

**BLAME IT ON THE GOVERNMENT: A JUSTIFICATION  
FOR THE DISPARATE TREATMENT OF  
DEPARTURES BASED ON CULTURAL TIES**

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I. INTRODUCTION

In illegal reentry cases, federal courts routinely downwardly depart from the United States Sentencing Guidelines (“Guidelines”) on the ground of the defendant’s cultural assimilation to the United States.<sup>1</sup> Under this departure, courts impose reduced sentences based on findings that defendants illegally returned to the United States because of their cultural ties to this country.<sup>2</sup> At the same time, courts generally disfavor departures from the Guidelines relating to crimes motivated by non-American cultural ties, as when defendants argue for lighter sentences because they were motivated to commit the crime by certain non-American cultural mores.<sup>3</sup> In this article, a departure on cultural assimilation grounds in immigration cases is referred to as an “American assimilation” departure

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<sup>1</sup> See Brian L. Porto, Annotation, *Downward Departure Under United States Sentencing Guidelines Based on “Cultural Assimilation”*, 6 A.L.R. FED. 2d 317 (2005) (cataloging the various circuits that allow departure on these grounds); see also discussion *infra* Part III.

<sup>2</sup> See, e.g., *United States v. Lipman*, 133 F.3d 726, 728 (9th Cir. 1998); see also discussion *infra* Part III.

<sup>3</sup> See, e.g., *United States v. Yu*, 954 F.2d 951, 954 (3d Cir. 1992); see also discussion *infra* Part IV. The term “non-American cultural ties” (or “foreign ties”) is an artificially created term and, for the purposes of this article, refers to cultures originating in or tracing a connection to a country outside the United States. For instance, individuals living in the United States who rely on their unique Mexican or Italian heritage as a reason for committing a particular crime might make a non-American cultural ties argument under my terminology. However, this is not to suggest that these cultures or beliefs are un-American. Quite the contrary, America embodies many different cultures and customs. The term “non-American cultural ties” is simply intended to distinguish these types of cultural defenses (albeit crudely) from those based on American assimilation grounds.

and a departure based on foreign cultural ties as a “non-American cultural” departure (collectively, the “cultural departures”).

Because the Guidelines are now advisory, federal courts are not restricted to their policy statements or their explicit departure grounds.<sup>4</sup> However, courts must still consider the Guidelines and their policy statements in crafting a sentence.<sup>5</sup> In fact, the majority of circuit courts have found that a trial court should consult the enumerated departures in the Guidelines as part of its sentencing process.<sup>6</sup> Accordingly, analyzing the Guidelines and related case law are important to understanding the permissibility of the cultural departures in the current sentencing regime.

There is little agreement amongst the few scholars that have addressed the permissibility of both these cultural departures. Some scholars argue

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<sup>4</sup> See *United States v. Booker*, 543 U.S. 220, 245 (2005); Lee D. Heckman, *The Benefits of Departure Obsolescence: Achieving the Purposes of Sentencing in the Post-Booker World*, 69 OHIO ST. L.J. 149, 169–71 (2008).

<sup>5</sup> *Booker*, 543 U.S. at 259–60 (noting that under 18 U.S.C. § 3553(a), courts must still consider the Guidelines and its policy statements); see also 18 U.S.C. § 3553(a) (2003) (referencing the Guidelines and policy statements as factors to be considered in sentencing).

<sup>6</sup> See Heckman, *supra* note 4, at 152 n.16 (“The First, Second, Third, Fourth, Fifth, Six, Eighth, Tenth, and Eleventh Circuits all require calculating applicable departures as part of consulting the Guidelines.”); *United States v. Wallace*, 461 F.3d 15, 32 (1st Cir. 2006); *United States v. Jackson*, 467 F.3d 834, 837–39 (3d Cir. 2006); *United States v. Moreland*, 437 F.3d 424, 432–33 (4th Cir. 2006); *United States v. McBride*, 434 F.3d 470, 474–77 (6th Cir. 2006); *United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006); *United States v. Calzada-Maravillas*, 443 F.3d 1301, 1305 (10th Cir. 2006); *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir. 2005); *United States v. Villegas*, 404 F.3d 355, 361–62 (5th Cir. 2005); *United States v. Selioutsky*, 409 F.3d 114, 118–19 (2d Cir. 2005). The majority of trial courts now use a three-part process when fashioning a sentence: first, a court calculates the applicable Guidelines range; next, the court calculates any applicable departures under the Guidelines; finally, it considers all the § 3553(a) factors to determine whether a variance is appropriate. See, e.g., *Wallace*, 461 F.3d at 32. Some courts have explicitly stated that judges should take into account pre-*Booker* case law in determining the appropriateness of a departure. See *Jackson*, 467 F.3d at 839. The Seventh Circuit has explicitly ruled that traditional Guidelines departures are now obsolete. *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005). The Ninth Circuit, although siding with the Seventh Circuit with regard to the anachronistic state of formal departures post-*Booker*, still finds that the “pre-*Booker* system of departures” should not be ignored, but simply that any such departure should now be interpreted as an exercise of the district court's post-*Booker* discretion. *United States v. Mohamed*, 459 F.3d 979, 985–87 (9th Cir. 2006).

that departures based on any cultural connection should be prohibited.<sup>7</sup> Others argue that cultural departures should be permissible<sup>8</sup> and it is unfair for courts to grant American assimilation departures, but not non-American cultural departures.<sup>9</sup> Still, another scholar finds this disparate treatment unproblematic, but only puts forth a brief explanation for his conclusion.<sup>10</sup> The purpose of this article is to provide a detailed and compelling justification for this differing treatment. American assimilation departures represent an implicit recognition of the government's (or more generally, America's) role in the act of illegal reentry. With non-American cultural departures, America is not to blame or, in the same way, culpable for the defendant's actions. Thus, the disparate treatment of these cultural departures does not indicate a bias for one culture over the other, but rather recognizes the government's partial culpability in the offense.<sup>11</sup>

Part II of this article examines the relevant provisions of the Guidelines that would allow a departure on cultural grounds. Parts III and IV analyze case law associated with the two types of cultural departures. Parts V through VII examine the apparent disparate treatment of these two departures and the scholarship on the subject. By exploring the analogy to entrapment law and the apportionment of culpability, I display that it is consistent for courts to grant American assimilation departures, but not non-American departures.

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<sup>7</sup> See, e.g., Kelly Diffily, *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, 257 (2005); Elizabeth Martin, *All Men Are (or Should Be) Created Equal: An Argument Against the Use of The Cultural Defense in a Post-Booker World*, 15 WM. & MARY BILL RTS. J. 1305 (2007).

<sup>8</sup> See, e.g., Jason F. Carr & Rene L. Valladares, *A Renewed Call to the Sentencing Commission to Address Whether Cultural Factors Can Serve as a Basis for Downward Departures*, 14 FED. SENT'G REP. 279, 282 (2002); Olabisi Clinton, *Cultural Differences and Sentencing Departures*, 5 FED. SENT'G REP. 348, 351 (1993).

<sup>9</sup> See, e.g., Kelly M. Neff, *Removing the Blinders in Federal Sentencing: Cultural Difference as a Proper Departure Ground*, 78 CHI.-KENT L. REV. 445, 446-49 (2003).

<sup>10</sup> See Blair T. Westover, *Cultural Assimilation as a Mitigating Factor to Immigration Offenses Under the Federal Sentencing Guidelines*, 10 J. GENDER RACE & JUST. 349, 381 (2007).

<sup>11</sup> See discussion *infra* Part VII.

## II. TEXTUAL ANALYSIS OF THE GUIDELINES RELATING TO CULTURAL DEPARTURES

The Guidelines do not explicitly refer to culture or cultural assimilation.<sup>12</sup> However, three portions of the Guidelines are relevant to any textual analysis of the permissibility of these cultural departures. First, the policy statement in Section 5H1.10 provides that “Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status” are “not relevant in the determination of a sentence.”<sup>13</sup> Section 5K2.0 then states that these same factors are prohibited as grounds for a downward departure.<sup>14</sup> Second, the policy statement in Section 5H1.6 provides that “family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.”<sup>15</sup> Still, under Section 5K2.0(a)(4), a court may depart downward based on family ties and responsibilities if such characteristics are present to an “exceptional degree.”<sup>16</sup> Finally, Section 1B1.4 serves as a catch-all provision and provides, “In determining . . . whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character, and conduct of the defendant unless otherwise prohibited by law.”<sup>17</sup> Section 5K2.0 further clarifies this standard by stating, “A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.”<sup>18</sup>

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<sup>12</sup> See *United States v. Guzman*, 236 F.3d 830, 836 (7th Cir. 2001) (Ripple, J., concurring in part, dissenting in part) (“The concept of cultural heritage is not discussed in the guidelines’ enabling statute, that statute’s legislative history, or in the guidelines themselves.”).

<sup>13</sup> U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2008).

<sup>14</sup> See *id.* at § 5K2.0(d)(1).

<sup>15</sup> *Id.* at § 5H1.6.

<sup>16</sup> *Id.* at § 5K2.0(a)(4).

<sup>17</sup> *Id.* at § 1B1.4.

<sup>18</sup> *Id.* at § 5K2.0(a)(2)(B). The Application Note to this section goes on to say that “inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to take into consideration relevant circumstances in sentencing, it is expected that departures based on such unidentified circumstances will occur rarely and only in exceptional cases.” *Id.* at § 5K2.0(a)(2)(B) cmt. n.3(A)(ii); see also *Koon v. United States*, 518 U.S. 81, 106 (1996) (“The Commission set forth factors courts may not consider under any circumstances but made clear that with those exceptions, it ‘does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could

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Whether the cultural departures fit into any of these categories depends on how one defines “culture.” As this article displays, courts interpret this term differently depending on the type of cultural departure. Some have associated culture with family ties in granting American assimilation departures.<sup>19</sup> Other courts have associated culture more closely with national origin and race in denying non-American cultural departures.<sup>20</sup> Scholars have also weighed in on how to define culture under the Guidelines in the context of downward departures. Some argue that this term is not coextensive with national origin or race, and thus, departures on cultural grounds should be allowed.<sup>21</sup> Other scholars argue that by prohibiting departures based on attributes such as race and national origin, Congress implicitly prohibited departures based on culture.<sup>22</sup> Agreeing on a definition of culture is not an easy task and fortunately lies beyond the scope of this article. For my purposes, it is enough to say that the Guidelines themselves do not expressly prohibit or allow cultural departures.

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constitute grounds for departure in an unusual case.”) (quoting U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. 4(b) (1995)).

<sup>19</sup> See, e.g., *United States v. Lipman*, 133 F.3d 726, 730 (9th Cir. 1998); see also discussion *infra* Part III.

<sup>20</sup> See, e.g., *United States v. Contreras*, 180 F.3d 1204, 1212 n.4 (10th Cir. 1999); see also discussion *infra* Part IV.

<sup>21</sup> See, e.g., Neff, *supra* note 9, at 469 (“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 . . . .”); Westover, *supra* note 10, at 364–66 (arguing that American assimilation is unrelated to national origin, and therefore, a departure on this ground is permissible under the Guidelines).

<sup>22</sup> See, e.g., Diffily, *supra* note 7, at 275 (arguing that by prohibiting race, gender, national origin, religion, and socio-economic status, Congress was also prohibiting departures based on culture). Interestingly, Diffily does not address the apparent disparate treatment of the American assimilation and non-American cultural departures. See Martin, *supra* note 7, at 1327 (“A simple reading of the text of [Section 5H1.10], as well as an examination of the purpose of the Guidelines, clearly suggests that Congress had no intention of allowing a cultural consideration.”).

## III. AMERICAN ASSIMILATION DEPARTURE JURISPRUDENCE

A. *United States v. Lipman*<sup>23</sup>

*Lipman* appears to be the first circuit court case discussing the permissibility of a departure on American assimilation grounds.<sup>24</sup> In this case, defendant Lipman pleaded guilty to one count of illegal reentry into the United States after being deported for a felony conviction.<sup>25</sup> At sentencing, Lipman requested downward departures on a number of grounds, including American assimilation pursuant to Section 5K2.0.<sup>26</sup> In support of this departure, Lipman cited his “significant ties” to the United States, including being brought to the United States at age twelve and residing in the country for an uninterrupted twenty-three years, attending New York public schools through high school, marrying a United States citizen with whom he raised children, and having his mother and three siblings reside in the United States as citizens.<sup>27</sup> He argued that these cultural ties, rather than purely economic incentives, motivated his return.<sup>28</sup> Although recognizing its authority to depart on American assimilation grounds, the district court denied the departure, reasoning that “Lipman’s family ties were not so unusual as to justify a downward departure in light of the nature and number of offenses that caused Lipman to lose his residency status in the first place.”<sup>29</sup>

On appeal, the Ninth Circuit discussed the general permissibility of American assimilation departures.<sup>30</sup> As its starting point, the court cited Sections 5K.20 and 1B1.4 of the Guidelines—the catchall provisions described above—for the proposition that a departure may be appropriate when there is a mitigating circumstance that was not adequately taken into account and not prohibited by law.<sup>31</sup> The court reasoned, “Except for those factors categorically proscribed by the Sentencing Commission as a basis for departure, e.g., race, sex, and national origin, the Guidelines place essentially no limit on the number of potential factors that may warrant

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<sup>23</sup> 133 F.3d 726 (9th Cir. 1998).

<sup>24</sup> See *Lipman*, 133 F.3d at 730; Westover, *supra* note 10, at 357.

<sup>25</sup> See *Lipman*, 133 F.3d at 728.

<sup>26</sup> See *id.*

<sup>27</sup> *Id.* at 729.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 731.

<sup>30</sup> See *id.* at 730–32.

<sup>31</sup> *Id.* at 730.

departure.”<sup>32</sup> The court also stated that because “the Sentencing Commission has never addressed or proscribed ‘cultural assimilation’ per se as a factor that may justify departure, we hold that a sentencing court has authority under U.S.S.G. § 5K2.0 to consider evidence of cultural assimilation.”<sup>33</sup>

The court likened this departure on American assimilation grounds to departures based on family and communities ties under Section 5H1.6.<sup>34</sup> Thus, the court concluded that “to the extent that cultural assimilation denotes family and communities, we hold that the district court has the authority to depart on this basis in extraordinary circumstances.”<sup>35</sup> The court also commented on the reduced culpability of a defendant who illegally reentered based on his ties to the United States rather than one who entered for economic reasons.<sup>36</sup> The court found that “cultural assimilation may be relevant to sentencing . . . if a district court finds that a defendant’s unusual cultural ties to the United States—rather than ordinary economic incentives—provided the motivation for the defendant’s illegal reentry.”<sup>37</sup> In this way, a defendant’s “culpability might be lessened if his motives were familial or cultural rather than economic.”<sup>38</sup> While recognizing the authority of the district court to depart on American assimilation grounds, the Ninth Circuit found that, based on the factual circumstances of the case, the district court did not abuse its discretion in denying a downward departure on these grounds.<sup>39</sup>

#### *B. Federal Circuits Generally Approve of American Assimilation Departures*

Consistent with *United States v. Lipman*, some federal circuits have explicitly accepted American assimilation as a ground for departure in illegal reentry cases.<sup>40</sup> Others have not formally ruled on the issue, but

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<sup>32</sup> *Id.* (internal quotations omitted).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *See id.* at 731.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 732.

<sup>40</sup> *See United States v. Bryan*, 219 F. App’x 234, 237 (3d Cir. 2007) (“We agree that in the appropriate case and under appropriate circumstances ‘cultural assimilation’ may provide a basis for departure.”); *United States v. Perez-Ramirez*, 415 F.3d 876, 878 (8th Cir. 2005) (recognizing the authority of the district court to downwardly depart one level

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none of these courts have rejected American assimilation as a potential mitigating factor.<sup>41</sup> In fact, the typical dicta in the latter cases suggest openness to departures on this ground.<sup>42</sup> The Sixth Circuit, for instance, stated:

Assuming, without deciding the issue, that cultural assimilation may provide a basis for downward departure, such a departure would be highly infrequent, and should occur only when the facts and circumstances of the case are sufficient to take case out of the heartland of cases. The Ninth Circuit also noted that cultural assimilation was akin to “family and community ties,” discussed under U.S.S.G. § 5H1.6 as a factor not ordinarily relevant in

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based on American assimilation grounds); *United States v. Rodriguez-Montelongo*, 263 F.3d 429, 433 (5th Cir. 2001) (holding that, based on the *Lipman* decision, “cultural assimilation is a permissible basis for downward departure”); *see also* *Westover*, *supra* note 10, at 360 (collecting cases).

<sup>41</sup> *See* *United States v. Rubio-Martinez*, 214 F. App’x. 272, 273 (4th Cir. 2007) (noting that a district court’s denial of a departure on American assimilation grounds is not subject to appellate review when the sentencing judge recognized its authority to depart in the appropriate cases); *United States v. Tostado-Sianez*, 217 F. App’x. 547, 550 (7th Cir. 2007) (noting that even if the sentencing court “might have found it useful to consider [the American assimilation ground] for departure explicitly, it was well within its discretion to decide that no such adjustment was warranted”); *United States v. Braxton*, 175 F. App’x. 380, 381–82 (2d Cir. 2006) (discussing, without reaching the decision as to whether the First Circuit allows American assimilation departures, the circumstances under which such a departure would be permissible and concluding that assuming the district court had discretion to depart on American assimilation grounds, the trial court did not abuse its discretion in denying this departure); *United States v. Galarza-Payan*, 441 F.3d 885, 889 (10th Cir. 2006) (noting that the Tenth Circuit has not explicitly addressed the American assimilation ground for departure, but recognizing ability to take such cultural ties into account in fashioning a sentence now that the Guidelines are advisory); *United States v. Melendez-Torres*, 420 F.3d 45, 51 (1st Cir. 2005) (noting that the court did not have jurisdiction to review a district court’s denial of a downward departure on American assimilation where the sentencing judge recognized its authority to depart); *United States v. Vasquez-Duarte*, 59 F. App’x. 625, 627 (6th Cir. 2003) (noting the court has not yet decided the issue of cultural assimilation, but describing the relevant standard for such a departure); *United States v. Sanchez-Valencia*, 148 F.3d 1273, 1274 (11th Cir. 1998) (noting that the district court’s denial of a departure on American assimilation grounds is not subject to appellate review when the sentencing judge recognized its authority to depart in the appropriate cases). The District of Columbia Circuit has not addressed this issue.

<sup>42</sup> *See* cases cited *supra* note 41.

determining whether a sentence should be outside the applicable guideline range, and that departure based on cultural assimilation would be appropriate only in “extraordinary circumstances.”<sup>43</sup>

Another court, relying on the *Lipman* decision, used enumerated factors to determine when American assimilation departures should be granted. In *United States v. Martinez-Alvarez*,<sup>44</sup> the Eastern District of Wisconsin set forth four factors determining the degree to which a defendant has assimilated to the United States.<sup>45</sup> These factors include the length of time the defendant lived in the United States,<sup>46</sup> the defendant’s familiarity with his country of origin,<sup>47</sup> the extent of the defendant’s family ties to the United States,<sup>48</sup> and what the defendant did and where the defendant went upon reentry.<sup>49</sup> Other courts have adopted these factors when considering whether to grant American assimilation departures.<sup>50</sup>

*C. American Assimilation Departures Associated with Family Ties Under Section 5H1.6 Rather than Prohibited Factors Under Section 5H1.10*

Courts that have cited to the Guidelines when considering a departure on American assimilation grounds have associated this departure with those based on family ties and circumstances.<sup>51</sup> The *Lipman* court

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<sup>43</sup> *Vasquez-Duarte*, 59 F. App’x at 627.

<sup>44</sup> 256 F. Supp. 2d 917 (E.D. Wis. 2003).

<sup>45</sup> *See id.* at 920.

<sup>46</sup> *Id.* (noting that this factor also includes whether a defendant was educated in America and his or her residency status at the time of deportation).

<sup>47</sup> *Id.* (“A defendant deported to a country [he or she] does not know will have a greater motivation to leave than one deported to a more familiar environment.”).

<sup>48</sup> *Id.* (noting that this factor considers whether all or most of the defendant’s family live in the United States or whether the defendant has a spouse or minor child in this country and whether any of those children are United States citizens).

<sup>49</sup> *Id.* (“In *Lipman*, for example, the defendant claimed that he re-entered to be with his daughter in New York, yet was arrested for possession with intent to distribute marijuana in Los Angeles.”).

<sup>50</sup> *See, e.g.*, *United States v. Tejada-Baltazar*, No. 03 CR 875, 2004 WL 1427117, at \*3–4 (N.D. Ill. June 23, 2004) (relying on the *Martinez-Alvarez* factors); *United States v. Reyes-Campos*, 293 F. Supp. 2d 1252, 1257 (M.D. Ala. 2003) (relying directly on the factors articulated in *Martinez-Alvarez*).

<sup>51</sup> *See, e.g.*, *United States v. Marin*, 1 F. App’x 845, 846 (10th Cir. 2001); *United States v. Carter*, No. Civ. 02-2016, 2005 WL 1199046, at \*5 (D. N.J. May 19, 2005); *see also* *United States v. Rivas-Gonzalez*, 365 F.3d 806, 808 (9th Cir. 2004) (noting that the district

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explicitly stated that “cultural assimilation is akin to the factor of family and community ties discussed under U.S.S.G. § 5H1.6.”<sup>52</sup>

In *Carter v. United States*,<sup>53</sup> the New Jersey District Court similarly characterized the defendant’s American assimilation argument as a proposed departure under family ties.<sup>54</sup> In that case, the defendant argued that he was “so assimilated into American culture that the Court should disregard the applicable punishments’ and grant a downward departure.”<sup>55</sup> The court explained that the “defendant’s ‘cultural assimilation’ claim is exactly, and solely, that . . . he should have been granted a downward departure based on family ties to the United States.”<sup>56</sup>

In *United States v. Marin*,<sup>57</sup> the Tenth Circuit distanced American assimilation departures in illegal reentry cases from the prohibited factors under Section 5H1.10 of the Guidelines.<sup>58</sup> The case involved a defendant who sought a downward departure on American assimilation grounds in connection with a money laundering conviction.<sup>59</sup> Citing *Lipman*, the Tenth Circuit found that a departure was not appropriate because the defendant’s assimilation did not speak to his motivation to commit the money laundering crime.<sup>60</sup> The court reasoned that extending the application of cultural assimilation departures beyond illegal reentry cases would “run afoul of U.S.S.G. §5H1.10, which prohibits the consideration of national origin in sentencing determinations.”<sup>61</sup>

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court did not explicitly differentiate between American assimilation and family ties when articulating its reasons for departure).

<sup>52</sup> *United States v. Lipman*, 133 F.3d 726, 730 (9th Cir. 1998). The court went on to say that American assimilation may also be regarded as a factor unmentioned in the Guidelines. *See id.* at 732.

<sup>53</sup> No Civ. 02-2016, 2005 WL 1199046 (D. N.J. May 19, 2005).

<sup>54</sup> *Id.* at \*4–5.

<sup>55</sup> *Id.* at \*3 n.7 (quoting *United States v. Vilcapoma*, 46 F. App’x 98, 99 (3d Cir. 2002)).

<sup>56</sup> *Id.* at \*5. The court ultimately declined to depart on this ground because the defendant’s circumstances were not extraordinary to merit such mitigation. *Id.*

<sup>57</sup> 1 F. App’x 845 (10th Cir. 2001).

<sup>58</sup> *See id.* at 847.

<sup>59</sup> *Id.* at 846.

<sup>60</sup> *See id.* at 846–47. Conceptually, this makes sense. American assimilation departures would only potentially apply in illegal reentry cases because other crimes (e.g., federal drug violations) are already reflective of established American mores. Thus, appealing to American assimilation as the motivation for the latter crimes would not set apart the defendant from other similarly situated defendants.

<sup>61</sup> *Id.* at 847.

*D. American Assimilation Departures Only Apply to Defendant's Motivation for Reentry*

Courts only apply American assimilation departures where a defendant was motivated to return to the United States based on his cultural ties to this country.<sup>62</sup> Courts have not extended this departure to situations where a defendant's assimilation does not bear on his motivation to commit the crime.<sup>63</sup>

*United States v. Rivas-Gonzalez*<sup>64</sup> provides an instructive fact pattern on the limitation of this departure. In that case, the defendant pleaded guilty to illegally reentering the United States after deportation.<sup>65</sup> The defendant requested a downward departure on American assimilation grounds, arguing that his cultural and family ties to this country justified a shorter sentence.<sup>66</sup> However, the defendant's assimilation to the United States occurred after his illegal reentry.<sup>67</sup> He reentered the United States shortly after his deportation in 1993, and he soon thereafter married an American citizen and fathered two daughters in this country.<sup>68</sup> The court distinguished this case from *Lipman*, which involved a defendant who was motivated to illegally return based on already created ties to this country.<sup>69</sup>

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<sup>62</sup> *E.g.*, *United States v. Lipman*, 133 F.3d 726, 730–31 (9th Cir. 1998) (distinguishing departure on American assimilation grounds from departure based on future threat of deportation because the former spoke to the defendant's culpability rather than his general status); *United States v. Martinez-Alvarez*, 256 F. Supp. 2d 917, 919 (E.D. Wis. 2003) (distinguishing American assimilation departure based on motivation of the defendant from departure on family circumstances relating to collateral effects of the sentence on the defendant's family).

<sup>63</sup> *See, e.g.*, *United States v. Braxton*, 175 F. App'x 380, 381 (2d Cir. 2006) (finding that departure on American assimilation grounds in a drug dealing conviction was not appropriate because the defendant's ties to this country did not speak to his motivation in engaging in crime); *United States v. Rivas-Gonzalez*, 365 F.3d 806, 811–12 (9th Cir. 2004), partly *superseded on other grounds*, 384 F.3d 1034 (9th Cir. 2004) (declining to apply American assimilation departure when cultural ties were formed after illegal reentry); *Marin*, 1 F. App'x at 847 (rejecting application of American assimilation departure in a money laundering offense because the defendant's cultural assimilation to this country did not bear on motive to commit crime).

<sup>64</sup> 365 F.3d 806 (9th Cir. 2004).

<sup>65</sup> *Id.* at 808.

<sup>66</sup> *Id.*

<sup>67</sup> *See id.* at 811–12.

<sup>68</sup> *Id.* at 808.

<sup>69</sup> *See id.* at 811–12.

Here, Rivas-Gonzalez did “not argue that he came to the United States because he wanted to be reunited to a wife and family that he did not then have,” but rather contended “that his ‘continued presence’ in the United States [after his illegal reentry] created bonds that assimilated him into our country by the time he was sentenced.”<sup>70</sup> The Ninth Circuit concluded that because his cultural assimilation occurred after his illegal reentry, rather than as a reason for it, an American assimilation departure was not warranted.<sup>71</sup>

*E. Defendants Reentering Because of American Assimilation Are Less Culpable*

By focusing on a defendant’s motivation to reenter the United States, courts have found that defendants motivated by their cultural ties to this country are less culpable than ones who returned for economic reasons.<sup>72</sup> For instance, in *Rivas-Gonzalez*, the court noted, “Cultural assimilation may . . . be relevant to the character of a defendant sentenced under [illegal reentry cases] insofar as his culpability might be lessened if his motives were familial or cultural rather than economic.”<sup>73</sup> Similarly, in *United States v. Valdez-Trujillo*,<sup>74</sup> the court noted that cultural assimilation serves to “mitigate [a] defendant’s culpability for the offense” and that this departure “is not based on a need for the defendant to support his family, but on the defendant’s degree of culpability for the offense of illegally reentering the United States.”<sup>75</sup>

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<sup>70</sup> *Id.* at 812.

<sup>71</sup> *See id.* The Ninth Circuit rejected the dicta in *Lipman* suggesting that American assimilation departures may apply in situations where the defendant did not create his ties until after reentry. *Id.*

<sup>72</sup> *See, e.g.,* *United States v. Lipman*, 133 F.3d 726, 731 (9th Cir. 1998) (discussing how a defendant’s culpability might be lessened if his or her motives were familial or cultural rather than economic); *United States v. Gavilanez*, 238 F. App’x 815, 817 (3d Cir. 2007) (discussing how a defendant who illegally reentered the United States based on his cultural ties to this country is “less blameworthy” than one who reentered for economic or illegal reasons); *Rivas-Gonzalez*, 365 F.3d at 811; *United States v. Valdez-Trujillo*, 11 F. App’x 551, 558–59 (6th Cir. 2001) (Holschuh, J., dissenting).

<sup>73</sup> *Rivas-Gonzalez*, 365 F.3d at 810.

<sup>74</sup> 11 F. App’x 551 (6th Cir. 2001).

<sup>75</sup> *Id.* at 558 (Holschuh, J., dissenting).

F. *Post-United States v. Booker*<sup>76</sup> *American Assimilation Jurisprudence*

Though *United States v. Booker* rendered the Guidelines advisory,<sup>77</sup> courts still look to the Guidelines in granting a departure or variance under Section 3553(a).<sup>78</sup> In this post-*Booker* setting, American assimilation is still a recognized ground upon which courts may mitigate sentences involving illegal reentry cases.<sup>79</sup> In *United States v. Gavilanez*,<sup>80</sup> for instance, the Third Circuit found that a district court may mitigate a defendant's sentence on the ground that his return was motivated by his prior assimilation to the United States.<sup>81</sup> The court concluded that in reducing the sentence on this ground, judges have discretion to either formally depart from the Guidelines or downwardly vary under Section 3553(a).<sup>82</sup> Post-*Booker* jurisprudence also continues to associate American assimilation with a defendant's family ties.<sup>83</sup> In *Gavilanez*, for example, the court noted that American assimilation is a relevant sentencing factor under Section 3553(a)(1) because a defendant's "history includes the cultural and familial ties that bind him to the United States."<sup>84</sup>

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<sup>76</sup> 543 U.S. 220 (2005).

<sup>77</sup> *See id.* at 245.

<sup>78</sup> *See* cases cited *supra* note 6.

<sup>79</sup> *See, e.g., United States v. Gavilanez*, 238 F. App'x 815, 817 (3d Cir. 2007) (finding a reduction in sentence for American assimilation was permissible as explicit departure or variance under 3553(a)); *United States v. Marquez-Olivas*, 172 F. App'x 855, 857 (10th Cir. 2006) (recognizing the permissibility of a downward departure on American assimilation grounds but finding that particular defendant failed to show that his circumstances were extraordinary); *United States v. Todd*, 618 F. Supp. 2d 1349, 1353 (M.D. Ala. 2009); *see also* cases cited *supra* note 6.

<sup>80</sup> 238 F. App'x 815 (3d Cir. 2007).

<sup>81</sup> *See id.* at 817.

<sup>82</sup> *See id.* *See also* *United States v. Roche-Martinez*, 467 F.3d 591, 595 (7th Cir. 2006) (recognizing the district court's authority to downwardly adjust the sentence on American assimilation grounds but finding the district court's denial not unreasonable based on the particular set of facts); *United States v. Galarza-Payan*, 441 F.3d 885, 889 (10th Cir. 2006) (noting that American assimilation is relevant to post-*Booker* analysis under § 3553(a)).

<sup>83</sup> *Gavilanez*, 238 F. App'x at 817; *Galarza-Payna*, 441 F.3d at 889 (noting that a defendant's "family and cultural ties" would fall under either § 3553(a)(1) or a defendant's history and characteristics); *United States v. Braxton*, 175 F. App'x 380, 381 (2d Cir. 2006) (noting that courts have approved cultural assimilation departures drawing on Section 5H1.6 of the Guidelines).

<sup>84</sup> *See Gavilanez*, 238 F. App'x at 817.

## IV. NON-AMERICAN CULTURAL DEPARTURE JURISPRUDENCE

A. *United States v. Natal-Rivera*<sup>85</sup>

*United States v. Natal-Rivera* appears to be the first federal circuit court opinion directly addressing the non-American cultural departure.<sup>86</sup> In that case, the defendant and her common law husband were charged with distribution and conspiracy to distribute cocaine.<sup>87</sup> Natal-Rivera pleaded guilty to one count of cocaine distribution and was sentenced to fifty-one months of imprisonment by the district judge.<sup>88</sup> The defendant appealed her sentence arguing, *inter alia*, that the district, in following the Guidelines, failed to take into account as a mitigation factor “the fact that her [Puerto-Rican] cultural background socialized her since childhood to follow her husband’s every command.”<sup>89</sup>

The Eighth Circuit disagreed and found that the sentencing judge did not err by discounting the defendant’s cultural heritage.<sup>90</sup> Citing to an English case, the court reasoned, “Historically, a difference in cultural background has been consistently rejected as an excuse in criminal activity.”<sup>91</sup> The court stated, “It is but a small step from there to conclude that Congress may prevent considerations of cultural background from being a mitigating factor for that criminal activity.”<sup>92</sup>

B. *Federal Circuits Have Generally Taken a Negative View of Non-American Cultural Departures*

The Eighth and Tenth Circuits have held that departures on non-American cultural grounds are impermissible,<sup>93</sup> while the Third, Seventh,

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<sup>85</sup> 879 F.2d 391 (8th Cir. 1989).

<sup>86</sup> *See id.* at 392.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *See id.* at 393.

<sup>91</sup> *Id.* (holding that an “unnatural offense” committed aboard East India ship in English harbor” was “not excusable even though not an offense in defendant’s native country”) (citing to *Rex v. Esop*, 173 Eng. Rep. 203 (Cent. Crim. Ct. 1836)).

<sup>92</sup> *Id.* (citing *United States v. Rasag*, No. Cr-S-87-343-PMP, 1 Fed. Sent. R. 200, 201 (D. Nev. 1998)) (holding the defendant’s claim that he or she broke the law to avoid embarrassment that may stem from a particular culture’s family structure is not a mitigating factor in sentencing).

<sup>93</sup> *See id.* at 393; *United States v. Dyck*, 334 F.3d 736, 743 (8th Cir. 2003); *United States v. Contreras*, 180 F.3d 1204, 1212 (10th Cir. 1999).

and Eleventh Circuits have speculated that such departures are likely prohibited.<sup>94</sup>

Consistent with *United States v. Natal-Rivera*, in *United States v. Dyck*,<sup>95</sup> the Eighth Circuit found that a defendant's specific cultural heritage was not a proper basis for departure.<sup>96</sup> The court, citing Section 5H1.10 of the Guidelines, ruled that the sentencing judge improperly departed downward based on the defendant's Mennonite upbringing, which supposedly left him ignorant and uneducated.<sup>97</sup> The Tenth Circuit, in *United States v. Contreras*,<sup>98</sup> similarly rejected an appeal from a defendant who, contesting her sentence for conspiracy to distribute cocaine conviction, highlighted her unusually high susceptibility to her father's influence based on her culture and religion.<sup>99</sup> The case involved a drug conspiracy that was run by the defendant's father.<sup>100</sup> The defendant explained that "parental subservience is . . . fundamental to traditional Hispanic/Mexican-American culture" and that her father's influence therefore contributed to her participation in the conspiracy.<sup>101</sup> However, the court found this cultural explanation was prohibited by Section 5H1.10.<sup>102</sup>

Another case, *United States v. Yu*,<sup>103</sup> serves as a prototypical situation involving a non-American cultural departure. Although not explicitly ruling that such departures are impermissible, the Third Circuit ruled that the facts in this case did not warrant a departure.<sup>104</sup> The defendant was

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<sup>94</sup> See *United States v. Guzman*, 236 F.3d 830, 833 (7th Cir. 2001); *United States v. Tomono*, 143 F.3d 1401, 1404 (11th Cir. 1998); *United States v. Yu*, 954 F.2d 951, 954 (3d Cir. 1992).

<sup>95</sup> 334 F.3d 736 (8th Cir. 2003).

<sup>96</sup> See *id.* at 743.

<sup>97</sup> *Id.*

<sup>98</sup> 180 F.3d 1204 (10th Cir. 1999).

<sup>99</sup> *Id.* at 1212 n.4.

<sup>100</sup> *Id.* at 1207.

<sup>101</sup> *Id.* at 1212 n.4.

<sup>102</sup> *Id.* In a related case, the Second Circuit found that a departure based on the atypical marriage practices of a religious community was prohibited. *United States v. Sprei*, 145 F.3d 528, 536 (2d Cir. 1998). In *Sprei*, the defendant relied on the special emphasis of his role as a father in the Hasidic community as a factor to mitigate his sentence. *Id.* at 536. The court found that such "special deference to the customs of a particular religious community" invoke the prohibited factors under Section 5H1.10. *Id.*

<sup>103</sup> 954 F.2d 951 (3d Cir. 1992).

<sup>104</sup> See *id.* at 959–60.

born and educated in Korea and moved to the United States in 1976 when he was forty-six years old.<sup>105</sup> In 1988 and 1989, during an audit of his tax returns, Yu made certain small payments to the examining agent for the agent's personal use.<sup>106</sup> He later pleaded guilty to bribery charges.<sup>107</sup> During sentencing, Yu urged the district court to depart downward "because of [the] cultural differences between the United States and Korea."<sup>108</sup> He argued that "based on his Korean experience, he considered the bribe as an honorarium and that it could be viewed as an insult not to offer the payment."<sup>109</sup> "The district court held that it did not have the power to depart" on these cultural grounds.<sup>110</sup>

On appeal, the Third Circuit affirmed and found, "While Yu points to his Korean origin as the source of his cultural values, he never contended . . . that at the time of the bribes in this case he did not understand that his actions violated our laws."<sup>111</sup> However, the court did not reach the issue "of whether a foreign culture is subsumed within the term 'national origin,'"<sup>112</sup> a prohibited factor under Section 5H1.10.<sup>113</sup> The court stated:

It is conceivable that an unschooled recent immigrant or a foreign traveler might reasonably point to practices in his country of origin that would justify a downward departure on the grounds that while he intended to do the acts for which he was convicted and was thus criminally liable, he did not recognize the extent of his culpability in this country.<sup>114</sup>

Despite this apparent openness to non-American cultural departures, the court's disfavor becomes evident when it reasoned: "Actually it is doubtful at best that cultural differences are allowable under the guidelines, even if

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<sup>105</sup> *Id.* at 952.

<sup>106</sup> *Id.* at 953.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 954.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 953.

<sup>114</sup> *Id.* at 954.

it would appear to be reasonable to depart on that basis in a particular case.”<sup>115</sup>

In *United States v. Guzman*,<sup>116</sup> the Seventh Circuit provided the most detailed analysis of whether the text of the Guidelines prohibits departures based on non-American cultural grounds.<sup>117</sup> The defendant, a Mexican citizen, pleaded guilty to conspiracy to distribute methamphetamine.<sup>118</sup> Her role was to help her boyfriend, who was also charged in the conspiracy.<sup>119</sup> The sentencing judge departed downward based on her “Mexican cultural norms,” which “dictated submission to her boyfriend’s will.”<sup>120</sup>

On appeal, Judge Posner vacated the sentence and remanded the case for resentencing on the grounds that such a departure was prohibited by the Guidelines.<sup>121</sup> He noted, “There is no illuminating legislative history, and no case in this court on whether ‘cultural heritage’ should be subsumed under any (perhaps a combination) of the factors expressly excluded by section 5H1.10.”<sup>122</sup> Judge Posner thought it likely that the drafters of the Guidelines believed that culture and ethnicity were excluded as improper considerations.<sup>123</sup> He reasoned that the prohibited factors such as race and religion themselves cannot be viewed apart from the cultural characteristics that are correlated with them.<sup>124</sup> Judge Posner also stated “that recognizing cultural heritage as an independent ground for departure” would perpetuate certain stereotypes that may strip potential victims of the full protection of laws.<sup>125</sup> Though he left open the “possibility of consideration of cultural factors in cases we cannot yet foresee,” he found

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<sup>115</sup> *Id.* at 954 n.2. In an unpublished opinion, the Third Circuit found that cultural heritage is not a proper ground for departure. *See United States v. Luna*, No. 08-351414, 2009 WL 1483139, at \*4 (3d Cir. May 28, 2009).

<sup>116</sup> 236 F.3d 830 (7th Cir. 2001).

<sup>117</sup> *See id.* at 832.

<sup>118</sup> *Id.* at 831.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 831–32.

<sup>121</sup> *Id.* at 834.

<sup>122</sup> *Id.* at 832.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 833. Judge Posner also commented that allowing such departures would create the “anomaly that a Mexican-American born in this country might be allowed to plead ethnicity, whereas one who had immigrated recently to the United States would be barred by the national-origin provision of the guideline.” *Id.*

that a departure in the instant case was not appropriate.<sup>126</sup> He explained that the district judge's interpretation of cultural heritage was "just the joinder of gender and national origin, two expressly forbidden considerations in sentencing."<sup>127</sup> In other words, "because the defendant is a Mexican woman, she may have been more likely to participate in her boyfriend's criminal activity than if she had been Anglo male."<sup>128</sup> The court found that relying on these considerations for a departure "would wreak havoc with section 5H1.10."<sup>129</sup>

The Eleventh Circuit similarly concluded that non-American cultural departures are most likely prohibited under the Guidelines in *United States v. Tomono*,<sup>130</sup> where a Japanese national pleaded guilty to smuggling certain wildlife into the United States.<sup>131</sup> During sentencing, the defendant argued for a downward departure, explaining that because of the "cultural differences between the United States and Japan, he was unaware of the serious consequences of his actions, and that these cultural differences constituted a factor not considered by the Sentencing Commission that should be taken into account."<sup>132</sup> The district court granted the departure, but the Eleventh Circuit vacated and remanded the case for resentencing.<sup>133</sup>

The Eleventh Circuit, citing *United States v. Yu*, found that considering 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."<sup>134</sup> Without reaching the question of whether cultural differences may ever serve as a ground to depart, the court found that the circumstances of the instant case did not merit a departure.<sup>135</sup> The court cited the defendant's knowledge of United States regulations forbidding importation of the animals in question and his comprehension of the custom forms he filled out.<sup>136</sup>

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> 143 F.3d 1401 (11th Cir. 1998).

<sup>131</sup> *Id.* at 1402.

<sup>132</sup> *Id.* at 1403.

<sup>133</sup> *Id.* at 1405.

<sup>134</sup> *Id.* at 1404 n.2.

<sup>135</sup> *Id.* at 1404 n.4.

<sup>136</sup> *Id.* at 1404.

*C. Non-American Cultural Departures Related to Native American Reservation Life*<sup>137</sup>

Three Eighth Circuit decisions<sup>138</sup> involving defendants raised on Native American reservations may be interpreted as approving non-American cultural departures.<sup>139</sup> One circuit court cited these decisions for the proposition that some courts “allow a cultural factor, specifically, having grown up on an Indian reservation, to be used in sentencing.”<sup>140</sup> Yet, it is not clear that these cases carve out an exception for non-American cultural departures. A close reading suggests these cases may depart on more familiar grounds, such as family ties and responsibilities (Section 5H1.6), employment related contributions and record of prior good works (Section 5H1.11), and physical condition (Section 5H1.4).<sup>141</sup>

In *United States v. Big Crow*,<sup>142</sup> the Eighth Circuit affirmed a district judge’s departure on the basis of the defendant’s “excellent employment record and his consistent efforts to overcome the adverse environment” of the reservation.<sup>143</sup> Similarly, in *United States v. One Star*<sup>144</sup> and *United States v. Decora*,<sup>145</sup> the court approved the sentencing judge’s departure based on “the combination of the difficulty of life on the reservation and the extraordinary and unusual nature [of the defendant’s] educational record and community leadership.”<sup>146</sup> As part of this analysis, the court relied on recognized grounds for departures, including physical condition, employment record, family ties, and good works.<sup>147</sup> In *One Star*, the Eighth Circuit also distinguished *Big Crow* from a case involving a denial

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<sup>137</sup> I am not suggesting that Native American culture is “non-American.” In fact, unlike the other aforementioned cultures, Native American culture is indigenous to the United States. I am simply using my previously defined term to distinguish this departure from one on assimilation grounds.

<sup>138</sup> *United States v. Decora*, 177 F.3d 676 (8th Cir. 1999); *United States v. One Star*, 9 F.3d 60 (8th Cir. 1993); *United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990).

<sup>139</sup> See Diffily, *supra* note 7, at 279.

<sup>140</sup> *United States v. Guzman*, 236 F.3d 830, 832 (7th Cir. 2001).

<sup>141</sup> See, e.g., *One Star*, 9 F.3d at 61.

<sup>142</sup> 898 F.2d 1326 (8th Cir. 1990).

<sup>143</sup> *Id.* at 1331.

<sup>144</sup> 9 F.3d 60 (8th Cir. 1993).

<sup>145</sup> 177 F.3d 676 (8th Cir. 1999).

<sup>146</sup> *Id.* at 679. See also *One Star*, 9 F.3d at 61.

<sup>147</sup> *One Star*, 9 F.3d at 61; see also *Decora*, 177 F.3d at 678 (discussing physical condition, employment record, and family ties).

of a departure based on the defendant's race.<sup>148</sup> Although noting that the latter departure was based on Section 5H1.10 of the Guidelines, and therefore rightly rejected as a departure ground, the court concluded that granting the departure in *Big Crow* was consistent based on the defendant's employment record and efforts to overcome the conditions of his Native American reservation life.<sup>149</sup>

Whether these cases represent a tacit acceptance of a departure on non-American cultural grounds is beyond the scope this article. The language of the opinions suggests otherwise in that the departures were based on a collection of already accepted grounds (e.g., family ties and employment record) rather than specifically on cultural grounds. Even so, such non-American cultural departures would be limited to cases relating to Native American reservation life.<sup>150</sup>

*D. Non-American Cultural Departures Associated with Prohibited Factors Under Section 5H1.10*

Nearly all the cases that reject non-American cultural departures associate these departures with the prohibited factors listed in Section 5H1.10.<sup>151</sup> In *United States v. Guzman*, Judge Posner provides the most pointed discussion on the topic. Although acknowledging that "culture or . . . ethnicity is not specified in the guideline or in the statutory provision that compelled it," he reasoned that the drafters intended for these aspects to be subsumed under the prohibited factors of Section 5H1.10.<sup>152</sup> In this way, he suggested that culture is inextricably linked to the prohibited factors such as race and nationality.<sup>153</sup> These prohibited factors would "unravel" if culture were an admissible consideration in sentencing.<sup>154</sup> Though not as detailed, other courts have also relied on Section 5H1.10 to deny non-American cultural departures. In *United States v. Contreras* and *United States v. Dyck*, the Eighth and Tenth Circuits explicitly cited these

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<sup>148</sup> *One Star*, 9 F.3d at 61.

<sup>149</sup> *Id.*

<sup>150</sup> In fact, none of these cases overrule or call into question the findings in *Natal-Rivera*. See *United States v. Decora*, 177 F.3d 676 (8th Cir. 1999).

<sup>151</sup> See, e.g., *Dyck*, 334 F.3d at 743; *United States v. Guzman*, 236 F.3d 830, 832 (7th Cir. 2001); *United States v. Contreras*, 180 F.3d 1204, 1212 n.4 (10th Cir. 1999); *United States v. Yu*, 954 F.2d 951, 953 (3d Cir. 1992); *United States v. Natal-Rivera*, 879 F.2d 391, 393 (8th Cir. 1989).

<sup>152</sup> *Guzman*, 236 F.3d at 832.

<sup>153</sup> See *id.*

<sup>154</sup> *Id.*

prohibited factors in rejecting a departure based on the defendants' Hispanic/Mexican-American and Mennonite cultures respectively.<sup>155</sup>

*E. Post-United States v. Booker Non-American Cultural Departure Jurisprudence*

In the post-*Booker* context, courts continue to reject non-American cultural departures.<sup>156</sup> In one case, the defendant, convicted of a drug related offense, sought a departure based on her Mexican cultural background that “taught her to be obedient and subservient to older family members.”<sup>157</sup> The district court, relying on *United States v. Contreras*, found that this cultural consideration came close to relying on national origin, a prohibited departure ground.<sup>158</sup> In another case, a defendant convicted of money laundering sought a downward departure based on the alleged “discrepancy between the Columbian government’s tacit condonation toward money transferring activity and this country’s attitude.”<sup>159</sup> The district court held it could not “find any basis for a guidelines departure in the cultural circumstances surrounding the offense.”<sup>160</sup>

In an interesting parallel, the Ninth Circuit reviewed a case where a sentencing judge used cultural factors to increase a defendant’s sentence for possession of methamphetamine and transporting and harboring illegal aliens.<sup>161</sup> The district judge relied on the defendant’s “citizenship, multi-cultural background and bilingual ability” to conclude “statistically he’s the kind of person that would engage in this kind of conduct in the future.”<sup>162</sup> The appellate court found that the sentencing judge abused his discretion by considering factors prohibited under Section 5H1.10.<sup>163</sup>

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<sup>155</sup> *Contreras*, 180 F.3d at 1212 n.4; *Dyck*, 334 F.3d at 743.

<sup>156</sup> See, e.g., *United States v. Romero*, 269 F. App’x 689, 690 (9th Cir. 2008); *United States v. Palma*, 376 F. Supp. 2d 1203, 1217–18 (D. N.M. 2005); *United States v. Torres*, No. 01 CRr. 1078, 2005 WL 2087818, at \*1–2 (S.D.N.Y. Aug. 30, 2005).

<sup>157</sup> *Palma*, 376 F. Supp. 2d at 1221.

<sup>158</sup> *Id.*

<sup>159</sup> *Torres*, 2005 WL 2087818, at \*1 (internal quotations omitted).

<sup>160</sup> *Id.* at \*2.

<sup>161</sup> *Romero*, 269 F. App’x at 690.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

## V. DISPARATE TREATMENT OF CULTURAL DEPARTURES

### A. Summary of Case Law

Federal courts afford disparate treatment to each of the cultural departures.<sup>164</sup> American assimilation departures are permissible and associated with family ties under Section 5H1.6,<sup>165</sup> while non-American cultural departures are disfavored and associated with the prohibited factors under Section 5H1.10.<sup>166</sup> But, the basic thrust of these cultural departures appears to be the same: a defendant requests a reduced sentence because a specific cultural connection motivated them to commit the crime. With American assimilation departures, the motivation comes from a defendant's ties to this country, and with non-American cultural departures, the motivation comes from a defendant's ties to a foreign culture.

Along the same lines, courts have taken a sympathetic view of the culpability of a defendant seeking a departure based on American assimilation grounds,<sup>167</sup> but not one seeking a non-American departure.<sup>168</sup> Courts have found that defendants who illegally reentered the United States based on cultural ties to this country are less culpable than their counterparts who reentered for economic reasons.<sup>169</sup> Obviously, courts rejecting non-American cultural departures failed to find these defendants less culpable than ones who commit the crime for non-cultural reasons.<sup>170</sup> But even when courts do not overtly rule against such departures, there is little evidence suggesting that they would find such defendants less culpable (and thus grant a departure). For instance, in *United States v. Yu*, the court did not consider a departure appropriate even in a hypothetical case with an unschooled recent immigrant who did not fully understand American law.<sup>171</sup>

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<sup>164</sup> Compare discussion *supra* Part III (discussing courts' approval of American assimilation departures), with discussion *supra* Part IV (discussing courts' disapproval of non-American cultural departures).

<sup>165</sup> See discussion *supra* Part III.C.

<sup>166</sup> See discussion *supra* Part IV.D.

<sup>167</sup> See discussion *supra* Part III.E.

<sup>168</sup> See discussion *supra* Part IV.B.

<sup>169</sup> See discussion *supra* Part III.E.

<sup>170</sup> See discussion *supra* Part IV.B.

<sup>171</sup> *United States v. Yu*, 954 F.2d 951, 954 n.2 (3d Cir. 1992).

*B. Definition of Culture in Context of Sentencing*

Part of the problem with this apparent inconsistency in treatment rests with how one defines culture in the context of sentencing. For instance, the *Lipman* court did not define culture, but simply noted that the term was not in the Guidelines.<sup>172</sup> As a result, the court concluded that, except for the prohibited factors under Section 5H1.10, the Guidelines do not restrict the grounds upon which a court may depart.<sup>173</sup> The *Guzman* court took a completely different view, finding that culture was inextricably linked to the prohibited factors such as race and national origin.<sup>174</sup>

Scholars do not agree on a definition of culture either. For instance, Kelly Neff defines culture as “a myriad of learned and acquired factors” that cannot be reduced to race or national origin.<sup>175</sup> If culture were dependent on race or ethnicity, it would mean that “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.”<sup>176</sup> Based on this analysis, Neff argues that allowing American assimilation departures, but not non-American cultural departures “thwarts the basic ideas of fairness in sentencing.”<sup>177</sup> If one type of defendant is less culpable the same should be said of the other:

While the [*Lipman* court] argued that a defendant who illegally reentered the United States for cultural reasons was more sympathetic than one who illegally reentered for economic gain, 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. . . . And yet, while the sympathetic

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<sup>172</sup> *United States v. Lipman*, 133 F.3d 726, 730 (9th Cir. 1998).

<sup>173</sup> *Id.*

<sup>174</sup> *United States v. Guzman*, 236 F.3d 830, 832 (7th Cir. 2001). The dissent argued, “[C]ultural heritage has a meaning distinct from the ‘forbidden’ factors set forth in § 5H1.10.” *Id.* at 835 (Ripple, J., concurring in part, dissenting in part).

<sup>175</sup> Neff, *supra* note 9, at 469.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 472.

reentry defendant is given more lenient sentencing considerations, no circuit has specifically approved the use of [non-American cultural grounds] as a mitigating factor for the recent immigrant defendant.<sup>178</sup>

However, Kelly Diffily argues for the contrary position.<sup>179</sup> She acknowledges that culture may not always be dependent on a person's national origin or race, but "as a baseline matter it would be anomalous to allow judges to disentangle culture from [these factors] since identification with a distinct culture stems from [one or more of these factors]."<sup>180</sup> Under this definition of culture, courts should prohibit both American assimilation and non-American cultural departures. However, the purpose of this article is not to settle on a specific definition of culture, but to reconcile the disparate treatment courts give to the cultural departures.

Another scholar, Blair Westover, has tried to reconcile the disparate treatment by simply arguing that American assimilation cases do "not turn on the actual culture in question."<sup>181</sup> He argued, "[A]ny person of any culture would attempt to return to his or her homeland."<sup>182</sup> On one hand, American assimilation cases do not "hinge on any aspect unique to the culture of the United States."<sup>183</sup> On the other hand, non-American cultural cases such as *United States v. Yu* hinge on the unique properties of the foreign culture, in this instance, Korean culture.<sup>184</sup> Westover's rather brief explanation may be reduced to the proposition that American assimilation departures involve cultural ties generally while non-American cultural departures involve a specific aspect of a culture. This does not change the fact that culture remains the operative principle upon which courts depart. Whether it is American culture generally or a specific aspect of Korean culture, the question remains: why do courts privilege culture in the former instance but not the latter?<sup>185</sup>

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<sup>178</sup> *Id.*

<sup>179</sup> See Diffily, *supra* note 7, at 277. See also Martin, *supra* note 7, at 1326 (arguing for the contrary position).

<sup>180</sup> Diffily, *supra* note 7, at 277 (internal quotations omitted). Diffily does not address the disparate treatment of American assimilation and non-American cultural departures.

<sup>181</sup> Westover, *supra* note 10, at 367.

<sup>182</sup> *Id.* at 367–68.

<sup>183</sup> *Id.* at 368.

<sup>184</sup> *Id.*

<sup>185</sup> Another possible explanation may be that there is something unique about illegal reentry cases compared with the crimes associated with non-American culture departures.

(continued)

## VI. CULPABILITY IN SENTENCING AND ENTRAPMENT LAW

In addition to cultural considerations, determining a defendant's culpability is an important factor in sentencing. Culpability or the general blameworthiness of a defendant is a familiar term in the criminal system.<sup>186</sup> It is important to distinguish this term from *mens rea*, which is a necessary element for the commission of a crime.<sup>187</sup> Someone may possess the requisite *mens rea* for a crime, but can still be found not culpable or blameworthy.<sup>188</sup> For instance, someone who kills in self-defense may commit the requisite criminal act (in this case homicide), but he may be found not blameworthy, and consequently not guilty of the offense.

### A. *Reduced Culpability and Apportionment of Culpability in Sentencing*

Assessing the culpability of a defendant is an integral part of sentencing.<sup>189</sup> Though the defendant has been found guilty of the crime,

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A person who illegally reenters this country does not further American culture in the same way that a person furthers his foreign culture by committing a crime because of his non-American cultural ties. However, this explanation is ultimately unpersuasive. For one, it is not entirely clear that illegal reentry crimes (unlike other crimes) do not further American culture in the same way. Second, the Guidelines do not restrict departures to only certain crimes. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (failing to restrict departures to specific crimes, except child and sex crimes, which do not apply here). Finally, this explanation fails to account for why courts apply American assimilation departures only in connection with a defendant's motivation to reenter, see discussion *supra* Part III.D, or why courts find such a defendant less culpable (and thus warranting a departure) than his counterpart who reenters for economic reasons. See discussion *supra* Part III.E.

<sup>186</sup> See *Tison v. Arizona*, 481 U.S. 137, 156 (1987) ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."); Nancy S. Kim, *Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants*, 17 U. FLA. J.L. & PUB. POL'Y 199, 214–15 (2006) (discussing culpability and cultural defenses); John Shepard Whiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1026–27 (1999) (discussing culpability and criminal liability).

<sup>187</sup> Kim, *supra* note 186, at 212.

<sup>188</sup> *Id.*; see generally Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1 (2002) (distinguishing intent and culpability and providing related historical analysis).

<sup>189</sup> See 18 U.S.C. § 3553(a)(1) (2003) (noting the relevance in sentencing of "the nature and circumstances of the offense and the history and characteristics of the defendant"); 28 U.S.C. § 994(d)(4) (mentioning that various defendant characteristics are relevant in sentencing, including "mental and emotional condition to the extent that such condition

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courts adjust sentences based on the circumstances surrounding the commission of the offense, including a defendant's participation or involvement in the crime relative to other participants or similarly situated defendants.<sup>190</sup> Common considerations bearing on the defendant's blameworthiness may include the culpability of co-defendants,<sup>191</sup> a mitigating role in crime,<sup>192</sup> and the vulnerability of the victim.<sup>193</sup>

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mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant"); *Williams v. New York*, 337 U.S. 241, 247 (1949) ("[T]he punishment should fit the offender and not merely the crime."); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002) ("[T]he principle that punishment should be directly related to the personal culpability of the criminal defendant."); Marc Miller & Daniel J. Freed, *Offender Characteristics and Victim Vulnerability: The Difference Between Policy Statements and Guidelines*, 3 FED. SENT'G REP. 3, 5 (1990) (noting that the blameworthiness of the defendant historically has been an "integral component[] of just sentencing"); Jon M. Sands, *Letter from Federal Defenders to U.S. Sentencing Commission About Federal Sentencing Since United States v. Booker*, 18 FED. SENT'G REP. 106, 107 (2005) (mentioning that courts must consider a host of factors that bear on, among other things, a defendant's culpability).

<sup>190</sup> See, e.g., Miller, *supra* note 189, at 6 ("Certain characteristics of offenders relate to the culpability or degree of blameworthiness of the particular defendant. Illustrations include mental competency, age, education, criminal record, position of trust, role in the offense, domination by a codefendant, and intoxication."); Sands, *supra* note 189, at 108.

The courts have found that a wide variety of mitigating circumstances of the offense (e.g., motive, role in the offense, lack of *mens rea*) and characteristics of the defendant (e.g., age, addiction, physical or mental illness, family responsibilities, tragic upbringing, demonstrated commitment to rehabilitation, treatment as a more effective means of protecting the public, solid employment record, good works in the community, and lack of a prior criminal record) are very relevant in arriving at what particular sentence is sufficient but not greater than necessary to provide proportional punishment and deterrence, to protect society, and to provide needed treatment and rehabilitation.

*Id.*

<sup>191</sup> See 18 U.S.C. § 3553(a)(6) (2003) ("[T]he need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."); Sands, *supra* note 189, at 108 n.26 (collecting cases where federal courts adjust a defendant's sentence based on relative culpability of co-defendants).

<sup>192</sup> See U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 and related Commentary (noting a downward level Guideline adjustment for the minimal role in the crime where the defendant is less culpable than other defendants involved). See, e.g., *United States v.*  
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Certain departures under the Guidelines also speak to the specific characteristics of defendants and their related culpability.<sup>194</sup> For instance, a sentencing judge can depart downward based on a defendant's choice of lesser harms,<sup>195</sup> diminished capacity,<sup>196</sup> a victim's role in the offense,<sup>197</sup> or

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*Morales-Machuca*, 546 F.3d 13, 24 (1st Cir. 2008) (noting their authority to adjust for minimal role of the defendant where he or she is less culpable than other defendants); Timothy M. Hall, Annotation, *What Constitutes Playing "Mitigating Role" in Offense Allowing Decrease in Offense Level Under United States Sentencing Guideline § 3B1.2*, 18 *U.S.C.S. Appendix*, 100 A.L.R. FED. 156, 160 (1990) (collecting cases where federal courts adjust sentences based on mitigating roles of defendants).

<sup>193</sup> See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b)(1) (noting an upward Guideline level adjustment based on the defendant's knowledge of vulnerability of the victim); *United States v. Vega-Iturrino*, 565 F.3d 430, 434 (8th Cir. 2009) (mentioning the sentencing judge's authority to upwardly adjust a Guideline level based on the vulnerability of the victim); *United States v. Morrill*, 984 F.2d 1136, 1137 (11th Cir. 1993) (noting that Section 3A.1 applies when "the special vulnerability of the victim makes the offender more culpable than he otherwise would be in committing the particular offense").

<sup>194</sup> See, e.g., *United States v. Newby*, 11 F.3d 1143, 1148 (3d Cir. 1993).

The illustrations given by the Commission as possible bases for downward departure, such as coercion and duress . . . diminished capacity . . . and voluntary disclosure of offense . . . are all circumstances that closely relate to the culpability of the defendant. Of course these illustrations are not exhaustive, but the Commission's interpretation supports our reading of the term as requiring mitigation of guilt or culpability.

*Id.* (citations omitted). I note here that these departures are conceptually different from departures not related to a defendant's culpability, but rather pertaining to other extenuating circumstances. These include, for example, departures based on family responsibilities during confinement or aberrant behavior. U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.6 & 5K2.20. See, e.g., *United States v. Monaco*, 23 F.3d 793, 802 (3d Cir. 1994) (noting that a family ties departure was warranted because the defendant was the sole provider for his mentally ill wife, but this departure did not "bear on [the defendant's] level of guilt or culpability" in committing the crime).

<sup>195</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K2.11 (noting the permissibility of a downward departure where "a defendant may commit a crime in order to avoid a perceived greater harm").

<sup>196</sup> *Id.* at § 5K2.13 (noting the permissibility of a downward departure where the defendant was suffering from a significantly reduced mental capacity contributing to his commission of the offense).

the presence of coercion or duress.<sup>198</sup> For example, in a departure based on lesser harms, a court finds that the defendant committed the crime to prevent a greater harm.<sup>199</sup> Although the defendant is guilty of the crime, the defendant's motive makes him or her less culpable than similarly situated defendants who committed the crime for other reasons. The same reasoning applies in diminished capacity cases. A court finds that a defendant whose state of mind was impaired during the commission of the offense is less culpable, and thus, merits a lower sentence than a similarly situated defendant of sound mind.<sup>200</sup> No other person shares the blame for these criminal acts. Rather, the defendant's unique motivation to commit the crime or mental state makes the defendant less blameworthy.

Departures based on the victim's role or coercion are somewhat similar. Here too, the court finds that the defendant deserves a lesser sentence because of his or her reduced culpability relative to similarly situated defendants.<sup>201</sup> A court can depart on a finding that the victim substantially provoked the offense<sup>202</sup> or, in the case of coercion, a finding that a co-defendant or another party played a substantial role in motivating the defendant to commit the crime.<sup>203</sup> However, what distinguishes these cases from the lesser harms or diminished capacity departures is that one

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<sup>197</sup> *Id.* at § 5K2.10 (“If the victim’s wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense.”).

<sup>198</sup> *Id.* at § 5K2.12 (“If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may depart downward.”).

<sup>199</sup> *United States v. Carvell*, 74 F.3d 8, 12 (1st Cir. 1996) (granting a downward departure on lesser harm grounds where the defendant manufactured marijuana as an alternative to suicide).

<sup>200</sup> *See, e.g., United States v. Riedl*, 164 F. Supp. 2d 1196, 1201 (D. Haw. 2001) (noting that diminished capacity or reduced mental capacity makes a defendant less culpable and departure is appropriate); *United States v. Grooters*, No. 1:07-CR-001, 2008 WL 2561380, at \*9 (W.D. Mich. June 24, 2008) (finding that a departure was warranted based on the defendant’s diminished capacity due to prescription drugs).

<sup>201</sup> *See, e.g., United States v. Gallegos*, 129 F.3d 1140, 1144–45 (10th Cir. 1997).

<sup>202</sup> *See, e.g., United States v. Yellow Earrings*, 891 F.2d 650, 653–54 (8th Cir. 1989) (affirming a sentencing judge’s downward departure based on a finding that the victim’s “misconduct substantially contributed to provoking the offense behavior”).

<sup>203</sup> *See, e.g., United States v. Enlow*, No. CR 06-2364 JB, 2007 WL 5231706, at \*7 (D. N.M. Aug. 23, 2007) (noting that coercion requires defendants to be under an “unlawful and present, imminent, or impending threat” and alleging a friend’s threat was insufficient to warrant departure under Section 5K2.12).

can conceptually apportion culpability amongst various participants of the crime.<sup>204</sup> Whether it is the victim who played a role in the offense or a third party who coerced the defendant to commit the crime, each of these individuals shares some of the blame for the crime. This apportionment then explains why courts reduce the sentence of these defendants. They are not entirely to blame; someone else is partially responsible for the offense.

The apportionment of culpability between the defendant and other participants also applies in American assimilation departures.<sup>205</sup> Instead of a victim or co-defendant, the government shares part of the culpability for the illegal reentry, thus reducing the defendant's portion of the blame and consequently his or her sentence.

*B. Entrapment and the Apportionment of Culpability Between the Defendant and Government*

The idea of the government sharing culpability for a defendant's wrongdoing is not a new concept in criminal law. The entrapment defense has long been recognized in situations where courts find that the defendant is not guilty of the crime due to the actions of the government.<sup>206</sup> An entrapment defense is difficult to show, however, and requires more than mere artifice or stratagem on the part of the government.<sup>207</sup> The

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<sup>204</sup> This idea of apportionment of culpability can be likened to similar notions in tort law. See, e.g., Michael D. Green, *Second Thoughts About Apportionment in Asbestos Litigation*, 37 S.U. L. REV. 531, 532–33 (2008).

<sup>205</sup> See, e.g., *United States v. Lipman*, 133 F.3d 726, 731 (9th Cir. 1998) (“[C]ultural assimilation is a fact-specific ground for departure that may speak to an individual defendant’s offense, his conduct and his character, and not just to possible future events unrelated to the defendant’s individual circumstances.”).

<sup>206</sup> See *Jacobson v. United States*, 503 U.S. 540, 542 (1992); *United States v. Russell*, 411 U.S. 423, 436 (1973); *Sorrells v. United States*, 287 U.S. 435, 437 (1932); Jess D. Mekeel, *Misnamed, Misapplied, and Misguided: Clarifying the State of Sentencing Entrapment and Proposing a New Conception of the Doctrine*, 14 WM. & MARY BILL OF RTS. J. 1583, 1588 (2006) (describing the long history of the entrapment defense in American jurisprudence).

<sup>207</sup> *Jacobson*, 503 U.S. at 548 (“It is well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprise.” (internal citation omitted)). It is important to note that “the doctrine of entrapment does not generally extend to acts of inducement by a private citizen who is not an officer of the law or government agent.” 21 AM. JUR. 2D *Criminal Law* § 207 (2009). See also *United States v. Morris*, 549 F.3d 548, 551 (7th Cir.

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government must implant or otherwise create in the defendant's mind the disposition to commit a criminal act and then induce the defendant to commit the crime.<sup>208</sup> For instance, in *Jacobson v. United States*,<sup>209</sup> the Supreme Court found entrapment where the government's sting operation involving child pornography charges consisted of targeted and repeated mailings over the course of approximately two years causing the defendant to become predisposed to break the law.<sup>210</sup> Because entrapment is an affirmative defense (much like self-defense),<sup>211</sup> the defendant still possesses the *mens rea* or the requisite intent for commission of the crime.<sup>212</sup> The issue is whether the defendant would have committed the crime had the government not induced him.<sup>213</sup> By successfully showing

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2008) ("There is no defense of private entrapment."); Andrew Carlon, *Entrapment, Punishment, and the Sadistic State*, 93 VA. L. REV. 1081, 1083–85 (2007) (discussing the disparate treatment of entrapment and private entrapment).

<sup>208</sup> *Jacobson*, 503 U.S. at 548; see also *United States v. Bala*, 236 F.3d 87, 94 (2d Cir. 2000) ("[T]he defense [of entrapment] has two elements: (1) government inducement of the crime, and (2) lack of predisposition on the defendant's part." (internal quotations and citation omitted)); Anthony M. Dillof, *Unraveling Unlawful Entrapment*, 94 J. CRIM. L. & CRIMINOLOGY 827, 831–34 (2004) (describing the elements of entrapment).

<sup>209</sup> 503 U.S. 540 (1992).

<sup>210</sup> *Id.* at 550.

<sup>211</sup> *United States v. Brace*, 145 F.3d 247, 257 (5th Cir. 1998); *Bala*, 236 F.3d at 94.

<sup>212</sup> See, e.g., *United States v. Armenta-Lopez*, No. 92-50535, 1993 WL 402954, at \*4 (9th Cir. Oct. 7, 1993) ("The defendant's *mens rea*, while he is physically carrying out the criminal act, is not particularly relevant to the defense of entrapment. What is critical is an earlier state of mind when the entrapment supposedly took place.") (Norris, J., dissenting); Katrice L. Bridges, *The Forgotten Constitutional Right to Present a Defense and Its Impact on the Acceptance Responsibility–Entrapment Debate*, 103 MICH. L. REV. 367, 374 (2004) (noting that entrapment does not negate *mens rea*, but is an affirmative defense and citing confusion by certain courts).

<sup>213</sup> *Jacobson*, 503 U.S. at 548; *Bala*, 236 F. 3d at 94; Bridges, *supra* note 212, at 374.

The crux of the entrapment defense is causation, or whether the defendant would have committed the crime had the government not induced him. Once the defendant has shown [this] . . . the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime before being approached by law enforcement officials.

*Id.*

entrapment, a defendant is not culpable or blameworthy for the crime.<sup>214</sup> Again, one can conceptually consider the culpability for the offense transferring to the government.<sup>215</sup> Of course, the government or its officials do not suddenly become guilty of the crime. This analysis is not rooted in criminal liability but rather intuitive notions of culpability. Because the government caused the defendant to commit the crime, the blame for the offense appropriately shifts to the government, and the defendant is found not guilty.

Entrapment also plays a role in sentencing. Sometimes referred to as “incomplete entrapment,” a court departs downward based on the government’s aggressive encouragement to commit the crime.<sup>216</sup> A court may find that “the conduct of th[e] investigation, although not amounting to entrapment, was sufficiently coercive in nature as to warrant a downward departure under Guideline 5K2.12.”<sup>217</sup> For instance, one court

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<sup>214</sup> *Sorrells v. United States*, 287 U.S. 435, 448 (1932) (noting the availability of the entrapment defense to “persons otherwise innocent” who are lured by the government to commit the crime); *Sherman v. United States*, 356 U.S. 369, 376 (1958) (arguing the purpose of entrapment is to prevent government from taking advantage of the “weaknesses of an innocent party” and trick him or her into “committing crimes which he [or she] otherwise would not have attempted”); *United States v. Russell*, 411 U.S. 423, 429 (1973) (“To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.” (internal quotations and citation omitted)); Dillof, *supra* note 208, at 845 (noting that defendants who show successful entrapment defense are not blameworthy).

<sup>215</sup> See, e.g., *Sherman*, 356 U.S. at 376 (noting that in entrapment cases, the government “beguiles” the defendant into the committing the crime); see also cases cited *supra* note 214.

<sup>216</sup> *United States v. Reyes*, 236 F. App’x 731, 735 (2d Cir. 2007) (“A departure for imperfect entrapment is based on conduct by the government that does not give rise to an entrapment defense but that is nonetheless aggressive encouragement of wrongdoing.” (internal quotations and citation omitted)); *United States v. Mejia*, 559 F.3d 1113, 1118 (9th Cir. 2009) (“A downward departure in sentencing may be appropriate where the level of coercion or duress does not rise to a complete defense” of entrapment.”); Suzanne Mitchell, *Clarifying the United States Sentencing Guidelines’ Focus on Government Conduct in Reverse Sting Sentencing: Imperfect Entrapment as a Logical Incomplete Defense That Warrants Departure*, 64 GEO. WASH. L. REV. 746, 761–65 (1996) (discussing departures based on incomplete entrapment and noting courts that have approved such departures); U.S. SENTENCING GUIDELINES MANUAL § 5K2.12 (discussing departure based on coercion or duress).

<sup>217</sup> *United States v. Garza-Juarez*, 992 F.2d 896, 910 (9th Cir. 1993) (reinforcing the district court’s ruling).

based its departure on a finding that a government agent initially proposed the activity and persistently contacted the defendant by telephone and in person over several months until the crime was committed.<sup>218</sup> Though these actions did not amount to a complete defense of entrapment, they were sufficient to merit a departure.<sup>219</sup> By raising an incomplete entrapment defense, a defendant does not negate his guilt, but simply seeks to lessen his culpability and thus his ultimate sentence.<sup>220</sup> As one scholar noted, such departures “identif[y] a proper check on the capacity of governmental agents to distort the factors which ought to measure culpability and the extent of punishment.”<sup>221</sup> Like complete entrapment, incomplete entrapment and a court’s related mitigation of a defendant’s sentence also represent an acknowledgement of the government’s

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<sup>218</sup> *Id.* at 912.

<sup>219</sup> *Id.* at 910.

<sup>220</sup> *See, e.g.,* United States v. Pacheco-Osuna, 23 F.3d 269, 272 (9th Cir. 1994) (recognizing “misconduct of an entrapping nature” by the government may warrant a downward departure because “entrapment . . . can cast light upon a defendant’s culpability”); United States v. Staufer, 38 F.3d 1103, 1107 (9th Cir. 1994) (noting that downward departures based on entrapment permit judges to “ensure that the sentences imposed reflect the defendants’ degree of culpability”); Mitchell, *supra* note 216, at 766 (raising imperfect entrapment does not “negate [the defendant’s] guilt, but lessen[s] her culpability”). Courts have distinguished this concept of “imperfect entrapment” from a related departure called “sentencing entrapment” or “sentencing manipulation.” “Sentencing entrapment occurs when a defendant is predisposed to commit a lesser crime, but is entrapped by the government into committing a crime subject to more severe punishment,” whereas imperfect entrapment occurs when the government has applied a certain amount of coercion or duress in connection with the stated offense that does not rise to the level of a complete defense but still merits a departure. *Mejia*, 559 F.3d at 1118; Mitchell, *supra* note 216, at 761–67 (distinguishing the doctrine of “sentencing entrapment” from “imperfect entrapment” where the former relates to the commission of a more severe offense and the latter relates to the disposition to commit the stated offense). Other courts seem to treat these as the same departure. *See, e.g.,* United States v. Beltran, 571 F.3d 1013, 1019 n.1 (10th Cir. 2009) (collecting “sentencing entrapment” cases that could be categorized under “imperfect entrapment”). For my purposes, it is not important whether these are two separate entrapment departures or two versions of the same departure. In both cases, the government’s actions lessen the culpability of the defendant and a departure may be warranted. *See, e.g.,* United States v. Fontes, 415 F.3d 174, 180 (1st Cir. 2005) (finding a court can depart downward under “sentencing entrapment” where a government agent improperly enlarged the scope or scale of a crime).

<sup>221</sup> Jeff Staniels, *Grading Culpability at Sentencing: The Example of Sentencing Entrapment*, 7 FED. SENT’G REP. 178, 179 (1995).

culpability in the offense. Only this time, a portion of the culpability shifts to the government officials who encouraged the commission of the offense. In this way, one can think of both the defendant and the government sharing responsibility for the commission of the crime.

## VII. APPORTIONMENT OF CULPABILITY AND CULTURAL DEPARTURES

### *A. Apportionment of Culpability Between the Defendant and Government in American Assimilation Departures*

Similarly, American assimilation departures can be analyzed in terms of the apportionment of culpability. Like in the case of incomplete entrapment, one can shift part of the blame for the illegal reentry to the government, based on its role in the offense. As noted above, in the case of American assimilation departures, courts have found that a defendant who illegally reenters the United States based on cultural ties to this country is less culpable than one who reenters for economic reasons.<sup>222</sup>

What exactly makes this defendant less culpable? One answer might be that courts value non-economic motives over monetary ones. Under this theory, an American assimilation departure would be similar to a diminished capacity or lesser harm departure described above. There is no third party or entity with whom to apportion culpability. The unique motivation of the defendant himself (in this case, cultural ties) warrants a departure. However, under this principle, a court must also allow non-American cultural departures. Like his American assimilation counterpart, a defendant in this case commits the crime based on his unique cultural ties, rather than economic reasons. Yet, as discussed above, courts have rejected non-American cultural departures,<sup>223</sup> and thus have not found these defendants less culpable.<sup>224</sup>

The role of the government provides the crucial distinguishing factor between these two cultural departures. Only in American assimilation departures can a person conceptually assign the government some culpability for the offense.<sup>225</sup> America is responsible for the defendant's

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<sup>222</sup> See discussion *supra* Part III.E.

<sup>223</sup> See discussion *supra* Part IV.

<sup>224</sup> See discussion *supra* Part V.

<sup>225</sup> This also explains why courts do not depart when defendants illegally return to this country for economic motives. The government did not directly cause or otherwise uniquely create the individual economic incentives that motivated these defendants to illegally reenter.

assimilation that ultimately motivated him or her to return. There is nothing controversial about the role a country plays in assimilating those immigrants who live within the country's boundaries.<sup>226</sup> It is almost axiomatic that a country's laws, institutions, mores, and culture provide the means by which an individual is assimilated.<sup>227</sup>

The government's role in American assimilation cases is somewhat different from its role in an incomplete entrapment setting. First, there is no agent or official contributing to the defendant's illegal reentry. Second, unlike with incomplete entrapment, the government does not intentionally encourage the commission of the illegal reentry. Even so, the basic principle of facilitating the commission of the crime remains the same. America created a situation, through its laws, institutions, customs, mores, by which a defendant assimilated into American culture. This assimilation then motivated the defendant's illegal return. Similar to an incomplete entrapment departure, an American assimilation departure signifies recognition of the government's partial culpability.

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<sup>226</sup> See Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347, 1353 (2005) (discussing America's historical role in the assimilation of immigrants); Sylvia R. Lazos Vargas, *Foreword: Emerging Latina/o Nation and Anti-Immigrant Backlash*, 7 NEV. L.J. 685, 700 (2007) (discussing the process of assimilation into America and noting that assimilation includes the "process of adopting and taking on as one's own cultural values and behaviors, such as language, dress, or speech, of the native group"); MILTON M. GORDON, *ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS* (1964) (discussing the process of assimilating into America and role of American culture).

<sup>227</sup> See Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 333 (1986) (noting various aspects that promote assimilation in America, including "speaking English, attending the public schools, listening to the national broadcast media, entering the job market, [and] joining a union"); Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 335 (2007) (focusing on public schools as a means of assimilation into a host country); Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 234 (2007) (discussing the host country's role in assimilation of immigrants and noting that successful assimilation is defined by the immigrants' full participation "in the country's economic, social, and cultural life"). Detailing the exact characteristics of assimilation—when it occurs, to what degree it occurs, whether it is a positive process—all lie beyond the scope of this article. For my purposes, it is enough to note that America (through its institutions, laws, and mores, etc.) is responsible for an immigrant's assimilation into this country.

*B. Justification for Disparate Treatment of the Cultural Departures*

The idea of government culpability also explains why courts depart on American assimilation grounds, but not on non-American cultural grounds. In the latter, the government does not cause the defendant to commit the crime.<sup>228</sup> By definition, this departure relies on ties to non-American cultures. Furthermore, the apportionment of culpability also explains why the disparate treatment of these cultural cases does not necessarily implicate an American culture bias. Courts depart for the same reason they would depart in incomplete entrapment cases—namely, the government played a role in making the defendant commit the crime. The government's role in American assimilation cases is the creation of a cultural connection through the defendant's assimilation. America plays no such role when a defendant commits a crime based on non-American cultural ties, thus a departure would be inappropriate.

Apportioning culpability also explains why courts may be more sympathetic to cultural departures relating to defendants living on Native American reservations.<sup>229</sup> The government played a unique role in creating and shaping Native American reservation life.<sup>230</sup> It is therefore understandable that a court would depart based on the hardships associated with reservation life, but not, for instance, the cultural mores of Korean society. Again, the government did not play a role in creating or shaping Korean cultural beliefs. This analysis does not assume a bias for any particular culture, nor does it seek to scrutinize the government's role in such cases. Rather, apportioning culpability between the defendant and the government explains why courts have granted American assimilation departures (and possibly Native American reservation departures), but not non-American cultural departures.

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<sup>228</sup> A non-American cultural departure can be analogized to the private entrapment defense, which does not serve as a defense in criminal cases. *See supra* text accompanying note 207. Here, the foreign or non-American culture serves as the private citizen who induces the defendant to commit the crime.

<sup>229</sup> *See* discussion *supra* Part IV.C.

<sup>230</sup> *See generally* Daniel T. Campbell, *The Courts, the Government, and Native Americans: The Politics and Jurisprudence of Systematic Unfairness*, 3 RACE & ETHNIC ANC. L. DIG. 30 (1996) (discussing Americans' historical role in Native American life, including the creation of Native American reservations).

### VIII. CONCLUSION

The fact that courts depart on American assimilation grounds, but not non-American cultural grounds may at first glance suggest some bias in favor of American culture. However, these cases can be read consistently in a way that does not privilege one culture over the other. Instead, much like incomplete entrapment departures, American assimilation departures simply represent a tacit understanding of the government's partial responsibility for the crime of illegal reentry.

Indeed, there is nothing new about the government shouldering some of the blame for an offense, and entrapment laws support the idea of apportioning culpability between the defendant and the government. Through its laws, institutions, and customs, the government created a situation where a defendant assimilated into America, and it was this assimilation that motivated their illegal return. With non-American cultural departures, the Government is not responsible for causing the defendant to commit the crime. By recognizing this difference, the apparent disparate treatment of downward departures under the United States Sentencing Guidelines based on American and non-American cultural ties can be reconciled.