.*

44. *Id.* at 393.

45. *Id.* at 392.

46. *Id.* at 393 (citing Rex v. Esop, 173 Eng. Rep. 203 (Cent. Crim. Ct. 1836)).

47. *Id.*

48. United States v. Big Crow, 898 F.2d 1326, 1331 (8th Cir. 1990). Interestingly, as opposed to *Natal-Rivera*, which involved a defendant convicted of a victimless crime, *Big Crow* involved a conviction for assault and battery.

49. Big Crow was convicted by a jury for assault with a dangerous weapon and assault resulting in serious bodily injury. *Id.* at 1328. His total offense level was twenty-three, which put his sentence range at forty-six to fifty-four months. *Id.* at 1329. The district court entered a two-point reduction for acceptance of responsibility, reducing the offense level to twenty-one, which warranted a sentencing range of thirty-seven to forty-six months. *Id.* The district court, however, then departed from the guidelines and sentenced Big Crow to twenty-four months and two years of supervised release. *Id.* Both the two-point reduction and departure were appealed by the Government. *Id.*

perseverance in overcoming the difficult conditions he faced growing up on an Native American reservation.[50] The Seventh Circuit has interpreted this case as endorsing culture as a consideration for downward departures.[51] The *Big Crow* court, however, never stated that it was affirming the defendant's departure based upon Big Crow's degree of cultural difference and the court's analysis does not support a cultural difference claim. For instance, a departure based upon cultural difference might evidence that the defendant did not know that her actions were unlawful because of her disparate cultural beliefs. In contrast, Big Crow was given a departure based upon his resilience in the face of adversity,[52] thereby likening the crime to aberrant behavior, in which recidivism was unlikely. While not mentioning culture, the Seventh Circuit may have interpreted *Big Crow* as a cultural difference case because of the Eighth Circuit's seemingly preemptive desire to respond to the argument that race, national origin, and socioeconomic status are prohibited areas under the guidelines.[53] The court declared that the prohibition could not have been intended to be "sweeping" considering that the Senate Judiciary Committee reported that "the requirement of neutrality . . . is not a requirement of blindness."[54]

Bearing in mind these decisions, the Third Circuit, in the majority and dissenting opinions of *Yu*, sharply criticized the use of cultural evidence in sentencing, but also extended one of the most exhaustive arguments as to why culture should be a mitigating factor.[55] *Yu* involved a Korean-American defendant who had spent the first forty-six years of his life in Korea before immigrating to the United States to begin life anew as a factory worker.[56] Four years after coming to the United States, he opened his own successful small business.[57] In 1988 and 1989, Yu's tax return was subject to an audit, during which

50. *Id.* at 1331 (quoting Transcript of Sentencing Hearing at 201–03) ("In this particular case, you never had a criminal record. . . . You have been a hard worker in your job, and not too pleasant of a job. You at least tried in your young life to overcome many of the difficult conditions, which the court knows exists [sic] in Indian country.").

51. United States v. Guzman, 236 F.3d 830, 832 (7th Cir. 2001).

52. *See, e.g.*, *Big Crow*, 898 F.2d at 1331–32 (citing the unemployment rate on the defendant's reservation and then noting that the defendant had been steadily employed for five years).

53. *Id.* at 1332 n.3.

54. *Id.*

55. United States v. Yu, 954 F.2d 951 (3d Cir. 1992).

56. *Id.* at 952–53.

57. *Id.* at 953.

Yu offered the examining agent money on two separate occasions in the amounts of $250 and $5,000.[58]

Yu pled guilty to bribing an IRS examining agent, but argued that the district court judge should have granted him a downward departure in sentencing because his actions were consistent with Korean culture.[59] Yu claimed that he had considered the money to be "honorariums," a practice that he claimed he believed to be not only lawful, but improper if not done.[60] He testified that in Korea, "citizens frequently give underpaid government bureaucrats something under the table; and that failure to give such an 'honorarium' is considered an insult."[61] Yu argued that cultural considerations in sentencing are distinct from arguments based upon the prohibited factor of national origin.[62]

The Third Circuit evaded the question of whether culture was distinct from national origin,[63] in part because Yu was not an entirely sympathetic defendant. At the time of his unlawful conduct, Yu had been engaged in the business of tax preparation in the U.S. for almost ten years.[64] In addition, Yu would not directly answer whether he believed his actions to be unlawful at the time he made them.[65]

From this, the majority could have dismissed Yu's cultural claim as unfounded and unreasonable without admonishing the use of culture in general. Nonetheless, without answering the question of whether culture is an appropriate mitigating factor,[66] the court went on to express its concern over one of the technicalities of cultural

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 959 (Becker, J., dissenting).

62. *Id.* at 953. The Government defended the refusal to depart based on the belief that culture is akin to national origin. In addition to arguing that the two are distinct, Yu also argued that the national origin provision was a "non-binding policy statement," and thus was only discretionary to courts. *Id.* at 953–54. While not answering the first argument, the Third Circuit did reaffirm that the provision's status as a policy statement did not alter its binding character on the courts. *Id.* at 954.

63. *Id.* ("Thus, we prefer to leave for another day the question of whether a foreign culture is subsumed within the term 'national origin,' a factor which the Sentencing Commission, faithful to its congressional mandate, 28 U.S.C. § 994(d), has deemed irrelevant in the determination of a sentence.").

64. *Id.*

65. *Id.* ("This point was not lost on us when we examined the record and thus at oral argument we directly asked whether Yu contended that, at the time of the offenses, he thought his conduct in bribing the agent was consistent with the culture of this country. We did not receive an affirmative response.").

66. *Id.*

considerations in sentencing. The majority voiced concerns over whether culture could be confined to those from foreign shores or whether cultures within American borders should also be considered.[67] The majority also felt that culture was wrapped into the prohibited consideration of national origin.[68] To the majority, these issues were more akin to an exercise in futility, evidenced by its final thoughts on the use of culture in sentencing: "[I]t is doubtful at best that cultural differences are allowable under the guidelines."[69]

Yu is probably most noteworthy, however, for its dissent by Judge Becker, which was the first comprehensive opinion in support of a cultural difference departure ground. He began by stating that there are many conceivable reasons why cultural difference is relevant to sentencing.[70] He noted that cultural difference sheds light upon a defendant's likelihood for reform or recidivism, since one who mistakenly believed her actions were socially and legally acceptable might be less likely to repeat the action in the future. There might also be a lower societal desire for retribution against one that acted in compliance with cultural beliefs because the person might be seen as less blameworthy.[71]

Judge Becker emphasized, however, that the real issue in *Yu* was not whether culture should be relevant in sentencing, because undoubtedly there are situations where it is, but rather the issue was whether culture is legally relevant.[72] Thus, Judge Becker believed that the primary analysis in *Yu* should have centered upon a comprehensive examination of whether national origin is distinct from culture—a topic that the majority chose not to tackle.

In resolving this issue, Judge Becker applied a plain meaning approach towards the sentencing guidelines, which led him to the conclusion that culture and national origin are distinct from each other.[73] For Judge Becker, the term national origin only embodies its plain- meaning, one's nation of birth, which is more limited in definition than culture.[74] To show that culture implicates more than just

67. *Id.* The Third Circuit raised the issue regarding its own institutional competency to address these questions and stated it felt that the answers to the problems they identified were best left to the Congressional Sentencing Commission. *Id.*

68. *Id.*

69. *Id.* at 954 n.2 (citing United States v. Natal-Rivera, 879 F.2d 391 (8th Cir. 1989)).

70. *Id.* at 956 (Becker, J., dissenting).

71. *Id.* (Becker, J., dissenting).

72. *Id.* (Becker, J., dissenting).

73. *Id.* at 958 (Becker, J., dissenting).

74. *Id.* (Becker, J., dissenting).

place of birth, he analogized that "[m]any Chicanos are American-born but have a distinct culture. A foreign-born person may have moved here as a child but have no noticeable cultural differences."[75] This suggests that culture is not dependent upon national origin, but rather turns upon factors broader and more expansive than one's place of birth.

He also addressed issues in the mechanics and application of a cultural difference claim. He acknowledged that not every cultural difference claim would be admissible under the guidelines. For instance, if a defendant offered that her cultural background was based upon being poverty-stricken, the sentencing guidelines already provide that "socioeconomic status may not be considered in sentencing."[76] Therefore, judges must dissect a defendant's claim of cultural difference and determine if the defendant is really asking for a departure based on a prohibited area.[77] If the cultural difference claim is based upon some factor not considered by the Sentencing Commission such as "excusable ignorance of American cultural norms" or based upon the existence of "extraordinary informal punishment in his or her ethnic community,"[78] Judge Becker stated that he saw nothing in the sentencing guidelines that would bar this type of claim.[79]

Despite Judge Becker's detailed analysis of the distinctions between culture and national origin, the Third Circuit left the issue unsettled as to whether culture was a proper basis for downward departures. Thus, district court judges, such as the one in *Yu* who stated that he had not denied the departure based upon discretionary factors, but rather because he believed the departure to be improper,[80] were left with no guidance as to whether the departures were warranted.[81]

75. *Id.* (Becker, J., dissenting).

76. *Id.* (Becker, J., dissenting) (citing U.S. SENTENCING GUIDELINES MANUAL § 5H1.10).

77. *Id.* (Becker, J., dissenting).

78. *Id.* (Becker, J., dissenting). Yu argued that since his name was published in newspapers regarding the offense, he had already suffered a form of societal punishment that exists in Korean culture—loss of face. *Id.* at 953.

79. *Id.* at 959 (Becker, J., dissenting).

80. "[J]ust so that it's clear I'm not exercising any discretion not to use a power that I have, I'm holding that I lack the power." *Id.* at 953.

81. *See also* United States v. Khang, 36 F.3d 77 (9th Cir. 1994). *Khang* involved defendants, born and raised in Laos, who were convicted of smuggling opium into the United States. *Id.* at 78. They claimed that the opium was a medicinal pain reliever used in Hmong culture; they did not know opium was illegal for this purpose in the U.S., and that they planned to give it to their father. *Id.* However, the Ninth Circuit found that it did not need to address the

B. *Reaffirmation of Departure Jurisprudence:* Koon

Part of the reason why the district court judge in *Yu* felt that he did not have the power to issue a departure based upon culture could have been due to the fact that after the adoption of the sentencing guidelines, district court judges may have felt restricted in considering discretionary factors for the purpose of issuing departures.[82] Perhaps to curtail this reaction, in 1996 the Supreme Court reaffirmed the historic power and authority of the district court judge in sentencing.[83]

Koon involved the sentencing of the officers convicted of violating Rodney King's constitutional rights under color of law, pursuant to 18 U.S.C. § 242.[84] After computing various factors, such as use of a dangerous weapon and the victim's bodily injury, into the sentencing calculation, the district court determined that the base offense level was twenty-seven, which carried a prison sentence of seventy to eighty-seven months.[85] From this, the district court proceeded to depart downward eight levels after reviewing factors such as the victim's provocation of the offense, the likelihood that the defendants would be targeted in prison for abuse, and the fact that the court did not deem the defendants violent persons from whom society needed protection.[86] This dropped the sentencing range to thirty to thirty-seven months imprisonment.[87] The court of appeals reviewed this mitigation de novo, resulting in a reversal of the eight level departure.[88]

question of whether culture was distinct from national origin because the defendants did not prove the basic facts underlying their attempt at a cultural difference claim in sentencing. *Id.* at 79. While they claimed they did not know opium was illegal, they smuggled the opium into the U.S. in batteries. *Id.* at 78–79. This case is just another example of the question of cultural difference being presented and remaining unanswered.

82. *See* Bowman, *supra* note 39, at 19.

83. Koon v. United States, 518 U.S. 81, 92 (1996).

84. *Id.* at 88. The case involved the violent beating of a black motorist, Rodney King, by officers of the Los Angeles Police Department. *Id.* at 85–87. The officers were initially tried in state court for assault with a deadly weapon and excessive use of force by an officer. *Id.* at 87. The trial ended in an acquittal on all the counts except one, which resulted in a hung jury. *Id.* at 87–88. The jury verdict incited widespread, devastating riots throughout Los Angeles. *Id.* at 88.

85. *Id.* at 89.

86. *Id.* at 89–90. For the mitigation, the court also looked to the likely job termination the defendants were facing, their probable inability to find similar work, the burden that the state and federal prosecution had already caused, and the fact that a severe punishment was unlikely to further any theory of punishment since the defendants were not likely to repeat their actions. *Id.*

87. *Id.* at 90.

88. *Id.* at 90–91.

The U.S. Supreme Court found that the de novo standard of review applied by the court of appeals was incorrect because it robbed too much of the sentencing discretion properly held by the district court.[89] The Supreme Court reaffirmed the belief that district courts have a particular institutional advantage over appellate courts in sentencing because the trial court is closer to the witnesses, has better control over the facts, and is presented with sentencing determinations on an ordinary basis.[90] In addition, the Court highlighted the departure procedures set forth by the sentencing guidelines, emphasizing that the Sentencing Reform Act acknowledged the wisdom and necessity that sentencing incorporate individual circumstances.[91] Quoting an earlier opinion, the Court restated that, besides the prohibited factors, the sentencing guidelines "place essentially no limit on the number of potential factors that may warrant a departure."[92] With this affirmation of the power of district courts in considering individualized factors in sentencing and issuing departures when warranted, the Supreme Court adopted and applied an abuse of discretion standard for review of sentencing decisions.[93]

C. *Post-*Koon *Cultural Difference Cases*

Even after the Supreme Court's affirmation of departure jurisprudence in *Koon,* no circuit has expressly held that cultural difference is an area distinct from race and national origin and therefore a proper ground for departure. Many of the cultural difference cases that have come up on appeal since *Koon* have been decided on grounds other than culture, or the courts have held that even if a departure based on cultural difference was available, it would not be warranted under the facts of the cases before them.[94] A major concern for the courts seems to be the difficult issues raised by departures based on culture, namely the possibility for overlap into prohibited departure grounds.[95] For example, in *Contreras*, the Tenth

89. *Id.* at 96–100.

90. *Id.* at 98–99.

91. *Id.* at 92.

92. *Id.* at 106 (quoting Burns v. United States, 501 U.S. 129, 136–37 (1991)).

93. *Id.* at 113–14.

94. *See* United States v. Guzman, 236 F.3d 830 (7th Cir. 2001); United States v. Tomono, 143 F.3d 1401 (11th Cir. 1998); United States v. Khang, 36 F.3d 77 (9th Cir. 1994).

95. *Guzman*, 236 F.3d at 832 (expressing the view that culture or ethnicity is not specifically listed in the sentencing guidelines as a prohibition because the drafters probably thought that their prohibitions adequately covered such factors); *Tomono*, 143 F.3d at 1404 n.2 (stating culture and national origin are "uncomfortably close" inquiries).

Circuit noted the closeness between an argument based on culture and an argument based on religion.[96] The defendant was convicted of numerous counts stemming from her involvement in her father's drug conspiracy that should have warranted a range of 235 to 293 months of imprisonment.[97] Instead, the district court departed downward, on grounds other than culture, and sentenced the defendant to 120 months, which the government appealed.[98] Contreras argued, for the first time on appeal, that the departure was warranted since the court should "consider her unusually high susceptibility to her father's influence due to her culture and religion."[99] Contreras argued that obeisance to one's father is an integral part of Mexican-American culture.[100] The Tenth Circuit stated that her argument cut deeper than "cultural norms and principles" and was rooted in religion, "[h]onor your father and your mother," making Contreras's argument a prohibited one under the sentencing guidelines.[101]

Similar to the Third Circuit's opinion in *Yu,* Judge Posner, writing for a Seventh Circuit majority, debated the arguments for and against a cultural difference mitigation ground with dissenting Judge Ripple in *Guzman.*[102] In *Guzman,* the defendant pled guilty to a charge of conspiracy to distribute methamphetamine, which would have resulted in a sentence of fifty-seven to seventy-one months imprisonment. The district court departed twenty-five levels because of her Mexican cultural heritage, resulting in a sentence of three days of time served, six months home detention, and two years of supervised release.[103] The district court granted the departure on the basis that, inter alia, one of the other persons involved in the conspiracy was the defendant's boyfriend, and "Mexican cultural norms dictated submission to her boyfriend's will."[104]

Despite the fact that the district court based the mitigation on a factor other than race or national origin, Judge Posner opined that this type of mitigation would only lead to the unraveling of the

96. United States v. Contreras, 180 F.3d 1204, 1212 n.4 (10th Cir. 1999).

97. *Id.* at 1207 (defendant convicted of "conspiracy, investment of illicit drug profits, and two counts of money laundering").

98. *Id.*

99. *Id.* at 1212 n.4.

100. *Id.*

101. *Id.*

102. United States v. Guzman, 236 F.3d 830 (7th Cir. 2001).

103. *Id.* at 831.

104. *Id.* at 831–32.

sentencing guidelines.[105] To demonstrate this chain of undoing, he first likened culture as synonymous with ethnicity.[106] Then, he noted that national origin and religion are often correlated with ethnicity.[107] Although not indicative of the groups that have historically received preferential treatment, thereby necessitating the need for sentencing reform, Judge Posner then concluded that "[a] judge who wanted to give a break to a black defendant, or a woman, or a Muslim, or a Colombian would have no difficulty pointing to ethnic characteristics that distinguished the defendant from a white male whose ancestors had come to America on the *Mayflower*."[108] This result would controvert the ideals of uniformity and objectivity.[109]

Even though the decision to mitigate would be discretionary and the instances in which defendants have requested departures based upon cultural difference have stemmed predominantly from situations involving victimless crimes,[110] Judge Posner continued his tirade against cultural difference considerations by highlighting what he considered to be a danger of a whole class of crime victims being denied protection of the law due to consideration of culture in sentencing.[111] For instance, Judge Posner worried that a man might beat his wife only to blame the violence on his patriarchal upbringing.[112] Despite these proffered dangers, the Seventh Circuit did not expressly hold that culture could not be a factor in sentencing. Instead, it held that what the district court considered as culture was really just a blend of two forbidden factors, gender and national origin.[113]

Judge Ripple supported his dissenting opinion that culture should be a permissible departure ground by pointing to areas of the legal system that already carved out a distinction between culture and prohibited areas such as race and national origin, by buttressing the validity of such a distinction with academic literature, and by address-

105. *Id.* at 832.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *See, e.g.*, United States v. Contreras, 180 F.3d 1204 (10th Cir. 1999) (involving conspiracy to distribute drugs); United States v. Tomono, 143 F.3d 1401 (11th Cir. 1999) (involving turtle smuggling); United States v. Yu, 954 F.2d 951 (3d Cir. 1992) (involving bribery of a government official).
111. *Guzman*, 236 F.3d at 833.
112. *Id.*
113. *Id.*

ing the parade of horribles presented by the majority with a practical look at when and under what circumstances a judge would utilize culture as a mitigating factor.[114] First, he offered other legal sources to highlight that culture has been described in the law as being comprised of one's behavioral characteristics, rather than one's immutable characteristics, such as race, gender, or national origin.[115] For example, Oregon's definition of cultural heritage is distinguished from race or national origin: "'Cultural heritage' means the language, customary beliefs, social norms, and material traits including, but not limited to the dress, food, music and dance of a racial, religious or social group that is transmitted from one generation to another."[116] In addition, Judge Ripple quoted an anthropologist, Melville Herskovits, to show that academic literature supported this distinction: "Race, nationality, language, and culture are in actuality independent variables. They meet only in the persons of given individuals who belong to a particular race, are citizens of a specific nation, speak a certain language, and live in accordance with the traditions of their society."[117]

Finding culture to be sufficiently distinct from the forbidden factors under the sentencing guidelines, Judge Ripple concluded by addressing the potential dangers highlighted by Judge Posner. Judge Ripple characterized culture as an unmentioned factor that would only justify a departure if present in a case to an extraordinary degree.[118] This need for the presence of culture to be unusually influential coupled with the judge's ability to weed out culture claims based upon impermissible factors, such as immutable characteristics rather than behavioral ones, justifies that the mechanics and application of culture as a mitigating factor would be sound.[119] Similar to Judge Becker's detailed analysis in *Yu*, Judge Ripple's endorsement of cultural difference ended in a stalemate, as the Seventh Circuit left unsettled the issue of whether cultural difference could be used as a basis for departure.[120]

114. *Id.* at 834–39 (Ripple, J., dissenting).

115. *Id.* at 836. (Ripple, J., dissenting).

116. *Id.* at 837 n.3 (Ripple, J., dissenting) (quoting OR. ADMIN. R. 413-070-0010 (1998)).

117. *Id.* at 838 (Ripple, J., dissenting) (quoting MELVILLE J. HERSKOVITS, MAN AND HIS WORKS 149 (1967)).

118. *Id.* (Ripple, J., dissenting).

119. *Id.* at 835. (Ripple, J., dissenting).

120. *Id.* at 833.

D. *Post-*Koon *Cultural Assimilation Cases*

Although no circuit has expressly held that cultural difference is a proper consideration in sentencing, surprisingly the Fifth,[121] Ninth,[122] and Eleventh Circuits[123] have held that a defendant's culture may be considered in sentencing if the culture is consistent with that of U.S. cultural norms. Cultural difference and cultural assimilation arguments have been raised primarily in the context of victimless crimes in which defendants advocate that their cultural beliefs warrant mitigation in sentencing, in part because their cultures makes their illegal actions more understandable. Yet, in comparing the two, a seeming double standard exists as courts allow a defendant's culture to mitigate a sentence if that culture coincides with the American majority, but disallow mitigation if the culture differs from the majority's. Intuitively, American society should hold a person more assimilated to U.S. culture to a higher standard of lawfulness and be less sympathetic when that person breaks the law, while being more sympathetic to a new immigrant. A brief overview of the use of the cultural assimilation claim will illustrate this disparity, which will be further analyzed in Part IV of this Note.

The Ninth Circuit case of *Lipman* is instructive for understanding the use of cultural assimilation.[124] Lipman was deported after losing his permanent resident status due to various felony convictions.[125] He illegally reentered the U.S. and was arrested.[126] He pled guilty to one count of illegal reentry[127] and urged the district court to grant a downward departure from the sentencing guidelines due to his assimilation into U.S. culture.[128] Lipman argued that he was different

121. United States v. Rodriguez-Montelongo, 263 F.3d 429 (2001).

122. United States v. Lipman, 133 F.3d 726 (9th Cir. 1998).

123. United States v. Sanchez-Valencia, 148 F.3d 1273 (11th Cir. 1998).

124. 133 F.2d at 726. *Cf.* United States v. Bautista, 258 F.3d 602, 607 (7th Cir. 2001). Bautista tried to use cultural assimilation as a grounds for mitigation, focusing on the effect of his sentence, not on the act he committed. Bautista noted the amount of time he had spent in the U.S. and the contacts that he had in the U.S., which persuaded the district court judge to grant him a departure because, "the idea of this young man . . . whose only real meaningful contacts are with his family[,] being separated from his family and being sent back to a place where he hasn't been since he was 12 years old . . . is quite unusual." *Id.* at 604–05. The Seventh Circuit rejected Bautista's use of cultural assimilation, in part because it went to the effects of his punishment rather than his culpability. *Id.* at 607.

125. *Lipman*, 133 F.3d at 728.

126. *Id.*

127. *Id.*

128. *Id.* ("At sentencing, Lipman requested a downward departure pursuant to U.S.S.G. § 5K2.0 on the ground of 'cultural assimilation.'").

from the typical person convicted of entering the U.S. illegally because his entry was not motivated by "economic needs"[129]; rather, he was motivated by cultural ties in the U.S.[130] Lipman had lived in the U.S. for twenty-three years, received his education in the U.S., married a U.S. citizen, fathered seven children in the U.S., and claimed he decided to reenter the U.S. to visit his daughter when he heard she had been the victim of sexual assault.[131] The district court refused to grant the departure.[132] Lipman appealed stating that the district court improperly held that it lacked the authority to grant a departure on this basis.[133]

The Ninth Circuit relied on U.S. Sentencing Guidelines Manual § 5K2.0, which states that a judge must consider whether "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission[,]"[134] and on *Koon's* affirmation of departure jurisprudence and held that district courts have the authority to consider a defendant's "cultural assimilation" when granting departures from the sentencing guidelines.[135] The Court suggested proper situations for the use of cultural assimilation in sentencing reentry defendants: when "unusual cultural ties" motivated the illegal reentry rather than economic circumstances and when it appears that the defendant's culpability in committing the illegal reentry should be lessened because he based his act on cultural motives.[136]

The Fifth Circuit and the Eleventh Circuit have followed the Ninth Circuit's lead in allowing departures based upon cultural assimilation. The Fifth Circuit reviewed, inter alia, its long list of unpublished decisions in support of the use of cultural assimilation in

129. *Id.* at 729 (asserting that "the typical reentry defendant lacks cultural or familial ties to the United States, is motivated only by economic needs, and 'come[s] to this country, commit[s] crimes, go[es] to prison, [and then] get[s] deported and return[s] to repeat the cycle several times'").

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 729–31. While Lipman clarified the law for other defendants and set in process an affirmation of "cultural assimilation" as a basis for downward departures among some circuits, he did not receive the benefit of his appeal. The Ninth Circuit held that the district court did not deny Lipman a downward departure because it felt it lacked the authority to consider "cultural assimilation," but rather because Lipman's case was not sufficiently "unusual" or "atypical" from similarly situated defendants, and affirmed the lower court's holding. *Id.* at 731–32.

136. *Id.* at 731.

sentencing and the *Lipman* decision in its determination that cultural assimilation is a proper basis for departure under the sentencing guidelines.[137] The Eleventh Circuit has not expressly held that cultural assimilation is a permissible factor under the sentencing guidelines, but has stated that district courts should know of their ability to depart based upon cultural assimilation because of *Lipman*.[138] Other circuits have decided cases on other issues when confronted with the cultural assimilation question.[139] Thus, the current state of the law appears to stand for a pejorative double standard, allowing the culture of the majority to serve as a mitigating factor for wrongdoing, but not allowing diverse cultural experiences to even be a consideration.

III. THE CULTURAL DEFENSE IN CRIMINAL LAW

Sentencing is not the only area in which commentators have advocated the use of cultural considerations to mitigate or eliminate a charge; there has also been the desire to have an official cultural defense in the criminal law. For purposes of analogy, this section discusses the major arguments in favor of a cultural defense in criminal law, since many of the arguments and applications between the cultural defense theory and the use of cultural difference in sentencing are similar. The cultural defense is an affirmative defense where (1) the defendant did not know that her actions were unlawful because the actions were consistent with or accepted in her culture or (2) the defendant was compelled to commit the illegal act because her culture so dictated.[140] One of the main arguments for the cultural

137. United States v. Rodriguez-Montelongo, 263 F.3d 429, 433 (5th Cir. 2001).

138. United States v. Sanchez-Valencia, 148 F.3d 1273, 1274 (11th Cir. 1998).

139. Without ruling on the accuracy of the respective district courts' rulings, all of the following unpublished court of appeals decisions found that the district court assumed it had the authority to depart based on cultural assimilation, but elected to not do so. Therefore, none of the cases were found to be properly on appeal, all were dismissed, and the question of cultural assimilation was evaded. *See* United States v. Valdez-Trujillo, No. 00-1154, 2001 U.S. App. LEXIS 13767 (6th Cir. June 6, 2001); United States v. Bustos-Castadena, No. 00-4867, 2001 U.S. App. LEXIS 10633 (4th Cir. May 23, 2001); United States v. Campos, No. 00-2291SI, 2001 U.S. App. LEXIS 8839 (8th Cir. May 7, 2001); United States v. Ulloa-Porras, No. 00-8023, 2001 U.S. App. LEXIS 196 (10th Cir. Jan. 8, 2001).

140. Renteln, *supra* note 17, at 439 (limiting the defense to "immigrants, refugees and indigenous people"); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1299–1300 (1986). An exhaustive comparison between the cultural defense and the use of culture only at sentencing is beyond the parameters of this Note. For an extensive comparison between the two, see Damian W. Sikora, Note, *Differing Cultures, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO

defense is that its use would further the goals of individualized justice.[141]

Although our justice system values the ideal that ignorance of the law is no excuse, the cultural defense theory and the application of individualized justice is warranted when one focuses on the words that follow this famous quotation: "Ignorance of the law excuses no man; not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to refute him.'"[142] Thus, even though consideration of a defendant's ignorance was seen as equitable and just, ignorance was not accepted as an excuse because of the apparent inability to distinguish between true and false claims.[143] Cultural defense theory states that a judge and jury might be able to more readily discern true and false claims of ignorance, and that the failure to do so might be a grave inequity.[144] Hence, while it might be fair to impute knowledge of American law to persons raised in this country, by contrast it seems grossly unfair to hold a new immigrant who has not been exposed to American "socializing institutions," such as school and places of worship, to the same standard.[145]

Application of individualized justice through the cultural defense theory has been argued as a furtherance of the goals of punishment, namely retribution.[146] Retribution is centered upon the idea of proportionality—an eye for an eye—the notion that punishment should fit the crime.[147] Cultural defense theory and individualized justice follow this idea by allowing a defendant who acted because of cultural reasons to be seen as less culpable, and therefore deserving of a lesser punishment.[148] The insistence upon examining why a defen-

ST. L.J. 1695 (2001). Sikora urges the use of culture at sentencing, but due to the focus of his article does not engage in a detailed analysis between culture and the proscriptions in the sentencing guidelines. *Id.* at 1718 n.135.

141. *See* Note, *supra* note 140, at 1301 (arguing that a cultural defense theory would further the notion of cultural pluralism and thus help to foster and maintain a culturally diverse society).

142. Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime:* Kargar *and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829, 851 (1999) (quoting JOHN SELDEN, TABLE TALK 65 (1689) (changing original to use modern spelling)) (emphasis removed). For more discussion of cultural considerations at sentencing furthering the idea of individualized justice, see Gomez, *supra* note 17, at 357–61; Sikora, *supra* note 140, at 1722.

143. *Id.*

144. *See* Note, *supra* note 140, at 1299.

145. *Id.*

146. Renteln, *supra* note 17, at 442.

147. *Id.*

148. *Id.*

dant acted as she did is an important part of individualized justice. Although one who steals for personal gain and one who steals to feed her children are both thieves, "the latter is in some sense less guilty morally."[149] Whether one killed in self-defense or whether one killed without provocation can make the difference between a refusal to prosecute and a life sentence.[150] Thus, "[i]f the legal system is to understand what motivates the actions of another, it must understand that person's culture" and account for it when judging the person.[151]

Proponents have argued that there is a particular need for an official cultural defense because the defense does not fit neatly into any of the existing defenses or grounds for mitigation.[152] For example, the insanity defense requires that some sort of mental disorder be present, which the defendant seeking to use a cultural defense likely does not have, and even if the judge believed some sort of strained insanity defense, the result would be a judicial determination of lunacy, which is not only an affront to the defendant but also an affront to the defendant's culture.[153] In addition, lack of mens rea is troublesome because the defendant probably did intend the action; however, her culture dictated that the action was not blameworthy.[154] There is also concern about leaving the defendant's fate in the hands of prosecutors who have the discretion to charge and judges who have the discretion to sentence when the legal system can be argued to "have traditionally been biased against the very groups that the defense is intended to benefit."[155]

Application of the cultural defense requires the judge to consider a wide array of factors, including, inter alia, the defendant's probabil-

149. *Id.* at 443 ("[M]motive is critical in establishing blameworthiness.").

150. *Id.* at 444.

151. *Id.* at 445; *see also* Glueck, *supra* note 24, at 62:

> The theory is that although, for instance, a burglary is always a burglary, not all burglars are alike in the motivations of their crime, in their mental and emotional makeup, social background, probability of recidivism and other circumstances which are certainly every bit as relevant to the aim of protecting society as is the crime itself, if not more so. Such factors, to some extent, make each crime a unique event and each criminal a unique individual.

152. Renteln, *supra* note 17, at 445–87 (examining the viability of culture as a defense under numerous existing defenses, such as necessity, duress, insanity and provocation); Note, *supra* note 140, at 1293–96.

153. Note, *supra* note 140, at 1296–97.

154. *Id.* For an exhaustive examination of the problems inherent in forcing the cultural defense into pre-existing defenses, see Renteln, *supra* note 17, at 445–87.

155. Note, *supra* note 140, at 1297–98 ("The combination of covertness and unfettered discretion is a particularly troubling method for dealing with cultural factors because this combination has historically presented an opportunity for officials to exercise prejudice against cultural minorities.").

ity of recidivism, the gravity of the crime, whether the victim, if any, was a member of the defendant's cultural group, and the degree to which the defendant has been assimilated into American culture.[156] All of the above factors should be discretionary. For instance, there should not be a set time period in which assimilation is deemed to occur, since the process will largely be fact-specific.[157] Professor Renteln argues that the cultural defense should serve as a partial excuse: if the defendant did commit a crime, it would be unjust to let the defendant go free, but if the defendant committed the crime because in her culture the act was not blameworthy or because her culture compelled her behavior, it would be unjust to charge and treat her the same as a defendant who reasonably should have known the consequences of her actions.[158] Thus, the partial defense fulfills the idea of retribution, a punishment proportional to one's moral culpability.[159]

A few of the concerns raised regarding the implementation and rationale of an official culture theory center on the scope of cultural defense and its implications for society. A particular concern in the cultural defense theory is how to prevent a surplus of defendants from asserting attenuated cultural defense claims, which, if unchecked, might leave the legal system with the task of weeding through a myriad of invalid claims.[160] There is also the concern that the defenses may be proffered based upon a defendant's membership in some assorted subculture which society might not view as a desirable grounds for mitigation, such as membership in gang culture or aristocrats claiming a "'Great Gatsby' defense when they drive while intoxicated."[161] Professor Renteln concedes that there may be no real way to weed out such claims other than by the judge and jury refusing to give them credibility.[162] Another concern focuses on whether the victim will receive full protection under the law where a cultural defense might drastically reduce or eliminate a defendant's charge, particularly if the victim is from a historically disadvantaged group

156. *Id.* at 1308–10.

157. Renteln, *supra* note 17, at 496 ("There is no evidence indicating that cultural adaptation and assimilation occur within any finite time period.").

158. *Id.* at 490–91.

159. *Id.*

160. *Id.* at 497; *see also* Note, *supra* note 140, at 1308 ("Judicial rejection of a cultural defense may rest on the concern that once the defense is introduced, it will be impossible to define its proper scope.").

161. Renteln, *supra* note 17, at 497.

162. *Id.* at 498.

such as minorities, women, and children.[163] These aforementioned concerns might be probative of why an official cultural defense has not been adopted.

IV. CULTURAL DIFFERENCE AS A PROPER BASIS FOR DOWNWARD DEPARTURES IN SENTENCING

This section first analyzes culture and depicts why cultural difference should be viewed as distinct from prohibited areas under the sentencing guidelines. Next, the section turns to the application of cultural difference as a mitigating factor and argues that many of the problems identified in applying a cultural defense are drastically reduced when culture is used, instead, in the sentencing stage. Attention is then given to policy considerations. Culture in sentencing will be detailed as consistent with our nation's ideals of pluralism and multiculturalism, and the grave discrepancy of allowing a cultural assimilation claim as opposed to a cultural difference claim will be addressed. In addition, it will be evident why the use of culture difference remains consistent with the goals of sentencing and individualized justice. All of this leads to the conclusion that cultural difference should be a recognized departure ground for sentencing.

An examination of what facets of society are embodied by culture leads to the conclusion that culture is an expansive term, one that is much broader and more encompassing than prohibited considerations such as race and national origin. Culture has been used to encapsulate numerous aspects of life such as language, societal norms, politics, food, dress, customary beliefs, child-rearing traits, shared way of life, and characteristics passed from one generation to the next.[164]

163. United States v. Guzman, 236 F.3d 830, 833 (7th Cir. 2001); Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1103–12 (1994) (providing a comprehensive overview of the arguments against the use of a cultural defense).

164. *See* OR. ADMIN. R. 413-070-0010 (1998) (defining culture as "the language, customary beliefs, social norms, and material traits including, but not limited to the dress, food, music and dance of a racial, religious or social group that are transmitted from one generation to another"); Larry L. Naylor, *Culture and Cultural Groupings*, *in* CULTURAL DIVERSITY IN THE UNITED STATES 3, 7 (Larry L. Naylor ed., 1997) (describing culture as the "beliefs, behaviors, customs, or a total way of life" shared by those living in the same geographical boundaries); Alison Dundes Renteln, *Clash of Civilizations? Cultural Differences in the Development and Interpretation of International Law*, 92 AM. SOC'Y INT'L L. PROC. 232, 233 (1998) (describing culture as including "such things as language, religion, politics, child-rearing practices and attire").

Culture is distinct from prohibited areas such as race and national origin because it is not dependent upon where a particular person was born or a person's lineage, but rather upon a myriad of learned and acquired factors, stemming from, for example, the type of socializing institutions the person was exposed to during that person's formative years. If culture were solely dependent on national origin, it would lead to the absurd result that one who was born and raised in France should absolutely share the same cultural beliefs and practices as one who was born in France but raised in America. If culture were solely dependent on race or ethnicity, it would mean that regardless of what type of community or values one was raised in, a person of Chinese descent who is a Chinese national should absolutely share the same cultural beliefs and practices as a third or fourth generation Chinese-American—simply because the two are both of Chinese lineage. Thus, as opposed to immutable characteristics that people cannot change, such as race or national origin, people learn and acquire their culture from their society of upbringing in a process termed "enculturation."[165] While the process of enculturation is often subtle, it can lead to great divergences in the practices, beliefs, and traditions among different groups of people.[166] Practices that are considered a societal norm in one group of people may be a societal taboo or even a legal wrong in another.

Culture should also be viewed as distinct from prohibited areas of the sentencing guidelines upon an examination of *why* certain factors are prohibited from consideration in sentencing. While the legislative history surrounding this issue is scant at best, it is apparent that the legislative committee wanted to make absolutely clear that it would not be appropriate for preferential treatment to be given to defendants of a particular race or religion.[167] This is similar to Judge Posner's concern voiced in *Guzman*.[168] Allowing cultural difference as a mitigating factor, however, would not likely run afoul of these concerns. For example, a judge is not permitted to issue a departure simply because a defendant is Mexican-American. That is prohibited

165. Renteln, *supra* note 164, at 233.

166. *See id.* at 232 (describing jokingly how different persons would set out to write a book on "The Elephant": "The Englishman gives his paper on 'Elephant Hunting in India.' The Russian presents 'The Elephant and the Five-Year Plan.' The Italian offers 'The Elephant and the Renaissance.' The Frenchman delivers 'Les Amours des Elephants' or 'the Elephant in the Kitchen.' The German gives 'The Military Use of the Elephant.' Finally, the American rises to give his paper on 'How to Build a Bigger and Better Elephant.'").

167. S. REP. NO. 98-473, at 38 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3220, 3221.

168. United States v. Guzman, 236 F.3d 830, 832 (7th Cir. 2001).

by the sentencing guidelines. Nonetheless, a judge should be allowed to consider, for instance, the defendant's cultural beliefs due to being raised in a Mexican-American community. A judge would consider whether the norms in that society tended to negate the defendant's understanding that what he or she did was wrong. If this is the case, the judge might then issue a departure from the sentencing guidelines. The next five defendants before the judge might be Mexican-American, and all five might not warrant departures because their actions were clearly unacceptable in their culture of upbringing and in the majority culture. Thus, the first defendant received a mitigation, not for being Mexican-American, but because the defendant's learned and acquired beliefs lessened his or her level of blameworthiness.

In addition, there are procedural safeguards that would prohibit judges from disguising preferences for one group or another behind a sentencing mitigation falsely based on cultural difference. When issuing a departure, a judge must clearly state why he or she is departing,[169] and that departure is subject to appellate review.[170] Thus, a departure that is not supported by anything other than favoritism to a group of people would most certainly be overturned, even under an abuse of discretion standard. Therefore, cultural difference as a mitigating factor is distinct from race and national origin, because the reasons for prohibiting race and national origin would not manifest in a cultural difference claim.

The cultural difference factor would be more straightforward and easily applied at the sentencing stage than at the trial stage. Namely, at the sentencing stage the scope of the cultural claim could be more easily limited. In evaluating whether culture should be a proper basis for downward departures, a defendant's culture should be considered if the culture in question pertains to "national culture"[171] or the culture of a "bona fide ethnic group."[172] This would have the effect of barring use of culture as a mitigating factor to one who grew up in a drug culture and allowing culture to be considered for one who grew up on a Native American reservation. Confining a cultural definition to that of nationalities and ethnic groups and not to that of countercultures and subcultures has been a task with which scholars advocat-

169. 18 U.S.C. § 3553(c) (1994).
170. 18 U.S.C. §3742(a)–(b) (1994).
171. *See* Renteln, *supra* note 164, at 233.
172. Renteln, *supra* note 17, at 497.

ing for some type of cultural defense in criminal law have long grappled.[173] Under the sentencing guidelines, however, limiting culture to that of ethnic minorities is markedly simpler, because of what can and cannot be considered under the sentencing guidelines. For example, as Judge Becker noted in his dissent in *Yu*, a defendant cannot successfully plead for a downward departure based on being raised in an impoverished culture because U.S. Sentencing Guideline Manual § 5H1.10 specifically forbids consideration of socioeconomic status in sentencing.[174] Similarly, a defendant could not claim that she deserves a downward departure based on growing up in the culture of a broken home since U.S. Sentencing Guideline Manual § 5H1.12 proscribes consideration of one's lack of guidance as a youth.[175]

While the sentencing guidelines would not limit every type of counterculture and subculture from asserting cultural difference as a means for downward departures, the sentencing guidelines are an effective bar to many of them, much more so than a bare cultural defense claim would be. As recognized by the advocates of the cultural defense theory, it would be impossible to bar every subculture from asserting culture as a basis for downward departure; however, this does not necessitate that culture should not be a permissible basis because courts still retain discretion in deciding whether or not to grant departures.[176] The discretion of the courts, plus the added limitations imposed by the sentencing guidelines, eliminates much of the struggle in reserving the cultural assertion for bona fide ethnic minorities or those belonging to a national culture.[177]

Cultural difference should be a permissible factor for sentencing because it is consistent with policy ideals of pluralism and multiculturalism. There is an especially great need for cultural difference to be recognized as a permissible factor considering that circuits are allowing cultural assimilation to be a factor in sentencing. If left as is,

173. *E.g.*, *id.* (Professor Renteln reasons that definitions of subcultures pertain more to class distinctions rather than cultural distinctions and that the worldviews of those in subcultures is not radically different from that of those in the dominant culture. However, Professor Renteln concedes that it may not be possible to thwart the use of the cultural defense by members of subcultures.).

174. United States v. Yu, 954 F.2d 951, 958 (3d Cir. 1992) (Becker, J., dissenting).

175. *See also id.* (Becker, J., dissenting) ("[I]f a 'cultural differences' claim is a surrogate for an alcohol-related excuse, it must fail because USSG § 5H1.4 specifically refuses to allow abuse of alcohol to reduce culpability.").

176. Renteln, *supra* note 17, at 497.

177. As Judge Becker noted in *Yu* regarding the floodgates concern: "In sum, the parade of horribles is not only irrelevant to our inquiry, but would not happen in any event." 954 F.2d at 957 (Becker, J., dissenting).

the message conveyed contravenes important policy ideals.[178] The message conveyed by promoting cultural assimilation and refusing to validate cultural difference is the notion that the legal system will consider the defendant as an individual only if the defendant's cultural identity is that of an American, stripped of any practices or behaviors from his or her native land. This notion defies our nation's ideals of pluralism and multiculturalism.

In addition, the allowance of cultural assimilation and not cultural difference thwarts basic ideas of fairness in sentencing. While the Ninth Circuit argued that a defendant who illegally reentered the United States for cultural reasons was more sympathetic than one who illegally reentered for economic gain,[179] similar reasoning would dictate that a defendant who has become fully assimilated in U.S. culture is less sympathetic than a defendant who is a recent immigrant and, based upon her native culture, believed that her actions were acceptable. Certainly, the latter defendant would seem to be less blameworthy, for she acted in compliance with her upbringing and in ignorance of any legal wrong. The former person committed her actions knowing full well the wrongfulness of them. And yet, while the sympathetic reentry defendant is given more lenient sentencing considerations, no circuit has specifically approved the use of cultural difference as a mitigating factor for the recent immigrant defendant.

The use of cultural difference is also consistent with the major goal in sentencing, namely retribution, or the demand for proportionality between the action and the punishment.[180] One of the concerns of using culture as an affirmative defense and in sentencing is that the victim is denied full protection under the law, and thus, the victim and society are robbed of the satisfaction of "just deserts."[181] However, retribution is not a problem in downward departures based upon cultural difference. First, almost all the cases in which federal courts of appeals have reviewed cultural difference sentencing claims

178. Courts have not considered cultural assimilation as running afoul of the forbidden factors of race or national origin. For instance, a cultural assimilation defendant is not being given a departure based upon the norms of *his* or *her* country of origin or race, but rather because of the degree of his or her enculturation to U.S. culture. This is, however, a distinction without a difference. In one situation, the courts are allowing the consideration of a defendant's life beliefs or culture and saying that it is proper, and in the other situation, the courts are discouraging the consideration of a defendant's life beliefs or culture as being prohibited under the guidelines.

179. United States v. Lipman, 133 F.3d 726, 731 (9th Cir. 1998).

180. *See* United States *ex rel.* D'Agostino v. Keohane, 877 F.2d 1167, 1170 (3d Cir. 1989).

181. United States v. Guzman, 236 F.3d 830, 833 (7th Cir. 2001).

involved victimless crimes. For instance, *Yu* involved bribery of a government official,[182] *Contreras* entailed conspiracy to distribute drugs,[183] and Tomono was convicted of importing illegal turtles.[184] These are not crimes in which there is a readily apparent, sympathetic victim demanding the legal system take an eye for an eye. This is not to say that such a situation would never arise; however, even if it did, a judge could still exercise discretion and not grant a downward departure in a violent or heinous crime or in a crime with a sympathetic victim. Nonetheless, as the need for a cultural mitigating factor seems to arise most often in victimless crimes, the desire for retribution is lessened, and therefore a lessened sentence would be appropriate if the defendant has shown that her culture makes her unlike the typical defendant convicted of this crime.

Moreover, even if there is a marked societal desire for retribution, the cultural evidence is not being admitted to negate the defendant's liability. Unlike the cultural defense, cultural difference cases arise at sentencing, when the defendant's guilt has already been established. Thus, the desire for retribution should be satiated to some extent in the knowledge that the defendant has already had some "just deserts"—being branded a criminal.

Uniformity in sentencing would also not be disturbed by a cultural consideration claim. The predetermined sentencing punishment terms would not be upset by a vast amount of departures. The issue has only been raised at the appellate level a handful of times. In addition, the sentencing guidelines warrant that a departure is appropriate for an unmentioned factor, only if that factor, in this case cultural difference, is influential to the defendant to an extraordinary degree. Thus, for the majority of cases, the predetermined proportionality between the action and the guidelines punishment would be maintained.

In cases where a departure is warranted because culture was present to an extraordinary degree, a different sort of proportionality would take precedence, that of individualized justice[185]—the belief

182. *Yu*, 954 F.2d at 951.

183. United States v. Contreras, 180 F.3d 1204 (10th Cir. 1999).

184. United States v. Tomono, 143 F.3d 1401 (11th Cir. 1998).

185. Glueck, *supra* note 24, at 63:

> [T]o 'individualize' the sentence in the case of any specific offender means, first, to differentiate him from other offenders in personality, character, sociocultural background, the motivations of his crime and his particular potentialities for reform or recidivism and, secondly, to determine which, among a range of punitive, corrective psychiatric and social measures, is best adapted to solve the individualized set of prob-

that it would be grossly unfair to punish a defendant who committed an action believing the action to be acceptable because of his or her cultural norms the same as a defendant who grew up in America and should have known the illegality of his or her actions. It is the notion that punishments should fit the particular defendant, not the particular crime.[186] The Supreme Court stated in *Koon* that this type of individualized sentencing was not thwarted by the adoption of the sentencing guidelines.[187]

The goal of the sentencing guidelines is, of course, to reduce unjustified disparities and so reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the sentencing guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. It must be remembered, however, that it has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a "unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[188]

This call for individualized sentencing advances the judicial system's goal of pluralism and respect for diversity by taking into consideration practices and behaviors outside that of the dominant group. Courts can achieve individualized sentencing by recognizing the defendant as an individual and taking account of his or her cultural beliefs that may have motivated his or her actions. Considering all of the aforementioned reasons, the legality and need for a departure ground based on cultural difference is apparent.

CONCLUSION

The sentencing decision can be seen as "the symbolic keystone of the criminal justice system" as it implicates the "goals of equal justice under the law[,]" "individualized justice with punishment tailored to the offender[,]" and "society's moral principles and highest values—

lems presented by that offender in such a way as materially to reduce the probability of his committing crimes in the future.

186. United States v. Lara, 905 F.2d 599, 604 (2d Cir. 1990) (finding no merit to the argument that courts are limited in their sentencing considerations to the characteristics of defendants that are directly related to the crimes).

187. Koon v. United States, 518 U.S. 81, 92 (1996).

188. *Id.* at 113.

life and liberty[.]"[189] To the criminal defendant who is found guilty for following his or her cultural norms, equal justice, individualized justice, life, and liberty equate to and demand consideration of the extent that his or her cultural upbringing affected his or her actions. In this amalgam of values inherent in criminal law and in sentencing, the legal system should recognize that culture is embodied in each of them, and specifically allow departures in sentencing based upon cultural difference.

189. 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 1 (Alfred Blumstein et al. eds., 1983).