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ALL MEN ARE (OR SHOULD BE) CREATED EQUAL: AN ARGUMENT AGAINST THE USE OF THE CULTURAL DEFENSE IN A POST-BOOKER WORLD

Elizabeth Martin*

INTRODUCTION

“[N]o question exists that the *Booker-Fanfan* decision will have a monumental impact on the sentencing process.”¹ After nearly two decades under the highly-systematic Federal Sentencing Guidelines, the federal criminal justice system was turned upside down in 2005 by the Supreme Court’s holdings in the combined decision of *United States v. Booker* and *United States v. Fanfan*.² This decision rendered the previously mandatory Guidelines merely “advisory” and opened the floodgates for judicial discretion in sentencing.³ Although academics generally applaud the decision,⁴ the post-*Booker* system allows judges to consider factors relevant to the individual defendant which are not specifically allowed for in the Guidelines. One such factor is the culture of the defendant.

This Note will argue that a defendant’s cultural background should never be taken into account in determining federal sentences, particularly in light of the recent *Booker* decision. Part I.A will discuss the cultural defense, its uses in sentencing, and the policy arguments against its use. Part I.B highlights a sample of cases where the cultural defense was successfully raised. Part II.A looks at the history and the application of the Federal Sentencing Guidelines. Part II.B explains the circuit split over

* J.D., William & Mary Law School, 2007. This Note is dedicated to Professor James Eisenstein of Penn State—my college mentor, teacher, and friend. I would also like to thank my fiancé Ryan and my family for their love and support.

¹ Robert J. Anello & Jodi Misher Peikin, *Evolving Roles in Federal Sentencing: The Post-Booker/Fanfan World*, 2005 FED. CTS. L. REV. 9, 32, available at <http://www.fclr.org/articles/2005fedctsrev9.pdf>.

² *United States v. Booker*, 543 U.S. 220 (2005) (holding the Guidelines unconstitutional as written). This Note will refer to the combined *Booker/Fanfan* decisions as the “*Booker*” decision.

³ *Id.* at 245–46.

⁴ See, e.g., Anello & Peikin, *supra* note 1, at 56–57 (“In many ways, the post-*Booker/Fanfan* world of sentencing is the best of both worlds—a more perfect system. While sentencing courts have regained some of the discretion lost to the Guidelines, this discretion is not unfettered or without checks.”). But see Craig Green, *Booker and Fanfan: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L.J. 395, 425 (2005) (arguing “that the flaw in *Booker* and *Fanfan* is not just that those decisions disrupted critical activities of a coordinate branch (though they certainly did); the problem is that the Court undertook such disruption without articulating any coherent, principled explanation”).

the acceptance of the cultural defense by examining the six federal appeals cases that rule on the application of the cultural defense to federal sentences. Part II.C discusses the *Booker* decision and the judicial and academic reactions to the ruling. Part II.D briefly looks at the lone federal appeals case ruling on the cultural defense in sentencing since *Booker*.⁵ The Conclusion explains why the cultural defense should not be allowed in federal sentencing, particularly in the post-*Booker* world, and examines the potential impact on the cultural defense of the four proposals recently put before the Sentencing Commission to reform the federal sentencing structure. Finally, it is recommended that Congress take action through the Sentencing Commission to explicitly forbid the use of the cultural defense, regardless of which of the new sentencing regimes is implemented.

I. CULTURAL DEFENSE

A. Introduction

1. Cultural Defense Defined

When members of ethnic or indigenous groups are charged with breaking the law, on occasion they will ask the court to consider their cultural background in judging their conduct.⁶ In general, however, courts do not consider the “culture” of a defendant, and instead make an effort “to apply an equal standard of justice to all people.”⁷ There are scholars and judges who disagree with this approach and argue that cultural backgrounds should be considered in the criminal justice system.⁸

The term “cultural defense” broadly refers to judges considering “the cultural background of litigants in the disposition of cases before them.”⁹ Though it can be

⁵ See *United States v. Ruiz-Alonso*, 397 F.3d 815 (9th Cir. 2005).

⁶ ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 5 (2004).

⁷ Kelly Diffily, Comment, *PROTECTing the Federal Sentencing Guidelines: A Look at Congress' Prohibition of Cultural Differences in Federal Sentencing Determinations in The Wake of The 2003 PROTECT Act*, 78 TEMP. L. REV. 255, 258 (2005) (citing Kay L. Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 LAW & SOC. INQUIRY 39, 40 (2003)).

⁸ See, e.g., *United States v. Guzman*, 236 F.3d 830, 834–39 (7th Cir. 2001) (Ripple, J., dissenting in part); *United States v. Yu*, 954 F.2d 951, 955–60 (3rd Cir. 1992) (Becker, J., dissenting), *cert. denied*, 506 U.S. 1048 (1993); RENTELN, *supra* note 6, at 6 (advocating the use of the cultural defense because “justice requires looking at the context of individuals’ actions”); Kelly M. Neff, Note, *Removing the Blinders in Federal Sentencing: Cultural Difference as a Proper Departure Ground*, 78 CHI.-KENT L. REV. 445, 468 (2003) (arguing for cultural difference as a legitimate ground for departure under the Federal Sentencing Guidelines).

⁹ RENTELN, *supra* note 6, at 5. For an interesting argument concerning the teaching of the cultural defense in the criminal law classroom, see Susan S. Kuo, *Culture Clash: Teaching Cultural Defenses in the Criminal Law Classroom*, 48 ST. LOUIS U. L.J. 1297, 1299 (2004) (“To provide some perspective on this apparent perspectivelessness, I incorporate the issue

used in civil cases,¹⁰ the cultural defense is usually raised in criminal cases.¹¹ While most frequently used in homicide cases, the defense is also raised in criminal prosecutions for crimes such as “animal cruelty, arson, bribery, hunting out of season, narcotics offenses, [and] sexual assault.”¹² The cultural defense is raised at all stages of the legal process, such as arrest, prosecution, plea bargaining, defense, and sentencing.¹³ This Note focuses specifically on the use of the cultural defense in the sentencing phase of criminal prosecutions.

2. Cultural Issues in Sentencing

Arguments in favor of the use of cultural defenses consider the moral culpability of the defendant’s actions and the effect that the defendant’s background has upon his actions.¹⁴ Based upon these rationales, defense counsel typically raise the cultural defense in five broad areas of sentencing: “criminal behavior accepted or expected in the defendant’s culture,” “stronger cultural motive for the crime,” “additional punishment from the defendant’s community,” “immigration consequences,” and the “defendant’s unusual behavior at sentencing.”¹⁵ These types of arguments are raised both as a stand-alone defense in an attempt to gain an acquittal and as a mitigating factor in sentencing.¹⁶

Much of the discussion of the “criminal behavior accepted or expected in the defendant’s culture” surrounds the notions of honor and shame in traditional Asian culture and the effect that these notions have upon the defendant’s motives.¹⁷ Similarly,

of the cultural defense in my Criminal Law course. . . . My hope is that, by addressing this matter, my students will learn to recognize the cultural assumptions imbedded in the cases they are reading and gain a deeper understanding of the law.”).

¹⁰ For a discussion of the use of the cultural defense in civil cases, see RENTELN, *supra* note 6, at 201–10.

¹¹ *Id.* at 6–7.

¹² *Id.* at 6.

¹³ *Id.* at 7.

¹⁴ Marcia G. Shein, *Cultural Issues in Sentencing*, in CULTURAL ISSUES IN CRIMINAL DEFENSE § 12.1(a) (James G. Connell III & Rene L. Valladares eds., 2003).

¹⁵ *Id.* § 12.1(b)–(f).

¹⁶ For arguments concerning the allowance of a defendant’s cultural circumstances as a mitigating factor in sentencing, see Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317, 1374 (2006) (arguing for the shift in the orientation of thinking of the cultural defense from an excuse to a mitigating factor in sentencing); Damian W. Sikora, Note, *Differing Cultures, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695 (2001) (concluding that it is against the interests of fairness and equity to enact a stand-alone cultural defense proposing instead that a defendant’s cultural circumstances should be allowed to serve as a mitigating factor in sentencing).

¹⁷ See Shein, *supra* note 14, § 12.1(b) (discussing *People v. Chen*, No. 87-7774 (N.Y. Sup. Ct. Mar. 21, 1989), and noting the court ordered probation after finding that “the defendant’s [Chinese] cultural premium on honor led him to kill his wife”); see also *People v. Aphaylath*,

defense attorneys have argued for the use of the cultural defense because of the effect that cultural backgrounds have on their clients' motives for crime.¹⁸ A third argument raised by defense counsel is that courts should give certain defendants lesser sentences because the defendants' cultures have traditional methods to administer punishment in addition to those imposed by the courts.¹⁹ Criminal defense attorneys also argue for reduced sentences when there are immigration consequences for criminal defendants facing deportation.²⁰ Finally, arguments have been made to consider the defendant's cultural background because of his "unusual behavior at sentencing," such as not showing remorse for committing the crime.²¹

3. Policy Arguments Against the Cultural Defense

There are a number of public policy reasons against the use of the cultural defense in federal sentencing. First, although evidence of the individual defendant's cultural background may lessen his sentence, the evidence may ultimately have an adverse effect on the cultural community.²² This type of treatment tends to perpetuate

502 N.E.2d 998, 999–1000 (N.Y. 1986) (finding error where a trial court refused to consider that a Laotian refugee's murder of his wife was the result of extreme emotional disturbance because under Laotian culture his wife's affections towards another man would have triggered sufficient shame to murder).

¹⁸ See Shein, *supra* note 14, § 12.1(c) (citing *People v. Kimura*, No. A-091133 (Cal. Super. Ct. L.A. County, Nov. 21, 1985) (reducing the defendant's charge to voluntary manslaughter after the defense presented evidence that the defendant, a Japanese immigrant who killed her two children by drowning them in an attempted parent-child suicide, did so to avoid what would have been an unacceptable social situation in Japan)). For further discussion of the *Kimura* case, see Alison Matsumoto, Comment, *A Place for Consideration of Culture in the American Criminal Justice System: Japanese Law and the Kimura Case*, 4 J. INT'L L. & PRAC. 507 (1995).

¹⁹ Shein, *supra* note 14, § 12.1(d); see also *United States v. Fulton*, 987 F.2d 631, 632 (9th Cir. 1993) (considering whether a S'Klallam Indian should receive a lesser sentence because his tribe needed to "enforce its culturally based sexual abuse program").

²⁰ Shein, *supra* note 14, § 12.1(e); see also *United States v. Ortega-Mendoza*, 981 F. Supp. 694, 696 (D.D.C. 1997) (granting the defendant a downward departure because his status as a deportable alien disqualified him from early release programs and from being assigned to a minimum security prison).

²¹ Shein, *supra* note 14, § 12.1(f); see also *People v. Superior Court ex rel. Soun Ja Du*, 7 Cal. Rptr. 2d 177, 181 (Ct. App. 1992) (discussing the trial court's grant of a probationary sentence after defendant was convicted of voluntary manslaughter because the defendant's failure to show remorse likely resulted from cultural and language barriers). For further discussion of the role of language and cultural barriers in criminal proceedings, see Richard W. Cole & Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. NEW ENG. L. REV. 193, 226–28 (1997).

²² Diffily, *supra* note 7, at 283.

stereotypes that foreign-born Americans are not held to the same legal standard as "Americans" and unfairly groups people of a particular culture together.²³

Second, the consideration of sentencing factors indirectly asks judges to accept a defendant's violent actions because the violence was acceptable within his cultural community.²⁴ This is particularly true in domestic abuse cases, in which the female victim will likely suffer more as a result of the man's lessened sentence.²⁵ The use of the cultural defense in these cases perpetuates the feeling that these victims have little recourse in American courts and leads to further victimization.²⁶ Furthermore, by reducing sentences based on cultural backgrounds, the courts are lessening the importance of the very freedoms that many immigrant victims, particularly women, come to this country to enjoy.

Conversely, a similar argument can be raised in cases in which female defendants are the ones being sentenced,²⁷ as in *United States v. Natal-Rivera*,²⁸ *United States v. Contreras*,²⁹ and *United States v. Guzman*.³⁰ If these defendants are able to successfully argue for a downward departure based on arguments of a patriarchal culture, a man from that culture could similarly argue that his culture allows for domestic abuse.³¹

"Finally, and perhaps most importantly," determining what is and is not the result of the defendant's culture "is a difficult, if not impossible, task."³² Cultural beliefs may not be uniform throughout a society, and they may differ from those within a cultural community in the United States and abroad.³³ In any case, if the cultural defense is accepted for foreign-born Americans, similar arguments could be raised for

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* For an argument that gender-related issues are legitimate sentencing factors, see Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691 (2006).

²⁶ Raeder, *supra* note 25.

²⁷ Diffily, *supra* note 7, at 284. For further discussion of the implications of the cultural defense on sexual discrimination, see Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154, 221 (2003) ("Keeping in mind that it was not so long ago that religion and culture played a major role in justifying racial, ethnic, and religious oppression that has now become unacceptable, it is high time that liberals start to question what has now become the inseparable link between respecting religious and cultural practices and countenancing the oppression of women.").

²⁸ 879 F.2d 391 (8th Cir. 1989) (discussed *infra* Part II.B.1).

²⁹ 180 F.3d 1204 (10th Cir. 1999), *cert. denied*, 528 U.S. 904 (1999) (discussed *infra* Part II.B.2).

³⁰ 236 F.3d 830 (7th Cir. 2001) (discussed *infra* Part II.B.4).

³¹ Diffily, *supra* note 7, at 284.

³² *Id.*

³³ *Id.*

accepting that a defendant's neighborhood, family, or gang membership has an effect on his criminal action and is reason for a downward departure.³⁴

Arguments in favor of the cultural defense also raise questions of practicality and application: When exactly does an individual become assimilated into American culture to an extent that culture may no longer be considered? Is it based on time? Employment? Language skills? Age at the time of immigration? Place of residence? Extent of behavior?³⁵ Then there is the question of the amount of the departure: Could that be quantified as well? Federal sentences are determined by a point-based sentencing rubric.³⁶ Do we want to add and subtract sentencing points based upon the defendant's assimilation to society?³⁷ In essence the problem is this: do we want to punish foreign-born Americans for learning English or becoming an active member of the workforce? In addition to the philosophical arguments against the cultural defense, these weaknesses in its practical application strengthen the argument against its use entirely.

B. Examples of the Successful Use of the Cultural Defense

1. People v. Wu

A classic example of the successful use of the cultural defense can be seen in the California case *People v. Wu*.³⁸ In *Wu*, the defendant challenged her conviction for the murder of her son and her subsequent prison sentence of fifteen years to life.³⁹ She argued that the trial court erred in refusing to give two requested jury instructions.⁴⁰ One of these instructions related to the effect that her cultural background may have had on her state of mind when she killed her son.⁴¹

The defense argued that the defendant "was, at the time of the killing, in a highly overwrought emotional state," and that this state could be explained by referencing the "effect of her cultural background on her perception of the circumstances"

³⁴ *Id.*

³⁵ *Id.* at 284–85.

³⁶ *See infra* Part II.A.

³⁷ *Id.* at 285.

³⁸ 286 Cal. Rptr. 868 (Ct. App. 1991) (depublished). For a detailed argument against the use of the cultural defense in infanticide cases by Asian immigrants, see Michele Wen Chen Wu, Comment, *Culture is no Defense for Infanticide*, 11 AM. U. J. GENDER SOC. POL'Y & L. 975 (2002–03).

³⁹ *Wu*, 286 Cal. Rptr. at 869.

⁴⁰ *Id.* at 869–70.

⁴¹ *Id.* at 870. The other argument related to her defense of unconsciousness. *Id.* at 869–70. Before ever discussing the cultural defense instruction, the court ruled that the conviction must be reversed because the unconsciousness instruction was not given despite the existence of evidence to support such an instruction. *Id.* at 887.

preceding her strangling of her son.⁴² The Court of Appeals of California held that the jury instruction concerning the effect that the defendant's culture had on her state of mind should have been given because the language of the instruction left the determination up to the jury: "There is no reason why defendant's requested instruction, simply pointing out that the jury *may* consider evidence of her cultural background in determining the presence or absence of the relevant mental states, should not have been given."⁴³ Because the trial court gave neither this instruction, nor the unconsciousness instruction, the Court of Appeals reversed the defendant's murder conviction.⁴⁴

2. *People v. Aphaylath*

The cultural defense also has been successfully utilized within the framework of the differing notions of honor in the United States and some foreign nations.⁴⁵ One case that dealt with this concept is *People v. Aphaylath*.⁴⁶ In *Aphaylath*, a Laotian refugee living in the United States was convicted of murdering his wife.⁴⁷ The defense argued that the defendant was under extreme emotional disturbance at the time of the crime because, pursuant to Laotian culture, his wife's receiving phone calls from an unattached man would "[bring] shame on defendant and his family sufficient to trigger defendant's loss of control."⁴⁸ The defense also wanted to present testimony of experts in Laotian culture to support the defense that "stress and disorientation encountered by Laotian refugees in attempting to assimilate into the American culture" contributed to the defendant's extreme emotional disturbance.⁴⁹ Although the trial court in *Aphaylath* refused to allow this expert testimony, the appellate court reversed.⁵⁰ The Court of Appeals held that the expert testimony was admissible in this case to support the defendant's defense of emotional distress.⁵¹

⁴² *Id.* at 881. Similar cultural arguments have been raised in other cases of infanticide by Asian immigrants. *See, e.g.,* Bui v. State, 717 So. 2d 6, 20–21 (Ala. Crim. App. 1997) (rejecting the appellant's claim of ineffective assistance of counsel because of his counsel's alleged lack of focus on appellant's cultural background during his trial for infanticide); Matsumoto, *supra* note 18, at 524 (discussing *People v. Kimura*, No. A-091133 (Cal. Super. Ct. L.A. County, Nov. 21, 1985), in which the defense used cultural evidence to establish that the defendant, in adhering to the practice of *oya-ko shinju*, was "mentally disturbed").

⁴³ *Wu*, 286 Cal. Rptr. at 882.

⁴⁴ *Id.* at 887.

⁴⁵ For a detailed discussion of the cultural issues surrounding different notions on honor in sentencing, see Shein, *supra* note 14, § 12.1(b).

⁴⁶ 502 N.E.2d 998 (N.Y. 1986).

⁴⁷ *Id.* at 999.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 999–1000.

⁵¹ *Id.* at 1000.

3. *State v. Kargar*

The cultural defense has been asserted successfully not only in cases of homicide but also in cases of sexual assault. The defendant in *State v. Kargar*, an Afghani refugee, was convicted of gross sexual assault after his neighbor viewed him kissing his eighteen-month-old son's penis.⁵² Before the bench trial, the defendant moved for a dismissal pursuant to Maine's *de minimis* statute.⁵³ In the *de minimis* hearing, the defense brought forth "testimony from many Afghani people who were familiar with the Afghani [cultural] practice . . . of kissing a young son on all parts of his body."⁵⁴ The trial court rejected the motion and Kargar was convicted.⁵⁵ On appeal, the Maine Supreme Court found that the trial court "erred as a matter of law [in finding] culture, lack of harm, and his innocent state of mind irrelevant [in] its *de minimis* analysis."⁵⁶

4. *United States v. Fulton*

The defendant's culture has also been used to argue for sentence reductions when culturally based methods of dealing with crime may be administered against the defendant.⁵⁷ In *United States v. Fulton*,⁵⁸ the defendant, an S'Klallam Indian, pled guilty to abusive sexual contact with a twelve-year-old female on an Indian reservation⁵⁹

⁵² *State v. Kargar*, 679 A.2d 81, 82–83 (Me. 1996). For a detailed analysis of *Kargar* and its use in the argument against the cultural defense, see Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime: Kargar and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829, 873 (1999) ("Given the safeguards woven into our criminal justice system, recognition of a formal cultural defense is both unnecessary and potentially harmful to the very members of our immigrant communities most in need of society's protection—women and children.").

⁵³ *Kargar*, 679 A.2d at 83. Maine's *de minimis* statute provides, in pertinent part:

1. The court may dismiss a prosecution if, . . . having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds the defendant's conduct:

A. Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the crime; or

B. Did not actually cause or threaten the harm sought to be prevented by the law defining the crime or did so only to an extent too trivial to warrant the condemnation of conviction; or

C. Presents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in defining the crime.

ME. REV. STAT. ANN. tit. 17-A, § 12(1) (2006).

⁵⁴ *Kargar*, 679 A.2d at 83.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ For further discussion of this doctrine, see Shein, *supra* note 14, § 12.3(a)–(b).

⁵⁸ 987 F.2d 631 (9th Cir. 1993).

⁵⁹ *Id.* at 632. This conduct violated 18 U.S.C. §§ 1153, 2244(a)(3) (2006). *Id.*

and was sentenced to twenty-one months imprisonment⁶⁰ under the U.S. Sentencing Guidelines.⁶¹ The defendant requested a downward departure at sentencing because, among other reasons,⁶² his tribe needed to “enforce its culturally based sexual abuse program.”⁶³ The Ninth Circuit declined to rule on the merits of this argument, stating that “[a] court’s discretionary refusal to depart downward is not reviewable on appeal.”⁶⁴

II. FEDERAL SENTENCING

A. Pre-Booker

1. History of the Sentencing Guidelines

Prior to 1984, federal district judges had nearly unrestricted power in determining the length of sentences for convicted criminal defendants.⁶⁵ Because of this broad discretion, sentences varied wildly throughout the country.⁶⁶ Congress created the United States Sentencing Commission (the “Commission”) with the Sentencing Reform Act of 1984⁶⁷ as an independent agency under its supervision to develop guidelines for federal district judges to use while imposing criminal sentences.⁶⁸ After a statute outlining the desired construction of the guidelines was passed, the Commission published the Federal Sentencing Guidelines Manual (the “Guidelines”) in April of 1987.⁶⁹ The Guidelines went into effect in November of that year with the intent of lessening the disparity in the criminal sentencing process across federal jurisdictions.⁷⁰ According to the manual, “Congress sought reasonable uniformity in sentencing by

⁶⁰ This sentence was determined “[f]ollowing an evidentiary hearing [in which] the district court determined that Fulton had used force within the meaning of U.S.S.G. § 2A3.4(a),” therefore setting his base offense level at sixteen. *Fulton*, 987 F.2d at 632.

⁶¹ *Id.* For further discussion on cultural issues in crimes committed by Native Americans, see Stephen D. Easton, *Native American Crime Victims Deserve Justice: A Response to Jensen and Rosenquist*, 69 N.D. L. REV. 939 (1993). See also Jon M. Sands, *Departure Reform and Indian Crimes: Reading the Commission’s Staff Paper with “Reservations,”* 9 FED. SENT’G REP. 144 (1996) (calling for sentencing reform to take into account Native American cases and defendants).

⁶² The defense also argued for departures based upon the defendant’s age and medical infirmity. *Fulton*, 987 F.2d at 633–34.

⁶³ *Id.*

⁶⁴ *Id.* at 634.

⁶⁵ *Mistretta v. United States*, 488 U.S. 361, 363–65, 412 (1989) (discussing the history of federal sentencing and ruling the Federal Sentencing Guidelines constitutional).

⁶⁶ *Id.* at 363–65.

⁶⁷ 18 U.S.C. §§ 3551–3626 (2000); 28 U.S.C. §§ 991–998 (2000).

⁶⁸ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2004).

⁶⁹ *Id.*

⁷⁰ *Id.*

narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.”⁷¹ In theory, the Guidelines assured that without any prior criminal history, a twenty-one-year-old black male in Philadelphia and a sixty-year-old white female in Kansas would receive an equal or very similar sentence for an equal crime. Since the Guidelines were issued in 1987, the manual has been amended nearly every year,⁷² but the purpose of the Guidelines has not changed.

2. Application of the Guidelines

In each criminal case, federal probation officers are the first court officials to use the Guidelines to determine the appropriate sentence. These individuals use the Guidelines to create a document known as a “pre-sentencing” report.⁷³ This report outlines the specifics of the crime and calculates the sentence⁷⁴ suggested by the Sentencing Table in the Federal Sentencing Guidelines.⁷⁵ In order to find the suggested sentence, each crime is assigned a base level somewhere between one and forty-three.⁷⁶ Robbery, for example, has a base offense level of twenty.⁷⁷ From the base level, federal probation officers in their reports, and later district judges in the final sentencing, take into consideration the specifics of the offense, such as the defendant’s role in the offense and relevant conduct, and adjust the base level accordingly.⁷⁸ In the case of robbery, the weapon used, the degree of injury to persons, the threats made, and the losses are all considered in determining the sentencing range.⁷⁹ Continuing with this example, if during the act a firearm was displayed but not discharged, the offense level increases by five.⁸⁰ If the loss was between \$50,000 and \$250,000, the offense level increases by two.⁸¹ Assuming these circumstances, the sentence designated for this particular crime would be that of a level twenty-seven.⁸² In order to determine the length of the sentence, using the manual’s Sentencing Table the probation officer would follow offense level twenty-seven across the chart and impose a sentence in the given range based on previous criminal history on a scale of “I”

⁷¹ *Id.*

⁷² *Id.*

⁷³ For an in-depth explanation of the role of the federal probation officer and the pre-sentence report under the Guidelines, see Gary M. Maveal, *Federal Presentence Reports: Multi-Tasking at Sentencing*, 26 SETON HALL L. REV. 544 (1996).

⁷⁴ *Id.* at 557–58.

⁷⁵ U.S. SENTENCING GUIDELINES MANUAL § 5A (2004).

⁷⁶ *Id.* (also dividing offenses into four “zones”).

⁷⁷ *Id.* § 2B3.1.

⁷⁸ *Id.* § 1B1.1.

⁷⁹ *Id.* § 2B3.1.

⁸⁰ *Id.* § 2B3.1(b)(2).

⁸¹ *Id.* § 2B3.1(b)(7).

⁸² *See id.* § 2B3.1.

through “VI.”⁸³ Therefore, if the robber had no criminal history and had committed a level twenty-seven crime, he should receive between seventy and eighty-seven months in federal prison under the Guidelines structure.⁸⁴ The probation officer would write these details in the report and then give it to the judge to use in sentencing.

The sentence in a pre-sentence report, however, is not necessarily final. Assuming that the judge does follow the Guidelines, he or she still has the option of reducing or increasing the designated sentence while staying within the spirit of the Guidelines.⁸⁵ Chapter 5, Part K of the manual outlines the grounds under which departures can be made.⁸⁶ One of the most common of these departures, outlined in section 5K1.1, is a downward departure known as Substantial Assistance.⁸⁷ This departure from the Guidelines, which must be initiated by the U.S. Attorneys’ Office, is based upon information given to authorities by the defendant that assists in the investigation or prosecution of other crimes.⁸⁸ Downward departures can also be based upon grounds such as the victim’s conduct, in which case the victim contributed significantly to promoting the offensive behavior;⁸⁹ diminished capacity, whereby the defendant committed a non-violent criminal offense while suffering from “significantly reduced mental capacity” not resulting from the “voluntary use of drugs or other intoxicants”;⁹⁰ or voluntary disclosure of the offense, in which case the “defendant voluntarily discloses to authorities” his involvement in the “offense prior to the discovery of such offense.”⁹¹

B. Pre-Booker Federal Circuit Court Cases which Consider the Cultural Defense in Sentencing

Much of the discussion in cases addressing the cultural defense revolves around the interpretation of section 5H1.10 of the Guidelines: a policy statement regarding “Race, Sex, National Origin, Creed, Religion and Socio-Economic Status.”⁹² This provision plainly states that “[t]hese factors are not relevant in the determination of

⁸³ *Id.* § 5A.

⁸⁴ *Id.*

⁸⁵ *Id.* § 5K.

⁸⁶ *Id.*

⁸⁷ *Id.* § 5K1.1.

⁸⁸ *Id.*

⁸⁹ *Id.* § 5K2.10.

⁹⁰ *Id.* § 5K2.13.

⁹¹ *Id.* § 5K2.16.

⁹² *Id.* § 5H1.10. Although not directly relevant to the cultural defense, the interpretation of section 5K2.0, known as the “catch-all” provision, also has been the subject of much debate. For a detailed analysis of departure grounds under section 5K2.0, see Jennifer L. Cordle, *The Imagination is a Fertile Stomping Ground: Non-Enumerated Grounds for Departure from the United States Sentencing Guidelines Under § 5K2.0*, 47 CLEV. ST. L. REV. 193 (1999).

a sentence.”⁹³ The question remains, however, whether this provision prohibits the consideration of “culture” in sentencing.⁹⁴ The Supreme Court has never ruled on this issue, and the Sentencing Commission has not clarified the Guideline provision. Therefore, the only federal appellate court guidance that exists on the interpretation of the provision is found in the opinions of the circuit courts. Prior to the *Booker* decision,⁹⁵ each of the six federal circuits that ruled on the application of the cultural defense in sentencing vacated the sentences imposed by the district court.⁹⁶ The rationale of these decisions and the interpretation of the sentencing provisions, however, are inconsistent. Although unresolved, the evolution of this circuit split is essential in understanding the current state of the cultural defense in the federal system.

1. *United States v. Natal-Rivera*

In 1989, the Eighth Circuit became the first federal court of appeals to specifically address the role of the cultural defense in sentencing. In *United States v. Natal-Rivera*,⁹⁷ the defendant appealed her sentence of fifty-one months imprisonment after pleading guilty to one count of distribution of cocaine.⁹⁸ After dismissing Natal-Rivera’s delegation and separation of powers arguments,⁹⁹ the court addressed the defense’s argument that the Guidelines are unconstitutional because they do not consider the defendant’s cultural background.¹⁰⁰

Last, Natal-Rivera argues that the Sentencing Guidelines are constitutionally infirm because they assertedly do not allow a sentencing court to consider the defendant’s cultural background when imposing sentence. Historically, a difference in cultural background has been consistently rejected as an excuse for criminal activity. It is but a small step from there to conclude that Congress

⁹³ U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2004).

⁹⁴ A proponent for the consideration of culture in sentencing has proposed the adoption of a section 5H1.13 entitled “Cultural Factors” within the Guidelines structure in light of the vagueness of section 5H1.10. Matsumoto, *supra* note 18, at 538.

⁹⁵ *United States v. Booker*, 543 U.S. 220 (2005).

⁹⁶ *United States v. Guzman*, 236 F.3d 830 (7th Cir. 2001); *United States v. Contreras*, 180 F.3d 1204, 1212 (10th Cir. 1999), *cert. denied*, 528 U.S. 904 (1999); *United States v. Sprei*, 145 F.3d 528 (2d Cir. 1998); *United States v. Tomono*, 143 F.3d 1401 (11th Cir. 1998); *United States v. Yu*, 954 F.2d 951 (3d Cir. 1992), *cert. denied*, 506 U.S. 1048 (1993); *United States v. Natal-Rivera*, 879 F.2d 391 (8th Cir. 1989).

⁹⁷ 879 F.2d 391 (8th Cir. 1989).

⁹⁸ *Id.* at 392; *see also* 21 U.S.C. §§ 841(a)(2), (b)(1) (2000).

⁹⁹ The Eighth Circuit dismissed this claim by holding that the Supreme Court had already ruled upon this issue in *Mistretta v. United States*, 488 U.S. 361, 410–11 (1989). *Natal-Rivera*, 879 F.2d at 392.

¹⁰⁰ *Natal-Rivera*, 879 F.2d at 393.

may prevent considerations of cultural background from being a mitigating factor for that criminal activity. We, therefore, reject Natal-Rivera's argument that the Guidelines violate due process on this point or that the district court erred in not taking into account her cultural heritage.¹⁰¹

This brief holding¹⁰² apparently settled the debate on the use of culture in federal sentencing in the Eighth Circuit, though exceptions have been raised successfully in several cases involving Native American defendants.¹⁰³

2. *United States v. Sprei* and *United States v. Contreras*

Roughly a decade later in the cases of *United States v. Sprei*¹⁰⁴ and *United States v. Contreras*,¹⁰⁵ two federal appellate courts specifically ruled that cultural heritage should be subsumed under the factors expressly excluded as impermissible reasons for a sentence reduction by section 5H1.10 of the Federal Sentencing Guidelines.¹⁰⁶

¹⁰¹ *Id.* (citations omitted).

¹⁰² The entire *Natal-Rivera* opinion is only three pages in the Federal Reporter.

¹⁰³ Some Eighth Circuit cases have allowed the cultural heritage argument of growing up on an Indian reservation to be used in sentencing. This exception is made with consideration of its compatibility with section 5H1.10 of the Guidelines. The government apparently did not argue incompatibility in this narrow grouping of cases. *See, e.g., United States v. Decora*, 177 F.3d 676, 679 (8th Cir. 1999) (upholding a downward departure for a Native American defendant convicted of assault with a dangerous weapon because of the adversity the defendant faced on the reservation); *United States v. One Star*, 9 F.3d 60, 60–61 (8th Cir. 1993) (upholding a downward departure for a defendant convicted of assault with a dangerous weapon because of the “unusual mitigating circumstances” of reservation life); *United States v. Big Crow*, 898 F.2d 1326, 1331–32 (8th Cir. 1990) (affirming a two-level departure for a defendant convicted of assault with a dangerous weapon and assault resulting in serious bodily injury because of, among other things, the defendant’s consistent efforts to overcome the adversities of living on the reservation).

¹⁰⁴ 145 F.3d 528 (2d Cir. 1998).

¹⁰⁵ 180 F.3d 1204 (10th Cir. 1999), *cert. denied*, 528 U.S. 904 (1999). In her analysis of the cultural defense in sentencing practices, Kelly Diffily puts *Sprei* in a separate category from *Natal-Rivera* and *Contreras*. Diffily, *supra* note 7, at 259–60 & nn.31–32. Diffily groups the cases in which the “culture serves to justify or explain” the criminal action as the basis for departure under “Conformity with Culture” and places *Natal-Rivera* and *Contreras* in this category. *Id.* at 259 & n.31. She places *Sprei* in a category labeled “Cultural Hardship,” for cases in which the defendant’s actions have “nothing to do” with culture, but it is argued that his culture creates a “unique need” for a reduced sentence. *Id.* at 259–60 & n.32. Although there are obvious differences in the rationales behind these decisions, they have been treated similarly in the courts. This Note, therefore, focuses upon the use of culture in sentencing generally and will not differentiate between these suggested categories.

¹⁰⁶ The Sentencing Commission adopted this guideline to comply with Congress’s direction that the guidelines be “entirely neutral as to the race, sex, national origin, creed, and socio-economic status of offenders.” 28 U.S.C. § 994(d) (2000).

In *Sprei*, the Second Circuit refused to uphold the defendant's lesser sentence based upon his religious community practices.¹⁰⁷ The defendant pled guilty to conspiracy in violation of 18 U.S.C. § 371 in a plot to defraud several insurance companies.¹⁰⁸ "Both parties agreed not to request a departure from the applicable" Guidelines range,¹⁰⁹ and the pre-sentence report prepared by the United States Probation Office did not recommend a departure.¹¹⁰ Prior to the sentencing hearing, "the district court received a downward departure motion" and thirty-seven letters submitted by the defendant's rabbi and the Bobov Community.¹¹¹ These letters explained the effect that the defendant's imprisonment would have on the marriage prospects of his children in an arranged-marriage culture.¹¹² Admittedly based upon these letters, the judge "departed downward six offense levels" and sentenced the defendant to "eighteen months' of imprisonment with three years of supervised release . . . based [upon] . . . Sprei's family circumstances and his history of good works."¹¹³

On appeal, the government argued that the district court "relied on forbidden religious and socio-economic grounds, couched as 'family circumstances,' in departing downward from the Guidelines range."¹¹⁴ The Second Circuit agreed, stating:

[T]o the extent the circumstances of Sprei's children are atypical because the established marriage practices of the Bobov Hasidic community place special emphasis on the role of the father, we agree with the Government that this is an improper basis for departure. Congress has directed that the Sentencing Guidelines must be "entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." By according special deference to the customs of a particular religious community, the district court has chosen to treat adherents of one religious sect more favorably than non-adherents who might also desire to assist in planning their children's futures.¹¹⁵

¹⁰⁷ *Sprei*, 145 F.3d at 536.

¹⁰⁸ *Id.* at 530.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* "The [pre-sentence] Report noted that Sprei [was] married and [that he] live[d] with . . . five of his six children . . . in the Borough Park section of Brooklyn." *Id.* The report also explained that the defendant "and his family are members of an Orthodox Jewish sect known as the 'Bobov Community.'" *Id.* "The Report adopted the application of the Sentencing Guidelines" specified in the plea agreement and "therefore recommended an offense level of 21, and a Criminal History Category of I." *Id.* "This analysis yield[s] a sentencing range of thirty-seven to forty-six months." *Id.*

¹¹¹ *Id.* at 531.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 532.

¹¹⁵ *Id.* at 536 (citations omitted).

The Second Circuit reversed the sentence and remanded, finding “that the district court abused its discretion in granting [the defendant] a departure based on his children’s [future] marriage prospects.”¹¹⁶

Another circuit court decision that refused to allow cultural heritage to be considered in sentencing based on section 5H1.10 of the Guidelines was *United States v. Contreras*.¹¹⁷ In *Contreras*, the Tenth Circuit vacated the defendant’s sentence because of a downward departure based on the defendant’s Mexican-American heritage and Roman Catholic religion.¹¹⁸ The district judge had given the defendant a sentence 115 months lower than the minimum recommended by the pre-sentence report.¹¹⁹ The Tenth Circuit directly rejected this rationale based upon section 5H1.10:

On appeal, in a pro se supplemental brief, Ms. Contreras urges this court to consider her unusually high susceptibility to her father’s influence due to her culture and religion. Ms. Contreras explains that “parental subservience is . . . fundamental to traditional Hispanic/Mexican-American culture. Its basis goes beyond mere cultural norms and principles, however, with its genesis in the very heart of the Catholic/Christian Religion, specifically in the 5th Commandment’s dictate ‘[h]onor your father and your mother’.” While we do not doubt the sincerity of Ms. Contreras’ argument, the Sentencing Guidelines prohibit us from considering race, national origin, creed, and religion.¹²⁰

The language of the holding therefore suggests not only that this specific defendant’s sentence should not be based upon cultural norms and religion but also that this type of reduction is prohibited under the Guidelines.

3. *United States v. Yu* and *United States v. Tomono*

Prior to the *Booker* decision, two other circuit courts denied downward departures on the basis of cultural heritage or religion without explicitly ruling against the practice in general: *United States v. Yu*¹²¹ and *United States v. Tomono*.¹²²

¹¹⁶ *Id.*

¹¹⁷ 180 F.3d 1204 (10th Cir. 1999), *cert. denied*, 528 U.S. 904 (1999).

¹¹⁸ *Id.* at 1212 n.4.

¹¹⁹ *Id.* at 1207. The probation office determined that the defendant’s base offense level was thirty-eight and that her criminal history category was I. *Id.* Her sentence according to the Guideline range was therefore assessed at 235 to 293 months imprisonment in the pre-sentence report. *Id.*

¹²⁰ *Id.* at 1212 n.4 (omissions and alterations in original) (citing U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2004)).

¹²¹ 954 F.2d 951 (3d Cir. 1992), *cert. denied*, 506 U.S. 1048 (1993).

¹²² 143 F.3d 1401 (11th Cir. 1998).

In 1992, the Third Circuit heard *United States v. Yu*¹²³ a case in which a native of Korea pled guilty to two counts of bribery of a public official. The defendant offered the bribes to the examining agent during an audit of his and his wife's joint tax return.¹²⁴ The defense asserted the defendant's experience in Korea led him to believe that it was an insult not to pay an "honorarium" to such an official.¹²⁵ He argued, therefore, that cultural differences are "distinct from national origin" in the language of section 5H1.10 of the Guidelines.¹²⁶

In its opinion, the Third Circuit avoided ruling on the question of whether cultural differences are subsumed by "national origin" within the language of section 5H1.10 and upheld the sentence, stating that it would have been an abuse of discretion to depart in this case:

Although the concept of sentencing based upon one's culture raises a number of questions as to whether differences in culture within the same society should be, or can be, identified as focal points for sentencing or whether cultural differences deemed to be a matter for sentencing consideration should be restricted to cultures which are foreign to American shores, we leave those questions to be answered by the Sentencing Commission which Congress has designated to deal with such issues. Suffice it to say, this case does not require resolution of "cultural" v. "natural origin" issues.¹²⁷

Although not an express repudiation or endorsement, this holding suggests that the use of the cultural defense may be appropriate but leaves the door open for clearer guidance by the Sentencing Commission.¹²⁸

Another pre-*Booker* federal appeals case to deal with the use of cultural heritage in sentencing is *United States v. Tomono*.¹²⁹ In this case, the Eleventh Circuit vacated a three-level downward departure and remanded the case as an abuse of discretion.¹³⁰

¹²³ 954 F.2d at 952. It is worth noting that the defendant had graduated from law school in Korea and had worked as an attorney at the Korean equivalent of the IRS before immigrating to the United States. *Id.* Yu was a naturalized American citizen, and he took courses at Temple University in Philadelphia, Pennsylvania. *Id.* at 952-53. Yu ran a "tax preparation business" and seemed to be financially successful. *Id.*

¹²⁴ *Id.* at 953.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 954.

¹²⁸ The dissent in *Yu* makes a strong argument in favor of the use of the cultural defense in sentencing. *Id.* at 955-60 (Becker, J., dissenting); see also *supra* note 11 and accompanying text.

¹²⁹ 143 F.3d. 1401 (11th Cir. 1998).

¹³⁰ *Id.* at 1402, 1405.

The defendant, a Japanese national who operated a commercial reptile import/export business, brought six illegal snakes into the United States with the intent to sell them.¹³¹ Tomono was charged with violations of the anti-smuggling statute¹³² and the Lacey Act.¹³³ At the sentencing hearing,¹³⁴ the defendant was granted a three-level downward departure under section 5K2.0¹³⁵ based upon “cultural differences between the United States and Japan,” and he was sentenced to five years of probation (unsupervised provided that he would leave the United States)” and fined \$5000.¹³⁶ The defense argued that Tomono was “unaware of the . . . consequences of his actions” because of these cultural differences.¹³⁷

On appeal, the Eleventh Circuit rejected the defense’s argument and vacated the sentence.¹³⁸ Citing the Third Circuit’s *Yu* decision, the court argued that departing downward based on the cultural differences in this case comes too close to departing based upon “national origin,” which is expressly forbidden under section 5H1.10.¹³⁹ Following the Third Circuit’s lead, the Eleventh Circuit also explicitly declined to decide whether cultural differences are ever an appropriate reason for departure.¹⁴⁰

¹³¹ *Id.* at 1402.

¹³² *Id.* “The anti-smuggling statute makes it a crime to fraudulently or knowingly import goods contrary to law.” *Id.* (citing 18 U.S.C. § 545 (1994)).

¹³³ *Id.* The Lacey Act “forbids the import, export, sale, or possession of fish or wildlife that has been ‘taken, possessed, transported, or sold’ in violation of federal, state or foreign law.” *Id.* (citing 16 U.S.C. §§ 3372 (1994)).

¹³⁴ At the sentencing hearing, the district court found that the base offense level for a crime involving wildlife is six. *See* U.S. SENTENCING GUIDELINES MANUAL § 2Q2.1(a) (1997). The district court added two offense levels because the offense involved a commercial purpose, *see id.* § 2Q2.1(b)(1), and five more offense levels because it found that the market value of the wildlife was more than \$40,000, *see id.* § 2Q2.1(b)(3)(A). The district court then subtracted two offense levels for acceptance of responsibility, resulting in a total offense level of eleven.

Tomono, 143 F.3d at 1402.

¹³⁵ Section 5K2.0 is a policy statement explaining that the Guidelines provide for departures, upward or downward, under circumstances “not adequately taken into consideration.” U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2006).

¹³⁶ *Tomono*, 143 F.3d. at 1403.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1405.

¹³⁹ *Id.* at 1404 n.2. (“We note, as the Third Circuit has, that the Sentencing Commission has expressly stated that national origin is not relevant as a factor in the determination of a sentence, and that considering any ‘cultural differences’ attributable solely to a defendant’s country of origin comes uncomfortably close to considering the defendant’s national origin itself, in contravention of the guidelines.” (citations omitted)).

¹⁴⁰ *Id.* at 1404 n.4. (“We need not decide whether ‘cultural differences’ may ever be an appropriate ground upon which to depart from the guidelines.”).

4. *United States v. Guzman*

The Seventh Circuit was the final circuit court to address cultural issues prior to the *Booker* decision. In *United States v. Guzman*,¹⁴¹ a Mexican woman was convicted of a conspiracy to distribute methamphetamine.¹⁴² The Guidelines range for the sentence was fifty-seven to seventy-one months in prison.¹⁴³ Based upon the defendant's request for a downward departure because of her cultural heritage and the pre-sentence report's recommendation,¹⁴⁴ "the judge sentenced her to time served (three days) plus six months of home detention . . . [and] two and a half years of supervised release."¹⁴⁵

On appeal, the government argued that "cultural heritage can never be [the] basis [of] a downward departure."¹⁴⁶ This argument was based on section 5H1.10 of the Guidelines.¹⁴⁷ Although the Seventh Circuit vacated the defendant's sentence,¹⁴⁸ the court did not hold that the cultural defense is necessarily forbidden under section 5H1.10 of the Guidelines:

[W]e need not exclude all possibility of consideration of cultural factors in cases that we cannot yet foresee. . . . It is enough in order to decide this case to note that the sentencing judge abused his discretion in granting this defendant a downward departure (let alone one of 25 levels) on the basis of her cultural heritage. What the district judge regarded as a matter of cultural heritage is just the joinder of gender and national origin, two expressly forbidden considerations in sentencing.¹⁴⁹

¹⁴¹ 236 F.3d 830 (7th Cir. 2001).

¹⁴² *Id.* at 831.

¹⁴³ *Id.*

¹⁴⁴ *Id.* The pre-sentence report recommended a downward departure for her Mexican heritage. *Id.* The defendant's role in the conspiracy was to assist her co-conspirator boyfriend, also a Mexican. *Id.* The report cited the Mexican cultural norm that "dictated submission to her boyfriend's will." *Id.* at 831–32. The report also noted that she had stayed with him, defying her family, because "she was pregnant with his child yet they were not married." *Id.* at 832.

¹⁴⁵ *Id.* at 831.

¹⁴⁶ *Id.* at 832.

¹⁴⁷ *Id.* For the text of this section and its statutory progenitor, see *supra* note 112.

¹⁴⁸ *Id.* at 834. The court did, however, note that judges are to work to remain within the framework of the Guidelines.

We further remind that when basing departures on factors not explicitly considered by the Sentencing Commission, a judge is to strive to remain within the conceptual universe of the guidelines, moving by analogy from its explicit provisions and stated objectives to the novel situation presented by the case before him.

Id.

¹⁴⁹ *Id.* at 833.

Therefore, although the Seventh Circuit was the last of the federal circuit courts to address the cultural defense prior to the *Booker* decision, the *Guzman* decision did not resolve the issue. Even by 2005, at the time of the *Booker* decision, the application of the cultural defense under the Federal Sentencing Guidelines had not been firmly decided either by the Supreme Court or by a majority of the circuit courts.

C. The Booker Decision

1. The Case

In 2005, the federal criminal justice system was turned upside-down by the decision in *United States v. Booker*.¹⁵⁰ In this consolidated case, two defendants had been convicted on charges relating to cocaine distribution in two separate cases.¹⁵¹ The first defendant's sentence, imposed under the United States Sentencing Guidelines regime, was reversed by the Seventh Circuit after the trial judge increased the sentence by more than eight years upon finding that the defendant possessed a greater quantity of drugs than was found by the jury.¹⁵² In the second defendant's case, the trial judge declined to apply the Guidelines' enhancement provisions, which would have added ten years to his sentence, and the government appealed the sentence to the First Circuit.¹⁵³

The Supreme Court granted *certiorari* in these cases to determine:

(1) "Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant."

(2) "If the answer to the first question is 'yes,' the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction."¹⁵⁴

¹⁵⁰ 543 U.S. 220 (2005).

¹⁵¹ *Id.* at 227–28.

¹⁵² *Id.*

¹⁵³ *Id.* at 228–29.

¹⁵⁴ *Id.* at 229 n.1.

In answering these questions, the Supreme Court held that the *Apprendi v. New Jersey*¹⁵⁵ and *Blakely v. Washington*¹⁵⁶ decisions applied to the U.S. Sentencing Guidelines.¹⁵⁷ Therefore, the Sixth Amendment requires that any fact, other than a prior conviction, necessary to support a sentence exceeding the maximum authorized by the facts determined by a jury or a guilty plea must be proved beyond a reasonable doubt or admitted by the defendant.¹⁵⁸ Subsequently, 18 U.S.C. § 3553(b)(1) was deemed unconstitutional.¹⁵⁹

This decision effectively rendered the United States Sentencing Guidelines advisory rather than mandatory.¹⁶⁰ Now federal district court judges are instructed to consider the Guidelines in their sentences but are no longer bound to apply them.¹⁶¹

2. Reaction to *Booker*

The Court's ruling in *Booker* has forced federal courts to quickly adapt to a new system of sentencing.¹⁶² Although the Supreme Court's language in *Booker* that the Guidelines should be "considered," along with Congress's oversight of the federal sentencing process, make it likely that courts will "continue to calculate a defendant's Guideline range, as they have for the past 17 years," the judge is no longer required

¹⁵⁵ 530 U.S. 466 (2000) (holding that the Due Process Clause of the Fourteenth Amendment requires that a jury make the factual determination on a basis of proof beyond a reasonable doubt that authorizes an increase in the maximum prison sentence). For an interesting discussion of *Apprendi* and its effect, see Douglas B. Bloom, *United States v. Booker and United States v. Fanfan: The Tireless March of Apprendi and the Intracourt Battle to Save Sentencing Reform*, 40 HARV. C.R.-C.L. L. REV. 539, 552 (2005) ("While Justice Breyer's preferred remedy [in *Booker*] left the Guidelines in the best possible state given *Apprendi*, its effective evisceration of Congress's goal of sentencing uniformity highlights the Court's error in adopting the *Apprendi* rule in the first place.").

¹⁵⁶ 542 U.S. 296 (2004) (invalidating petitioner's sentence as a violation of the Sixth Amendment because the jury's verdict alone did not authorize the sentence and the judge sentenced above the statutory maximum only upon finding some additional fact).

¹⁵⁷ *Booker*, 543 U.S. at 230–32.

¹⁵⁸ *Id.* at 232. The holdings in the *Booker* decision are actually the result of two majority opinions. The first opinion was written by Justice Stevens, joined by Justices Scalia, Souter, Thomas, and Ginsberg, which held the mandatory Sentencing Guidelines unconstitutional. *Id.* at 226–27. The second majority opinion, which Justice Breyer wrote, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsberg, found that the appropriate remedy was to render the Guidelines "advisory" and to allow appellate court review for "reasonableness." *Id.* at 245–46, 261–63. For further analysis of the two majority opinions, see Green, *supra* note 4, at 400–14.

¹⁵⁹ *Booker*, 543 U.S. at 245–46. This is the provision that made the U.S. Sentencing Guidelines mandatory.

¹⁶⁰ *Id.* at 245.

¹⁶¹ *Id.* at 246.

¹⁶² See Anello & Peikin, *supra* note 1, at 32.

to impose that sentence.¹⁶³ Factors other than those set forth in the Guidelines are now important in the sentencing determination, although data suggest “that sentencing judges are likely to remain within the Guidelines ranges in most cases.”¹⁶⁴ Most relevant to the application of the cultural defense after *Booker*, defense attorneys are now able to argue for the consideration of defendants’ individual characteristics by providing that information to the court, even though it is unrelated to the offense conduct.¹⁶⁵

Although the ground for seeking appellate review was not altered by *Booker*, the case did alter circuit courts’ review of criminal sentences.¹⁶⁶ Circuit courts are no longer forced to reverse sentences that depart from the Guidelines; instead, they now may review for “reasonableness.”¹⁶⁷ This lessened standard, coupled with the advisory nature of the guidelines, substantially increases judicial discretion in sentencing and will likely decrease nationwide federal sentencing uniformity.¹⁶⁸

¹⁶³ *Id.* at 31.

¹⁶⁴ *Id.* at 34. For evidence that there has been a significant decrease in sentences within the Guidelines post-*Booker*, see Susan R. Klein, *Shifting Powers in the Federal Courts: Symposium Issue: The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 731 (2005) (“A chart showing all reported decisions between January 12 and March 15, 2005 shows that only 62.1% of the over five-thousand cases were within Guidelines range. This is a marked decrease over the 71% of sentences that conformed to the Guidelines in 1995 and the 65% in 2002.” (citing U.S. SENTENCING COMM’N, FEDERAL SENTENCING STATISTICS REPORT FOR FISCAL YEARS 1995–2002, at tbl. 8; Memorandum from the Office of Policy Analysis to Judge Hinojosa, Chair, U.S. Sentencing Commission (Mar. 22, 2005), available at http://www.ussc.gov/Blakely/Booker_032205.pdf)). This trend continued throughout the 2005–2006 fiscal year, with only a slight increase in Guideline range sentencing to 62.2% from January 12, 2005, to January 11, 2006. U.S. SENTENCING COMM’N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING app. D, at 10 (2006), available at http://www.ussc.gov/booker_report/Booker_Report.pdf.

¹⁶⁵ Anello & Peikin, *supra* note 1, at 32–33.

¹⁶⁶ *Id.* at 32.

¹⁶⁷ *Id.* “Within approximately a month of deciding *Booker/Fanfan*, the Supreme Court issued memorandum opinions in more than 400 cases, granting certiorari, vacating the decision below, and remanding for further consideration in light of *Booker/Fanfan*.” Rosemary T. Cakmis, *The Role of the Federal Sentencing Guidelines in the Wake of United States v. Booker and United States v. Fanfan*, 56 MERCER L. REV. 1131, 1156 (2005).

¹⁶⁸ For further discussion of increased judicial discretion post-*Booker* and an argument in favor of the advisory nature of the Guidelines, see Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in Booker and Fanfan*, 33 PEPP. L. REV. 615, 616 (2005) (“Judicial discretion is alive and well. After almost twenty years of structured sentencing in federal courts, judicial discretion has been restored and prosecutorial power has been curtailed. . . . The Booker decision restores judicial discretion, a key component of sentencing that has been absent for the last twenty years.”).

D. Post-Booker Cultural Defense Analysis—United States v. Ruiz-Alonso

The first and only cultural defense case to be heard at the federal appeals level since *Booker* is *United States v. Ruiz-Alonso*.¹⁶⁹ In this illegal re-entry case, the government appealed a district court's decision at sentencing to "downward depart" four levels based upon a variety of factors, in particular cultural assimilation.¹⁷⁰ The defendant sought to dismiss the appeal, arguing that the government failed to demonstrate that it had "the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General" to proceed with the appeal.¹⁷¹ The Ninth Circuit rejected the defendant's argument, holding that "the government's timely and properly filed notice of appeal" gave the court jurisdiction, which was not "defeated by the government's failure to obtain approval [under] 18 U.S.C. § 3742(b)." ¹⁷² The court then briefly turned to the downward departure and ruled without further explanation that, in light of the discretionary nature of the Guidelines post-*Booker* and the new "reasonableness" standard, the sentence must be vacated and the case remanded for resentencing.¹⁷³ Although the jurisdictional aspect of this case and its application of *Booker* have been cited in multiple circuit court cases,¹⁷⁴ no court has yet responded to the cultural defense aspect of this case. Therefore, although this post-*Booker* cultural defense case does exist, its impact is relatively minute.

CONCLUSION

There is no question that the highly formalized Guidelines system allowed little room for judicial discretion in sentencing decisions prior to *Booker*. As discussed above, each detail of the crime and prior conviction of the offender was accounted for in the sentencing structure. Because of this rigidity, Congress, through the Federal Sentencing Commission, allowed federal district judges a bit of discretion though the so-called "catch all" provision in section 5K2.0 of the Guidelines.¹⁷⁵ An argument could also be raised that Congress was purposefully vague in its language in certain provisions of the Guidelines. The relevant example is, of course, section 5H1.10, which prohibits the consideration of "Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status," but does not specifically address the term "culture."¹⁷⁶

¹⁶⁹ 397 F.3d 815 (9th Cir. 2005).

¹⁷⁰ *Id.* at 817.

¹⁷¹ *Id.* (quoting 18 U.S.C. § 3742(b) (2000) (outlining the reasons for and the restrictions on government sentencing appeals)).

¹⁷² *Id.* at 820.

¹⁷³ *Id.*

¹⁷⁴ See, e.g., *United States v. Davis*, 428 F.3d 802, 808 (9th Cir. 2005).

¹⁷⁵ U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2004).

¹⁷⁶ *Id.* § 5H1.10.

A simple reading of the text of the provision, as well as an examination of the purpose of the Guidelines, clearly suggests that Congress had no intention of allowing a cultural consideration.

Federal courts, however, have not read this provision uniformly. Three federal circuits have explicitly ruled it to be an unlawful consideration in sentencing,¹⁷⁷ and three others have ruled against its use in particular cases while expressly declining to rule on whether culture could ever be considered in sentencing.¹⁷⁸ Despite this split in the circuits, the Supreme Court has never taken up the issue and has therefore allowed a degree of discretion to the district court judges in this area. The recent *Booker* decision, however, has significantly broadened defense attorneys' opportunities to make cultural arguments in sentencing. Because the Court rendered the Guidelines merely advisory, rather than mandatory, judges may now consider whatever relevant factors the attorneys bring forth in sentencing, regardless of the interpretation of section 5H1.10. In this post-*Booker* world where judicial discretion is subject only to a test of "reasonableness," it is necessary that the federal government take action to prohibit federal judges from accepting the cultural defense and sentencing defendants differently based upon their cultural backgrounds.

As with many important issues of policy, there are essentially two routes by which the use of the cultural defense could be prohibited: judicial action or congressional action. Since the establishment of the U.S. Sentencing Guidelines and the U.S. Sentencing Commission, major sentencing determinations have been made by the courts. For example, it was left up to the courts to determine whether a defendant could be sentenced longer than the statutory maximum authorized by conviction,¹⁷⁹ and whether a jury's verdict authorized any sentence less than the statutory maximum.¹⁸⁰ It was also the courts that ruled that the congressionally created Guidelines were no longer mandatory.¹⁸¹ It would seem at first glance, therefore, that the court system is the more obvious venue for reform.¹⁸² However, now that the Guidelines system is no longer mandatory and individual judges are at liberty to alter sentences based upon characteristics of the defendant, it is in the interest of the judiciary to maintain the current system. It is therefore necessary for Congress, through the Sentencing

¹⁷⁷ See *United States v. Contreras*, 180 F.3d 1204 (10th Cir. 1999), *cert. denied*, 528 U.S. 904 (1999); *United States v. Sprei*, 145 F.3d 528 (2d Cir. 1998); *United States v. Natal-Rivera*, 879 F.2d 391 (8th Cir. 1989).

¹⁷⁸ 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. Yu*, 954 F.2d 951 (3d Cir. 1992), *cert. denied*, 506 U.S. 1048 (1993).

¹⁷⁹ *Appendi v. New Jersey*, 530 U.S. 466 (2000).

¹⁸⁰ *Harris v. United States*, 536 U.S. 545 (2002).

¹⁸¹ *United States v. Booker*, 543 U.S. 220, 245 (2005).

¹⁸² For an interesting discussion of the interplay between Congress and the courts in federal sentencing and of the possible responses by both branches after *Booker*, see Green, *supra* note 4, at 424.

Commission, to step in and clarify vague provisions in the Guidelines, such as section 5H1.10, or pass legislation specifically outlawing the defense.

In November 2004, in anticipation of the *Booker* decision, criminal law experts presented four options for revised sentencing regimes to the Sentencing Commission in the event that the mandatory Guidelines were found to be unconstitutional.¹⁸³ Because it is most likely that Congress and the Sentencing Commission will address the issues surrounding the cultural defense within a larger sentencing reform, each of these four proposals will be presented with their likely effect on the cultural defense.

One suggestion that was raised for post-*Booker* Congressional Guideline reform is the so-called “topless” Guideline structure.¹⁸⁴ Under this system, the Guidelines could be restructured to require only a *minimum* sentence for each offense level.¹⁸⁵ For example, a bank robbery, which would have had a pre-*Booker* sentence range of forty-one to fifty-one months, would now have a “minimum sentence” of forty-one months.¹⁸⁶ This approach would alleviate the possibility of defendant-sympathetic judges sentencing defendants to unusually low sentences based upon their cultural background, while allowing judges to sentence at the statutory minimum where they deem appropriate. This system also “preserve[s] the traditional role of judges and juries in a way that a plan that submits sentencing facts to juries does not.”¹⁸⁷ Although this system would meet both goals of allowing for judicial discretion and promoting more even sentencing, it has been argued that it could create harsher sentences for the defendant than the pre-*Booker* system.¹⁸⁸

The second proposal that the Sentencing Commission received, which seems to be favored by the Commission and most practitioners, is what has been called the “Blakelyization” Plan.¹⁸⁹ This plan would “convert[] the bases for the most frequently used guidelines adjustments (such as . . . role in the offense [and drug amounts]), into facts to be found by juries beyond a reasonable doubt.”¹⁹⁰ The most notable problem raised by this plan is that it would require bifurcated jury trials on issues of guilt and sentencing, thus decreasing the efficiency of the federal criminal courts.¹⁹¹ As applied

¹⁸³ Anello & Peikin, *supra* note 1, at 42.

¹⁸⁴ *Id.* at 43–44.

¹⁸⁵ *Id.* at 43.

¹⁸⁶ Green, *supra* note 4, at 423–24.

¹⁸⁷ Anello & Peikin, *supra* note 1, at 44.

¹⁸⁸ Green, *supra* note 4, at 424.

¹⁸⁹ Anello & Peikin, *supra* note 1, at 44–45; *see also* Klein, *supra* note 164, at 738–39 (“I suggested in my testimony before the U.S. Sentencing Commission that Congress or the Commission replace the present 258 box grid (based upon six criminal history categories and forty-three offense levels) with ten offense levels, retaining the same zero to life spread by increasing the judicial discretionary range within each grid from 25–40%. This shifts some fact-finding authority back to juries and retains some judicial discretion.”).

¹⁹⁰ Anello & Peikin, *supra* note 1, at 44–45.

¹⁹¹ *Id.* at 45. An interesting report on the “Blakelyization” Plan appeared in *The Seattle Times* on January 12, 2005. *Id.*; *see also* Peter Lewis, *Scoring May Raise Movers’ Sentences*,

to the cultural defense, this plan could take two paths: first, the courts could follow the lead of the Tenth, Second, and Eighth Circuits which have ruled that the cultural defense cannot be considered;¹⁹² second, the courts could follow the Seventh, Eleventh, and Third Circuits, and allow cultural issues to be submitted to juries for sentencing purposes.¹⁹³ If the second proposal is followed, the “Blakelyization” plan could lead to the regular implementation of the cultural defense in federal sentencing.

The third plan submitted to the Commission, which did not receive much support by the Commission, was to apply the Guidelines in an advisory nature, as they are currently, post-*Booker*.¹⁹⁴ As discussed above, this plan gives a great deal of flexibility to judges in looking at individual factors, such as culture, in making sentencing determinations, and is therefore the favored option of federal judges.¹⁹⁵ In the relevant context of limiting the cultural defense, this status quo option is the most dangerous because of the increased discretion available to the judges in making sentencing determinations.

Finally, the Commission received a proposal known as the “Upside Down Guidelines Plan,” which also garnered little support from the Sentencing Commission.¹⁹⁶ In this system, “courts start their analysis with the harshest possible sentence, and work their way down until a final sentence is reached [through] across-the-board conversion of aggravating factors into mitigating factors that would be treated like

SEATTLE TIMES, Jan. 12, 2005, at B1. The District Court in Western Washington relied on a Blakelyization-type approach in the conviction of three Israeli defendants in a fraud case involving household-moving customers. Anello & Peikin, *supra* note 1, at 45. In this case, “the jury spent seven hours deliberating 17 specific questions [of] factual issues” that would affect the defendants’ sentences. *Id.*

¹⁹² *United States v. Contreras*, 180 F.3d 1204 (10th Cir. 1999), *cert. denied*, 528 U.S. 904 (1999); *United States v. Sprei*, 145 F.3d 528 (2d Cir. 1998); *United States v. Natal-Rivera*, 879 F.2d 391 (8th Cir. 1989).

¹⁹³ *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. Yu*, 954 F.2d 951 (3d Cir. 1992), *cert. denied*, 506 U.S. 1048 (1992).

¹⁹⁴ Anello & Peikin, *supra* note 1, at 45–46.

¹⁹⁵ “The Judicial Conference of the United States,” the principle policy-making body for the federal court system, “‘urged Congress to take no immediate legislative action to alter the federal sentencing system in the wake of the Supreme Court ruling limiting the Sentencing Guidelines to an advisory role.’” Klein, *supra* note 164, at 738 (quoting Posting of Lyle Deniston to SCOTUSblog (March 15, 2005, 13:28 EST), http://www.scotusblog.com/movabletype/archives/2005/03/chief_justice_i.html). The Conference stated in its March 15, 2005, report that “‘it would oppose any legislation that would respond to the Supreme Court’s decision in *United States v. Booker*/*United States v. Fanfan* by raising directly the upper limit of each sentencing Guideline range or expand the use of mandatory minimum sentences.’” *Id.* (quoting News Release, Administrative Office of the U.S. Courts, Conference Calls Off-Site Security for Judges Top Priority (March 15, 2005), available at <http://www.uscourts.gov/ttb/mar05ttb/security>).

¹⁹⁶ Anello & Peikin, *supra* note 1, at 45–46.

affirmative defenses to the maximum sentence.”¹⁹⁷ Here, the application of the cultural defense is much the same as it was with the “Blakelyization” plan. If the cultural defense is allowed to become a mitigating factor, its application will likely increase rapidly in the federal system. If courts follow the circuits that prohibit the defense, and the defense is not considered an appropriate mitigating factor, however, the cultural defense will essentially be prohibited.

The fate of the cultural defense therefore lies essentially within the fate of the Guidelines. If the current post-*Booker* system stays in place, the significant amount of judicial discretion will undoubtedly allow for the expansion of the cultural defense. In this scenario, it would be necessary for the cultural defense to be specifically outlawed, either by a decision by the Supreme Court resolving the circuit split or by legislative action by Congress. Similarly, if the “Blakelyization” Plan or the “Upside Down Guidelines Plan” is selected as the appropriate remedy, the prohibition of the cultural defense under section 5H1.10, or its functional equivalent, must be clarified. The Sentencing Commission should address this when it determines the sentencing factors to be sent to the jury (in the “Blakelyization” Plan) or the mitigating circumstances to lessen the sentence (in the “Upside Down Guidelines Plan”). The strongest move in favor of the prohibition of the cultural defense, and the one favored by the Attorney General,¹⁹⁸ is the “topless” Guideline system. With the imposition of the mandatory minimum sentences for all federal crimes, the great disparity in sentences involving “cultural” factors would be significantly lessened.

Faced with these four proposals, the time is ripe for the Sentencing Commission to take action. As one commentator suggested,

“If a fundamental reconfiguration of federal sentencing structures is to occur, someone or some institution outside of Congress, the Justice Department, and the robed judiciary will have to take the lead in formulating and advancing it. Congress lacks the expertise for the job. DOJ has the expertise, but not the motivation. The judges don’t do legislation. Institutionally, that leaves the Sentencing Commission. One of the most puzzling features of the post-*Booker* landscape is the absence of the Commission as anything other than a gatherer of data. The Commission has the time, the expertise, the data, and (one would think) the motivation to take a leading role in molding thinking about where we should go from here.”¹⁹⁹

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 53. On June 21, 2005, Attorney General Alberto Gonzalez, who had previously “been silent on the issue . . . [publicly] opposed the current system, stating that the ‘advisory guidelines system we currently have can and must be improved.’” *Id.* He also explicitly came out in favor of the construction of a minimum guideline system. *Id.*

¹⁹⁹ Jordan, *supra* note 168, at 673–74 (quoting Douglas Berman & Frank O. Bowman III,