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THE DILEMMA OF DIFFERENCE: RACE AS A SENTENCING FACTOR

PALCIDO G. GOMEZ*

I. INTRODUCTION

[T]he dilemma of difference: by taking another person's difference into account . . . you risk reiterating the significance of that difference and, potentially, its stigma and stereotyping consequences. But if you do not take another person's difference into account - in a world that has made that difference matter - you may also recreate and reestablish both the difference and its negative implications.¹

This paper addresses the dilemma of difference, specifically that associated with the race of an offender, as it affects criminal sentencing under the federal sentencing guidelines mandated by the Sentencing Reform Act.² I argue that federal judges should continue to consider an offender's race as a mitigating factor³

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1. Martha Minow, *The Supreme Court 1986 Term - Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 71 (1987).

2. 18 U.S.C. §§ 3551-3742 (1988); 28 U.S.C. §§ 991-998 (1988). One member of the Sentencing Commission called the guidelines "probably the most significant change in the criminal law in this century." *Symposium: Equality Versus Discretion in Sentencing*, 26 AM. CRIM. L. REV. 1813, 1830 (1989)(statement of Commissioner Stephen Breyer).

3. Because ours is a history saturated with racial prejudice, I am uncomfortable suggesting that race be considered at sentencing as an aggravating factor. However, the Supreme Court recently upheld a Wisconsin statute that authorizes enhanced sentences for racially motivated crimes. *See Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993). In an opinion authored by Chief Justice Rehnquist, a unanimous court considered the enhanced sentences justified in light of the "greater individual and societal harm" racially moti-

when imposing criminal sentences, despite language to the contrary in the guidelines and the enabling statute.⁴

The sentencing decision is the "symbolic keystone of the criminal justice system."⁵ It involves two competing concepts, both basic to the American legal tradition. First, we embrace the notion that sentences should fit the crime; two persons, convicted of the same or similar crimes, should receive similar punishment. On the other hand, we believe that punishment should be individualized; that is, courts should structure individual sentences to best meet the goals of the criminal law and the needs of society.⁶ The history of sentencing theory is an attempt to balance these two sometimes conflicting demands.⁷

The way we carry out that balancing is critical. The sentencing decision often entails stripping a person of those things our society values most, life and liberty.⁸ Moreover, sentencing decisions are uniquely visible. The general public may have little familiarity with most of the mechanisms of the criminal justice system.⁹ But they do understand sentences: Boesky got three years; Nixon never served a day; Hurricane Carter did nineteen years.¹⁰ These sentences, and opinions about them, shape public assessment concerning the legitimacy of our criminal justice system.¹¹

Concern for that legitimacy gave impetus to the sentencing reform movement. Among the factors sparking reform was widespread belief that the sentencing decision was tarnished by ra-

vated crimes inflict. *Id.* at 2201.

4. See UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 5H1.10, at 326 (1993)[hereinafter GUIDELINES MANUAL]; 28 U.S.C. § 994(d)(11) (1988).

5. 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 1 (Alfred Blumstein et al. eds., 1983)[hereinafter RESEARCH ON SENTENCING].

6. *Id.*

7. D. A. THOMAS, PRINCIPLES OF SENTENCING 6-14 (2d ed. 1979) (describing the evolution of these concepts and its effect on sentencing policy).

8. RESEARCH ON SENTENCING, *supra* note 5, at 1.

9. See generally MILTON HEUMANN, PLEA BARGAINING, THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS (1978).

10. *Judge Drops Murder Charges in the Hurricane Carter Case*, N.Y. TIMES, Feb. 27, 1988, § 1, at 8.

11. Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783, 783 (1981).

cial discrimination.¹² In 1979, blacks accounted for 10.1% of this country's adult male population, yet occupied 48% of the beds in our state prisons.¹³ This disparity, when publicized, brought charges of racial discrimination.¹⁴ The sociological studies and the literature that followed have yet to answer the charges definitively.¹⁵

12. RESEARCH ON SENTENCING, *supra* note 5, at 3; JOAN PETERSILIA & SUSAN TURNER, GUIDELINE-BASED JUSTICE, THE IMPLICATIONS FOR RACIAL MINORITIES 1 (1985); *Symposium: Equality Versus Discretion in Sentencing*, *supra* note 2, at 1815-16 (presentation of Commissioner Ilene Nagel). Other factors contributing to the sentencing reform movement were prison uprisings, concern about the rights of offenders, control of post-sentencing discretion, accountability, disillusionment with rehabilitation, and crime control. RESEARCH ON SENTENCING, *supra* note 5, at 3.

13. RESEARCH ON SENTENCING, *supra* note 5, at 13; *see also* PETERSILIA & TURNER, *supra* note 12, at v.

14. PETERSILIA & TURNER, *supra* note 12, at 1; RESEARCH ON SENTENCING, *supra* note 5, at 3. Charges of racial discrimination within the criminal justice system are not new, nor are they confined to the sentencing process. In 1883 Frederick Douglas spoke on the subject: "Justice is often painted with bandaged eyes, she is described in forensic eloquence as utterly blind to wealth or poverty, high or low, white or black, but a mask of iron however thick could never blind American justice when a black man happens to be on trial." Thomas M. Uhlman, *The Impact of Defendant Race in Trial-Court Sanctioning Decisions* in PUBLIC LAW AND PUBLIC POLICY 19, 20 (John A. Gardiner ed., 1977)(quoting Frederick Douglas)(footnote omitted).

15. Sociologists have debated since the late 1920s whether the disparities in sentencing are race-related. Uhlman, *supra* note 14, at 19. Dale Dannefer & Russell K. Schutt, *Race and Juvenile Justice Processing in Court and Police Agencies*, 87 AMER. J. OF SOC. 1113, 1113-14 (1982)(reviewing the literature concerning this debate); *see also* James D. Unnever et al., *Race Differences in Criminal Sentencing*, 21 THE SOC. Q. 197, 204-05 (1980); Steven Klepper et al., *Discrimination in the Criminal Justice System: A Critical Appraisal of the Literature*, in 2 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 55, 94-5 (Alfred Blumstein et al. eds., 1983)(contains a chart of previous studies exhibiting the differences of opinion and some of the complexities involved in addressing the problem through sociological inquiries).

Uhlman, *supra* note 14, at 40 (concluding from a study of a sample of over 43,000 cases in a metropolitan area that there was significant discrimination in the sentencing process); Cassia Spohn et al., *The Effect of Race on Sentencing: A Re-examination of an Unsettled Question*, 16 LAW AND SOC'Y REV. 71 (1981-82)(using the same sample, they controlled for prior criminal record, and divided the sentencing decision into two components: (1) the decision whether or not to incarcerate, and (2) the length of the sentence. They found that although blacks were more likely than whites to be incarcerated, race had no direct effect on the severity of a sentence. They also found evidence of discrimination based on wealth).

James L. Gibson, *Race as a Determinant of Criminal Sentences: A Methodological Critique and A Case Study*, 12 LAW AND SOC'Y REV. 455 (1978)(concluding that discrimination was not a factor on an institutional level, yet finding that the discriminatory attitudes of individual judges made race a significant factor in some sentencing decisions).

James J. Collins, *The Disposition of Adult Arrests: Legal and Extralegal Determinants of Outcomes*, in FROM BOY TO MAN, FROM DELINQUENCY TO CRIME 68, 69-70 (Marvin E. Wolfgang et al. eds., 1988)(Collins found that "nonwhites were less likely to have arrest charges dismissed . . . [a]nd more likely to be incarcerated." There was also evi-

Both Congress and the drafters of the federal sentencing guidelines were sensitive to the studies and reports, as well as public sentiment, suggesting that racial bias infected many sentencing decisions. However, the Sentencing Commission distorted Congress' sensitivity. Following what it interpreted as a Congressional mandate,¹⁶ the Commission declared simply that race, sex, national origin, creed, religion, and socio-economic status "are not relevant in the determination of a sentence."¹⁷ The enabling statute and legislative history reveal that Congress anticipated a more sophisticated approach to this complex problem.¹⁸ Congress recognized that race may be a relevant factor in the sentencing decision: but under what circumstances?¹⁹

This article suggests two classes of cases where a judge should consider the offender's race as a mitigating factor during the sentencing decision: first, where cultural uniqueness peculiar to the offender's race exists and is causally related to the crime; second, where racial discrimination has tainted the criminal process. I address two distinct situations in this second category: first, where it is likely that racial discrimination has occurred at previous stages of the criminal process; second, where prior racial bias has made it likely that the defendant's criminal history category inaccurately magnifies the seriousness of a defendant's crime or the likelihood that the defendant will commit further

dence that nonwhite repeat offenders were treated more severely than whites with similar records. His study also found a correlation between racial discrimination and the formality of the procedures. Less formal procedures encouraged more discretion and, as a result, more racial discrimination).

Kleck, *supra* note 11, at 799 (Kleck concluded that there exists no "general or widespread overt discrimination against black defendants . . ." However, he found evidence of racial discrimination for specific jurisdictions, judges, and crime types).

16. Congress instructed the Sentencing Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d)(11) (1988).

17. GUIDELINES MANUAL, *supra* note 4, § 5H1.10, at 326.

18. Congress required that the guidelines exhibit more than simple neutrality towards an offender's race. S. REP. NO. 225, 98th Cong., 2d Sess., reprinted in 1984 U.S.C.A.N. 3220, 3354 n.409 [hereinafter S. Rep. No. 225]. The report reads: "The requirement of [sentencing] neutrality with regard to such factors [race, sex, national origin, creed, and socio-economic status] is not a requirement of blindness."

19. The Senate Report gives limited guidance: "In sentencing a person to imprisonment it would be appropriate to have a judge consider, for example, recommending placement in an institution equipped to accommodate the religious dietary laws followed by the defendant, or an institution housing prisoners of the defendant's sex." S. Rep. No. 225, *supra* note 18, at 3354 n.409.

crimes.²⁰ The “cultural uniqueness” cases call for the sentencing judge to consider alternative models of criminal justice and the effects of an offender’s culture on his culpability. Both types of cases urge judges not to “freeze in place the past consequences of differences.”²¹ This approach recognizes that “neutral means might not produce neutral results, given historic practices and social arrangements that have not been neutral.”²²

II. CULTURALLY UNIQUE CASES

The idea is not popular today: two people who committed the same crime receive disparate sentences because they happen to come from different cultural backgrounds. And yet, I suggest, we must sometimes do just that. My argument is rooted in: (i) the role of cultural diversity in our system of politics, and (ii) classic liberal theories of culpability.²³

Punishment is only justified when (1) the action is morally condemnable, and (2) the actor is culpable.²⁴ These determinations require an assessment of both the act and the individual actor. These, in turn, require an inquiry into whether, and to what extent, an act is morally condemnable; different cultures may view the same act differently. The theory of culpability allows the criminal justice system to punish only those offenders who meet a standard of blameworthiness.²⁵ A person is not re-

20. The second situation may arise when federal courts, sentencing pursuant to the federal sentencing guidelines, consider departures under § 4A1.3, Adequacy of Criminal History Category. I track the language of this policy statement. GUIDELINES MANUAL, *supra* note 4, § 4A1.3, at 277-79.

21. Minow, *supra* note 1, at 12.

22. *Id.* at 22.

23. See generally Richard Delgado, “Rotten Social Background”: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation, 3 LAW & INEQUALITY: A JOURNAL OF THEORY AND PRACTICE 9 (1985).

24. David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 388 (1976). Judge Bazelon adds a third prerequisite which I consider in an analysis of the actor’s culpability: that “society’s own conduct in relation to the actor entitles it to sit in condemnation of him with respect to the condemnable act.” That is, if society is responsible for or has condoned the defendant’s act, society may not condemn him. *Id.*

25. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 35-40 (1968); see also STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR OFFENDERS (1988). Wheeler and his colleagues suggest that the offender’s blameworthiness is one of the major factors which society uses to measure the seriousness of a criminal act. *Id.* at 53, 81-123.

sponsible for a crime unless the criminal action was voluntary.²⁶ If pressures beyond the actor's control make his act less than voluntary, the offender is not culpable and his action may be mitigated.²⁷

Recent reform efforts have added a third emphasis: equal treatment.²⁸ Using disparity as their battle cry, guideline defenders are close to burying the rehabilitative model of criminal justice. Disparity, these proponents say, is a result of an outdated emphasis on the individual offender,²⁹ an approach that encourages "unfettered judicial discretion."³⁰ Indeterminate sentencing, required by a rehabilitation-orientated penology,³¹ focuses on an assessment of the individual offender's "amenability

26. *Id.*

27. Delgado, *supra* note 23, at 17. If voluntary choice is eliminated or diminished, the offender's action may be mitigated. Delgado refers to this concept as the "voluntary choice model." *Id.* See also Bazelon, *supra* note 24, at 389. Judge Bazelon mentions several examples, taken from his years on the bench, where the actor's free choice was illusory. See *United States v. Alexander*, 471 F.2d 923, (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1044 (1972). *Alexander* involved an economically deprived, oppressed African-American youth, Benjamin Murdock, who shot and killed a marine. The marine had called Mr. Murdock a "black bastard" after taunting him and two friends with other racial remarks. *Id.* at 929, 957. There was psychiatric testimony that Murdock's "emotional difficulties were closely tied to his sense of racial oppression" and that shooting the marine was not voluntary. *Id.* at 957. See also *Everett v. United States*, 336 F.2d 979, (D.C. Cir. 1964) (before JJ. Miller, Burger, and Wright) (involving a man who burglarized a liquor store so that he would be able to provide medical care for his pregnant wife); *United States v. Moore*, 486 F.2d 1139 (D.C. Cir.) (en banc), *cert. denied*, 414 U.S. 980 (1973) (rejecting the necessity defense of a drug addict convicted of possession of heroin); *Easter v. District of Columbia*, 361 F.2d 50 (U.S. App. D.C. 1966) (en banc) (concerning a chronic alcoholic convicted of being "drunk and intoxicated" on a Washington, D.C. street); *United States v. Barker*, 514 F.2d 208, 229 (D.C. Cir.), *cert. denied*, 421 U.S. 1013 (1975) (Barker was one of the Watergate defendants whom Judge Bazelon described in his concurring opinion as "super-patriotic citizen[s] steeped in cold war ideology.").

28. GUIDELINES MANUAL, *supra* note 4, at 2; see also Ilene H. Nagel, Testimony before the Committee on the Judiciary, Subcommittee on Criminal Justice 1 (July 23, 1987). Ms. Nagel calls the elimination of disparity a "core motive" justifying the guidelines. *Id.*

29. S. Rep. No. 225, *supra* note 18, at 3221.

30. The phrase is generally attributed to Judge Marvin E. Frankel who is recognized as the father of sentencing reform. UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS, June 18, 1987. During the Marx Lectures at the University of Cincinnati Law School November 3-5, 1971, Frankel proposed that a National Sentencing Commission oversee sentencing policy and rules. The lectures were subsequently published. Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CINN. L. REV. 1 (1972). Frankel's book, CRIMINAL SENTENCES, LAW WITHOUT ORDER is an expanded version of the Marx Lectures. MARVIN E. FRANKEL, CRIMINAL SENTENCES, LAW WITHOUT ORDER (1973).

31. RESEARCH ON SENTENCING, *supra* note 5, at 62.

to treatment."³² When judges focus on individual offenders rather than the offender's actions, disparate sentences are inevitable.³³

Many of the same critics of flexible sentencing also charge that it can reflect and accentuate racial bias.³⁴ That there are more minorities, sentenced to longer terms, serving a longer portion of their sentences, than their proportion in the population would indicate is not open to serious question.³⁵ Still, sociological studies do not agree why this is so.³⁶ The studies are plagued by methodological problems,³⁷ including serious flaws in the selection process.³⁸

Scholars generally do agree, however, that it is an oversimplification to claim a direct link between race and sentencing;³⁹ the key determinants in the latter are the seriousness of the offense and the offender's prior record.⁴⁰ Nevertheless, racial discrimination may have a substantial impact on sentencing decisions in specific regions and jurisdictions,⁴¹ stemming from

32. *Id.*

33. See generally FRANKEL, *supra* note 30, at 3-11. Further, reformers argue, individualized sentences do not necessarily enhance the prospects for rehabilitation. PETERSILIA & TURNER, *supra* note 12, at 1, n.1.

34. JOAN PETERSILIA, RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM, 1 (U.S. Dep't of Justice, Rand Corp.) (1983).

35. *Id.* at 63; see also *supra* note 13 and accompanying text.

36. See *supra* note 15.

37. See generally Gibson, *supra* note 15. Commissioner Nagel argues that Congress legislated a method for measuring disparity. The method is unlike those in most sociological studies. Nagel, Testimony before the Committee on the Judiciary, Subcommittee on Criminal Justice, *supra* note 28, at 6-7.

38. Klepper et al., *supra* note 15, at 63-65. Klepper and his colleagues argue that, because of discrimination at the initial stages of the criminal process, the crimes that reach successive stages "are not representative of the broader population of crimes." *Id.* at 64. "[B]iases induced by sample selection might mask the true extent of [any] discrimination . . . even create the illusion of reverse discrimination at the sentencing stage" *Id.* at 65. At least one study claims that patterns of greater leniency toward black defendants are not uncommon. Kleck, *supra* note 11, at 799-800.

39. Uhlman, *supra* note 14, at 27. Uhlman indicates that researchers now believe that to suggest a "direct link between race and sentencing is an inaccurate oversimplification of a multifaceted relationship." *Id.*

40. RESEARCH ON SENTENCING, *supra* note 5, at 11. Among the other important factors is whether or not there has been a plea agreement. *Id.* at 18.

41. *Id.* at 15-16. Defendants are subject to more racial discrimination in rural courts. Apparently, the more bureaucratic the court, the less attention it pays to offender characteristics. Margaret P. Jendrik, *Sentence Length: Interactions with Race and Court*, 12 J. CRIM. JUST. 567, 569-70 (1984).

specific types of crimes,⁴² and in isolated decisions involving individual participants,⁴³ especially parole decisions.⁴⁴ Differences in behavior among races may also play a role in the disproportionate number of minorities serving prison terms, especially when these behavioral differences interact with other factors such as the "patterns in the deployment of law enforcement resources and the differing rates of apprehension, conviction, and imprisonment" of racial minority offenders.⁴⁵

Proponents of sentencing guidelines urged that guideline sentencing would address the problem of racial discrimination in the sentencing process.⁴⁶ Others, however, fear that guidelines will exacerbate racial tension.⁴⁷ Most studies indicate that factors which correlate with recidivism also correlate with race.⁴⁸ The experience in Minnesota is illustrative. As a general principle, the Minnesota guidelines are indifferent to an offender's race.⁴⁹ Judges may not consider race in a decision to depart.⁵⁰

42. Nagel, Testimony before the Committee on the Judiciary, Subcommittee on Criminal Justice, *supra* note 28, at 11-19. Commissioner Nagel maintains that race, sex, and region are statistically significant factors in both the in/out decision and sentence length of bank robbers; race is a significant factor in the sentence length of bank embezzlers; sex, race, ethnicity, age, and region significantly effect the in/out decision when heroin distribution and importation is the crime. *Id.* at 6-19. Petersilia suggests de facto discrimination against Afro-Americans and Hispanics charged with property crimes. PETERSILIA, *supra* note 12, at 94; but see Stevens H. Clarke & Gary G. Koch, *The Influence of Income and Other Factors on Whether Criminal Defendants go to Prison*, 11 LAW AND SOC'Y REV. 57 (1976).

Studies indicate that race is a significant factor in death penalty cases. RESEARCH ON SENTENCING, *supra* note 5, at 16; see also *McCleskey v. Kemp*, 481 U.S. 279, 321-44 (Brennen, J., dissenting), *reh'g denied*, 482 U.S. 920 (1987).

43. RESEARCH ON SENTENCING, *supra* note 5, at 13.

44. Many view whites as better candidates for rehabilitation. PETERSILIA, *supra* note 34, at 97.

45. RESEARCH ON SENTENCING, *supra* note 5, at 13.

46. See, e.g., William W. Wilkins, Jr., Statement at the United States Sentencing Commission Hearing 108 (Atlanta, Georgia, Oct. 29, 1986) (Wilkins claims that "[e]verybody will be fed from the same spoon, be they black or white, rich or poor.").

47. PETERSILIA & TURNER, *supra* note 12, at vii. Many early proponents of guideline sentencing had a change of heart when they realized that guidelines would not effectively address the problem of racially disparate sentences. Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AMER. CRIM. L. REV. 771, 779 (1992).

48. PETERSILIA & TURNER, *supra* note 12, at 25. Petersilia & Turner argue that using these factors is "the functional equivalent of using race itself." *Id.* at vi. They demonstrate that eliminating the factors that correlate with race will decrease the accuracy of predicting recidivism by only 5%-12%. *Id.* at 25-26.

49. MINNESOTA SENTENCING GUIDELINES COMMISSION, 1, (1982); see also Charles A. Moore & Terance D. Miethe, *Regulated and Unregulated Sentencing Decisions: An Analysis of First-Year Practices under Minnesota's Felony Sentencing Guidelines*, 20

Yet the minority prison population has increased significantly since the Minnesota legislature imposed guidelines.⁵¹ Although we lack long term studies addressing the correlation between guidelines and minority prison population, it appears doubtful that guidelines can address racial discrimination in sentencing; they may even compound the problem without curbing recidivism.⁵² In fact, preliminary numbers indicate the guidelines have not succeeded in curbing racial bias in the criminal justice system.⁵³ Rather, the guidelines themselves may make discrimination based on race inevitable.⁵⁴

The guidelines embody the traditional sentencing concepts of individualized sentences and uniformity in sentencing. However, they give greater weight to the latter.⁵⁵ In this respect, they forsake the personalized approach to sentencing developed by the common law⁵⁶ with little corresponding gain in fairness. The

LAW AND SOC'Y REV. 253, 256 (1980).

50. *Id.* at 257.

51. PETERSILIA, *supra* note 34, at 25.

52. *Id.*

53. See Heaney, *supra* note 47, at 779-82, 790-92. Judge Heaney, the Senior Judge for the Eighth Circuit Court of Appeals, uses early Commission statistics to show that guideline sentencing has increased racial disparity especially among Hispanics and Black males between the ages of 18 and 35. *Id.*; but see William W. Wilkins, *A Response to Judge Heaney*, 29 AM. CRIM. L. REV. 795. Judge Wilkins is a Circuit Judge for the Fourth Circuit Court of Appeals and the Chair of the Sentencing Commission. Judge Wilkins claims the pace immigration cases move through the system accounts for the 200% increase in the number of Hispanics sentenced under the guidelines during 1989. *Id.* at 800.

54. See Heaney, *supra* note 47, at 791-92.

55. GUIDELINES MANUAL, *supra* note 4, at 2-4.

56. *United States v. Barker*, 771 F.2d 1362, 1365 (9th Cir. (1985); cf. *McCleskey v. Kemp*, 481 U.S. 279, 304 (Brennen, J., dissenting) *reh'g denied*, 482 U.S. 920 (1987)(quoting *Woodson v. North Carolina*, 428 U.S. 280, 304. "Any exclusion of the compassionate or mitigating factors stemming from the diverse frailties of humankind that are relevant to the sentencer's decision would fail to treat all persons as uniquely individual human beings.")(quotation marks omitted); *Williams v. New York*, 337 U.S. 241, 245-47, *reh'g denied*, 337 U.S. 961 (1948), and *reh'g denied*, 338 U.S. 841 (1948)("Highly relevant - if not essential - to [a judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics . . ."); *WHEELER ET AL.*, *supra* note 25, at 44 n.11 ("The knowledge of the life of a man, his background and his family, is the only proper basis for the determination as to his treatment. The sentencing judge in the federal court has the tools with which to acquire that information. Failure to make full use of those tools cannot be justified."). See also Joseph E. deGenova, Testimony before the United States Sentencing Commission 319 (Washington, D.C., Dec. 3, 1986). Mr. deGenova, who was the United States Attorney and a member of the Sentencing Commission for the Superior Court of the District of Columbia, stated that the guideline system would force judges to

inequities of this trade-off appear most clearly in cases involving a culturally diverse defendant.

Whether or not an act is viewed as criminal is not universal.⁵⁷ Each community evaluates its constituents' actions against a backdrop that reflects that community's world view. In a nation that celebrates cultural diversity, the criminal justice system must take account of cultural differences; an individualistic model that focuses exclusively on the actor's deeds is not sufficient. While the actor's deeds are always relevant in assessing wrongfulness, we must also inquire into the "social expectations of others for what the actor *should have done*."⁵⁸ In this approach the social obligations that accompany the actor's role in the particular cultural society take on added significance.⁵⁹

"give up some individuality [and] the kind of 'benign disparity,' as some people would call it, in order to achieve the greater good for the greater number." *Id.* But see S. Rep. No. 225, *supra* note 18, at 3235 (suggesting that the guidelines will actually enhance individualization of sentences).

57. The group conflict model suggests one reason why different societies may have divergent views concerning what acts are criminal. See GEORGE B. VOLD, *THEORETICAL CRIMINOLOGY* 203-19 (1953). A democratic society is the product of the constant struggle for power among antagonistic groups. The victorious groups, through legislative majorities, are able to define criminal action. Thus, what is criminal can be arbitrary depending upon which group has power at any given time. *Id.* at 208-09. And, significantly, power is related to race. Allen E. Liska & Mark Tausig, *Theoretical Interpretations of Social Class and Racial Differentials in Legal Decision-Making for Juveniles*, 20 Soc. Q. 197, 204 (1979).

Of course, there are societal principles that discourage abrupt changes in the definition of criminal action. Within democratic societies the definitions of criminal action tend to evolve rather than change suddenly. However, distinct societies may have dissimilar principles. And, as a result, disparate definitions of criminal action may evolve. Also, non-democratic societies may experience abrupt changes in definitions of criminal action. Consequently, among the many peoples of the world, it is not unusual to discover that the same act is illegal in one culture and ordained by another.

58. V. Lee Hamilton & Joseph Sanders, *Universals in Judging Wrongdoing: Japanese and Americans Compared*, 48 AMER. SOC. REV. 199, 199-200 (1983)(emphasis in original).

59. *Id.* at 199. These role-based social expectations "can serve both as direct inputs to judging wrongdoing and as normative contexts within which action will be judged." *Id.* at 200.

A universal model also shifts the focus of sanctions from a retributive emphasis to an approach that incorporates the benefits of punishment based on restitution. A criminal justice system that focuses on an actor's deeds views an offender as the sole cause of a particular crime. Accordingly, the cure lies in sanctioning the offender. On the other hand, a criminal justice system that does not focus on the actor's deeds, but rather views the actors relationally, places a restitutive function on sanctions. Offenders are not merely "perpetrators," to be sentenced in terms of their deeds alone, but rather persons "embedded in a series of role obligations and structural constraints." Punishment, therefore, is restitutive, "focused on restoring social bonds" destroyed or diminished by the

Blameworthiness is related to culture.⁶⁰ Whether or not a culture condones a particular action may increase or decrease the actor's culpability. Likewise, an offender's culture may add to the pressures that make it difficult for him to comply with a societal norm.⁶¹ In situations like these, a sentencing judge should consider an offender's race and cultural background. We have long recognized that "[j]udges develop . . . expanded concepts of harm and blameworthiness that enable them to consider variables and circumstances not built into the statute law or the common law, but that are close cousins of the underlying values built into that law."⁶² Sentencing judges thus occupy a unique role in our society's criminal justice system. We allow, even require, judges to extend technical legal requirements concerning the degree of culpability and use standards broader than those of the courtroom.⁶³ An offender's race is a variable that sentencing judges should incorporate into those broad standards. Consider the following story.

In January, 1985, Ms. Fumiko Kimura left her home in suburban Los Angeles and travelled by bus to the beach in Santa Monica, California.⁶⁴ With her were her daughter Yuri, six months old, and her son Kazutaka, four years old. At the shore, Ms. Kimura took Yuri in her arms, grabbed Kazutaka tightly by his hand, and walked into the sea. Ms. Kimura had recently learned that her husband was keeping a mistress. To rid herself of the shame and to rescue her children from humiliation, Ms. Kimura attempted *oyako-shinju* - parent-child suicide. Ms. Kimura was rescued by passers by, but her two children drowned. The Los Angeles County District Attorney charged Ms. Kimura with first degree murder. Four thousand members

offender's actions. *Id.* at 208; see also John Griffiths, *Ideology in Criminal Procedure, or a Third "Model" of the Criminal Process*, 79 YALE L. J. 359 (1970).

60. Traditionally, sentencing courts undertake an individual assessment of the defendant's culpability. *United States v. Barker*, 771 F.2d 1362 (9th Cir. 1985); see also *supra* notes 25-27 and accompanying text.

61. See *supra* note 27.

62. WHEELER ET AL., *supra* note 25, at 124.

63. *Id.* at 87-97.

64. This story is adapted from Spencer Sherman, *Legal Clash of Cultures*, NAT'L L.J., Aug. 5, 1985, at 1. See also Teresa Wantabe, *Japanese Mom Who Drowned Her Kids is Freed*, San Jose Mercury News, California News Section at 1G; Myrna Oliver, *Immigrant Crimes Cultural Defense - A Legal Tactic*, L.A. TIMES, July 15, 1988, at 1. (Ms. Oliver presents a half dozen analogous cases which present similar sentencing issues).

of the Japanese community in Los Angeles spoke in Ms. Kimura's behalf. They signed and delivered a petition to the District Attorney explaining that Ms. Kimura's behavior would not be considered murder in Japan. According to the petitioners, "the roots of her Japanese culture" directed Ms. Kimura's acts. Prosecutors in her native land would have sought a conviction of involuntary manslaughter, nothing more. If convicted in Japan, they claimed, Ms. Kimura would probably face "a light, suspended sentence, probation, and supervised rehabilitation."

Assume that Ms. Kimura pled guilty, in a federal court, to two counts of voluntary manslaughter.⁶⁵ Under the federal sentencing guidelines, Ms. Kimura's total offense level is twenty-seven.⁶⁶ She is in criminal history category I.⁶⁷ Thus, the range of her sentence is seventy to eighty-seven months.⁶⁸ The sentencing judge should be free to consider Ms. Kimura's race and Japanese culture as a mitigating factor and depart from the range prescribed by the guidelines.⁶⁹ The judge should articulate

65. Apparently, Ms. Kimura had the requisite intent and premeditation to be charged with first or second degree murder. See CAL. PENAL CODE § 189 (West 1988). The California Deputy District Attorney assigned to the actual case appeared to be aware of the dilemma it presented. However, she rejected the defense attorney's suggestion that the charge be bargained down to involuntary manslaughter. "You're treading on such shaky ground when you decide something based on a cultural thing," she argued, "because our society is made up of so many different cultures . . . but they are living in our country and people have to abide by our laws . . . [v]oluntary manslaughter is as low as we'll go." Sherman, *supra* note 64, at 26.

66. The base offense level for involuntary manslaughter is 25. GUIDELINES MANUAL, *supra* note 4, § 2A1.3, at 36. The ages of the victims make them unusually vulnerable and victim-related adjustments increase the base level by two. *Id.* § 3A1.1, at 239. In Mrs. Kimura's situation, there are no adjustments for role in the offense or obstruction. *Id.* §§ 3B1.1-3B1.3, at 243-46; § 3C1.1, at 247. Because Ms. Kimura pled guilty to two counts of voluntary manslaughter, the guidelines add two levels to the offense level. *Id.* §§ 3D1.1-3D1.5, at 252-62. Assume Ms. Kimura accepts responsibility for the crimes. This reduces her offense level by two. *Id.* § 3E1.1, at 263. Ms. Kimura's total offense level is 27.

67. *Id.* § 4A1.1, at 267.

68. *Id.* at 288.

69. The departure provisions introduce a common law approach into the guideline structure. The guidelines authorize departures in situations that present factors of a kind not considered by the Sentencing Commission when formulating the guidelines. 18 U.S.C. § 3553(b) (1988).

The Commission anticipated that during the first five years district judges would depart more than they should. Stephen G. Breyer, Testimony at the United States Sentencing Commission Hearings (Chicago, Illinois, Oct. 17, 1986). The guidelines contain language to the contrary. GUIDELINES MANUAL, *supra* note 4, at 6 ("the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often."). In addition, the strict language of the guidelines and policy state-

his reasons for departure using a framework that embraces the "universal model" outlined earlier.⁷⁰ I propose a three-step approach, triggered by a threshold inquiry.

As a threshold issue, the sentencing judge should consider whether the defendant's race or cultural background was a significant factor in the act. If so, the judge should focus first, on the offender's action, second, on the offender's culpability, and third, on the form(s) and severity of sanctions that would best serve the goals of sentencing as expressed by the offender's cultural community.

While focusing on the defendant's act, the court should inquire whether the offender's racial or cultural community has a unique perspective concerning the particular act. Next, the court should consider whether the offender's position or role within her particular community renders her less culpable, and if so, how much less. The judge should inquire into traditional roles within the offender's culture.⁷¹ Finally, if the offense warrants punishment, the sentencing judge should determine the appropriate form(s) and severity of punishment against the backdrop of the offender's racial or cultural community.

There is little doubt that Ms. Kimura's race and cultural background were significant motivating factors in her act. Testimony of members of Los Angeles' Japanese community should be sufficient to establish its consistency with her culture and the community's expectation of a woman in her situation. Ms. Kimura's culpability is directly related to her social role within

ments, as well as media reports suggesting that the guidelines handcuffed judges, created an ambiance of inflexibility in the legal community. Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1744-45 (1992). This "mixed message" has caused many district and appellate judges to overlook their "statutory duty to depart." *Id.* at 1744-46.

The guidelines authorize two types of departures. The first kind of departure involves instances where "the guidelines provide specific guidance for departure, by analogy or by other numerical or non-numerical suggestions." *Guidelines Manual*, *supra* note 4, at 6. The second type of departure is "unguided." *Id.*; see generally Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1 (1991).

70. See *supra* notes 57-61 and accompanying text.

71. Hamilton & Sanders, *supra* note 58, at 209 ("Whether the unit is a family or a society (or something in between), its social organization is likely to affect its ways of righting wrongs and settling disputes. And all units have histories that can illuminate the how and why of their organizing principles.").

the cultural community and whether the community viewed her actions as conforming to that role.

Ms. Kimura's culpability does not reach the level associated with voluntary manslaughter.⁷² When contrasted to American culture, social obligations are more important to actors within the Japanese culture.⁷³ Japanese culture contains a hierarchy of roles, within which actors are influenced by community expectations.⁷⁴ Thus, freedom of choice to act or not to act may be greatly diminished by the society's role-based expectations. Ms. Kimura's role was that of a wife and a mother. She had recently discovered that her husband was supporting a mistress. Her social obligation was to rid herself of shame without leaving that shame to haunt her children. *Oyako-shinju*, though perhaps more common in earlier times, was nevertheless within the realm of her community's expectations. Her culpability is not that of one convicted of voluntary manslaughter. She should not be incarcerated for seventy to eighty-seven months.

If not seventy to eighty-seven months incarceration, how long? Her act and the level of culpability, viewed from the perspective of her cultural community, is analogous to involuntary manslaughter.⁷⁵ Applying the guidelines to involuntary manslaughter, her total offense level is twelve.⁷⁶ The sentencing table suggests that the length of her sentence be from ten to sixteen months.⁷⁷ Selecting a just form of punishment for Ms. Kimura is

72. "Manslaughter is the unlawful killing of a human being without malice." Manslaughter is voluntary if it occurs "[u]pon a sudden quarrel or heat of passion." 18 U.S.C. § 1112(a) (1988).

73. Hamilton & Sanders, *supra* note 58, at 200. The basis for this difference appears to be the "ideology of individualism" which dominates American life and the group ideology so evident in Japanese culture. *Id.*

74. *Id.* at 208.

75. Manslaughter is involuntary when it occurs "[i]n the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." 18 U.S.C. § 1112(a) (1979). Ms. Kimura's crime, I suggest, viewed from the perspective of her community, might best be described as a lawful act that produced death, committed without due caution and circumspection.

76. Assuming that the sentencing judge finds Ms. Kimura's act to be criminally negligent rather than reckless, her base offense level is 10. GUIDELINES MANUAL, *supra* note 4, § 2A1.4, at 36-37. Adjusting for the unusual vulnerability of the victims (+2 levels), the fact that there are two counts (+2 levels), and assuming that Ms. Kimura accepts responsibility (-2 levels), her total offense level is 12. *Id.*

77. GUIDELINES MANUAL, *supra* note 4, at 288.

more complex. Incarceration may not be appropriate.⁷⁸

The United States and Japan are examples of divergent "moral cultures;"⁷⁹ each seeks to accomplish distinct goals through criminal sanctions.⁸⁰ Though Ms. Kimura's act took place in the United States, her Japanese culture significantly influenced her actions. Because our society celebrates both cultural pluralism and individualized justice, her sanctions, too, should be influenced by the goals and purposes expressed by her cultural community.⁸¹ The sentencing judge should seek to restore the social bonds necessary for Ms. Kimura and her community to resume a positive relationship.

In a pluralistic society, cases like Ms. Kimura's will not be the norm, nor will they be highly unusual. The sentencing guidelines should allow judges to depart using race as a mitigating factor where an offender's race is a significant factor in the crime. Issues concerning race were not unusual in state and federal courts before the Guidelines era. These issues involved other Asian societies,⁸² Afro-Americans,⁸³ Hispanics,⁸⁴ and

78. In the actual case, Ms. Kimura pled no contest to two counts of voluntary manslaughter and faced a maximum sentence of thirteen years in state prison. However, Los Angeles County Superior Court Judge Robert W. Thomas sentenced her to one year in county jail and five years probation. Judge Thomas also ordered Ms. Kimura to undergo psychiatric treatment. The judge credited her with time served and Ms. Kimura was released from custody the day of sentencing. *Mother Placed on Probation in 2 Drownings*, L.A. TIMES, Nov. 21, 1985, at 1.

79. The United States is a "guilt" culture. Japan has a "shame" culture. Hamilton & Sanders, *supra* note 58, at 200, 208. In a guilt culture an "individual responds to internalized demands from the self, avoiding misdeeds because of their internalized psychological costs." *Id.* at 200. On the other hand, an actor embedded in a shame culture "responds to the anticipated reaction of others, avoiding misdeeds because of their social ramifications." *Id.*

80. Generally, "guilt" cultures such as the United States focus on individual actors. Thus, the focus of criminal sanctions tends to be retributive. "Shame" cultures, on the other hand, focus on groups and the obligations of individuals within groups. The focus of criminal sanctions in societies that are shame oriented, like Japan, is restitutive. See *supra* notes 57-59 and accompanying text.

81. Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1299 (1986) ("Treating persons raised in a foreign culture differently should not be viewed as an exercise in favoritism, but rather as a vindication of the principles of fairness and equality that underlie a system of individualized justice.").

82. See Sherman, *supra* note 64, at 26-27; Oliver, *supra* note 64; Dick Polman, *After a Killer Eludes Jail, A "Cultural Defense" is on Trial*, PHILADELPHIA INQUIRER, July 2, 1989, Nat'l Section, at A01; and Katherine Bishop, *Asian Tradition at War With American Laws*, N.Y. TIMES, Feb. 10, 1988, A18. These articles describe the legal problems that Asian tribal people encounter in the United States. Following the Vietnam war, the

United States government relocated several groups of Asians to various sites within the United States. These groups have been reluctant to surrender their traditions. When the tribal traditions conflict with American laws, courts have difficulty resolving issues of culpability and sanctions. The Hmong tribe from Laos provides an excellent example. The Hmong's medicinal use of opium, ritual slaughtering of animals, and practice of *zij poj niam* are particularly troublesome to courts.

Zij poj niam is a one of several traditional forms of marriage among the Hmong. Best translated as marriage-by-capture, this practice has led to several kidnapping and rape charges in California's San Joaquin Valley. Ms. Bishop describes traditional *zij poj niam*:

Couples meet and carry on a courtship that often begins with a celebration of the New Year, and a ball tossing game for eligible young people. Eventually the young man "captures" the young woman in the presence of an older relative while the young woman ritually protests that she does not want to go with him.

He takes her to his family home where she is met by relatives for a brief ceremony at the door, and remains for three days in which the marriage is consummated and his relatives visit her family to pay a "bride price" for her.

Id. at col.2.

Tradition further complicates the dilemma for Hmong women. Often they do not challenge *zij poj niam* because "once a marriage has been consummated, no matter how it came about, a Hmong female is generally considered unmarriageable by other Hmong men." Sherman, *supra* note 64, at 27, col.1.

Most of the cases involving *zij poj niam* have been resolved in juvenile courts. The one case that proceeded to a formal disposition involved a plea bargain. The judge accepted a plea whereby the court dropped kidnapping and rape charges and the defendant pled guilty to false imprisonment. The judge sentenced the defendant to 90 days in jail. *Id.*

Arriving at a just sanction involves additional serious problems. Traditional Asian people sentenced to jail for minor crimes have hanged themselves rather than face the disgrace that accompanies jail. *Id.* at col.1.

83. See the brief description of *United States v. Alexander*, 471 F.2d 923, (D.C. Cir.), *cert. denied*, 409 U.S. 1044 (1972). In *Alexander*, Benjamin Murdock, an African-American, was convicted of killing a white marine in a bar. After testimony from a psychiatrist, Murdock's attorney sought to show that the defendant's "rotten social background" deprived him of the freedom not to act. Murdock's attorney asked the jury to "take the trip back through [the defendant's] lifetime" in the ghetto "and look at the effect that his lifetime had on him . . . and determine whether he could control himself or not." *Id.* at 959 n.100.

In his controversial book *Criminal Violence, Criminal Justice*, Silberman suggests that black crime, generally attributed by liberals to the poverty of the ghetto, is actually the result of a break down of cultural devices that controlled crime within the Afro-American community. CHARLES E. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE*, 135 (1978). Mechanisms that enhanced self control under extreme provocation began to erode in the early 1960s, claims Silberman. The result has been a culturally-based rise in violence. *Id.* at 143-52.

84. See *United States v. Gomez*, 797 F.2d 417 (7th Cir. 1986). *Gomez* involved an illegal alien from Columbia who was convicted of trafficking drugs. The Seventh Circuit Court of Appeals ruled that statements by the prosecutor and the judge noting the defendant's illegal alien status were not improper. The Court ruled the comments were not ethnic, but geographic in nature. *Id.* *State v. Curbello-Rodriguez*, 351 N.W.2d 758 (Wis.

Native Americans.⁸⁵ Under the guidelines, federal courts continue to encounter issues concerning race when sentencing criminal defendants.⁸⁶ The results have been less than satisfactory.

Sentencing judges have sanctioned the Sentencing Commission's distorted representation of Congress' intent regarding the relevance of an offender's race, sex, and national origin.⁸⁷ Con-

Ct. App. 1984) is an example from state court. At about midnight one summer evening, the victim, a young woman of 16 years, and a friend met Armando Garcia on Madison Street in Madison, Wisconsin. The victim asked Garcia if she could borrow a dollar. Garcia stated that he did not have a dollar with him, and invited the young women to his apartment where he promised to give them money. The young women accompanied Garcia to his apartment. There they met the defendant and two others, recent immigrants from Cuba. The two women spoke no Spanish. Garcia spoke English and Spanish. The others spoke no English.

The two young women sat at the kitchen table and smoked marijuana with the men. When the women attempted to leave, the men locked the door and secured it with a chain. The victim was raped repeatedly by the defendant and his two companions.

The court found the 25 year-old defendant guilty of three counts first degree sexual assault, six counts sexual assault as an aider and abetter, and one count abduction. The pre-sentence report recommended 20 to 25 years incarceration; he got 80 and appealed, among other things, the severity of the sentence. The court of appeals upheld the sentence. Judge Bablitch wrote a concurring opinion, but disagreed with the trial court's sentence.

Although powerless to do anything but "rubber stamp" a sentence so long as the trial court discussed certain discretionary factors, the length of the sentence left Judge Bablitch with a "sense of injustice . . . deep and lingering." *Id.* at 770. She believed the defendant's culture was relevant, not to justify his acts, but in the sentencing decision. *Id.*

After noting that the defendant had no previous record, Judge Bablitch reviewed his testimony. The defendant believed the young women to be "available" when they came to the apartment about midnight, looking for a dollar and some marijuana, and then stayed and talked to a group of men they did not know, whose language they did not share. "Perhaps, in his culture," she wrote, "such conduct at such an hour would be widely interpreted as an invitation to sexual games by willing players familiar with the possible consequences." *Id.* at 770.

85. Tova Indritz, Testimony before the Committee on the Judiciary, Subcommittee on Criminal Justice 239 (Denver, Colorado, November 5, 1986)(Ms. Indritz is the Chief Federal Public Defender in Albuquerque, New Mexico); Donna Chavez, Testimony before the Committee on the Judiciary, Subcommittee on Criminal Justice 164 (Denver, Colorado, November 5, 1986)(at the time of her testimony Ms. Chavez was the Assistant Attorney General of the Navajo Nation).

86. See, e.g., *United States v. Jones*, 997 F.2d 1475 (D.C. Cir. 1993); *United States v. Prestemon*, 929 F.2d 1275 (8th Cir.), cert. denied, 112 S. Ct. 220 (1991); *United States v. Lowden*, 905 F.2d 1448 (10th Cir.), cert. denied, 498 U.S. 876 (1990); *United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990).

87. See *supra* notes 16-19 and accompanying text; see also THOMAS W. HUTCHINSON & DAVID YELLEN, *FEDERAL SENTENCING LAW AND PRACTICE* 376 (1989). The authors label the Commission's policy statement concerning the relevance of race, sex, national origin, creed, and socioeconomic status as "too sweeping" considering the legislative history of the Sentencing Reform Act. *Id.*; Freed, *supra* note 69, at 1727. Freed, a pioneer in the

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gress' intent was to arrest, at the sentencing stage, the operation of racism, sexism and other forms of bias.⁸⁸ The guidelines misstate this intent. And if it were not for several highly discerning judges,⁸⁹ federal courts would have barred completely the effects of race,⁹⁰ gender,⁹¹ and national origin⁹² on highly relevant sen-

sentencing reform movement, views appellate courts' failure to address "whether [a] guideline or policy statement is authorized by and consistent with the statute" as a fundamental impediment to the evolution of sentencing principles under the guidelines. *Id.* at 1731.

88. See *supra* notes 16-19 and accompanying text; see also *United States v. Gaviria*, 804 F. Supp. 476, 480 (E.D.N.Y. 1992). *Gaviria* involved a downward departure where the defendant's "status as a victim of systematic physical and emotional abuse substantially lessen[ed] her blameworthiness." *Id.* Maria Gaviria pled guilty to knowingly and intentionally possessing cocaine with intent to distribute. She faced a guideline sentence that included between 70 and 87 months incarceration. Judge Weinstein departed downward to the statutory minimum of 60 months. In relating the all too familiar story of a Latin American woman victimized by a pattern of physical and psychological abuse, Judge Weinstein gave the § 5H1.10 policy statement its proper hue.

Ms. Gaviria's early life in poverty-stricken Medellin, Columbia was "hand-to-mouth." Her father had eighteen children. She was beaten and abused by her parents, relatives, babysitter, and, after her marriage at sixteen, her husband. The beatings and sexual abuse continued after Maria and her husband came to the United States to deal drugs. When she was arrested in Queens, New York, Maria knew no English, had no money, did not know how to travel, and was completely dependent on her husband, fearing death at his hands if she didn't do exactly what he ordered. *Id.* at 477.

Judge Weinstein recognized the syndrome and its prevalence in Latin cultures. *Id.* at 479-80. He indicated that 18 U.S.C. § 3661 required that a sentencing judge consider all available information about the defendant. Judge Weinstein then rejected a literal interpretation of § 5H1.10 as contrary to the Congressional directive contained in 18 U.S.C. § 3661. He departed from the guideline range, refusing to "deny the effects of gender on relevant and appropriate sentencing criteria." *Gaviria*, 804 F. Supp. at 480.

89. *United States v. Restrepo*, 999 F.2d 640 (2d Cir.) (holding that a defendant's status as an alien may be relevant in extraordinary cases), *cert. denied*, 114 S.Ct. 405 (1993); *United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990) (majority opinion of Judge Heaney affirming a downward departure based, in part, on a Native American defendant's persistent efforts to overcome adverse conditions on the Pine Ridge Reservation); *United States v. Handy*, 752 F. Supp. 561 (E.D.N.Y. 1990) (opinion of Judge Glasser departing downward in light of the exceptionally promising future of defendant's children, despite the fact that family ties and responsibilities are "not ordinarily relevant" under § 5H1.6 of the guidelines). See also *United States v. Yu*, 954 F.2d 951 (3d Cir. 1992) (dissenting opinion of Judge Becker maintaining that cultural differences could justify a downward departure), *cert. denied*, 113 S. Ct. 964 (1993); Olabisi L. Clinton, *Cultural Differences and Sentencing Departures*, 5 FED. SENT. R. 348 (discussing the decision of Judge William A. Ingram in *United States v. Saeturn*, No. 90-20085 (N.D. Cal. 1992)).

90. See, e.g., *United States v. Jones*, 997 F.2d 1475 (D.C. Cir. 1993); *United States v. Prestemon*, 929 F.2d 1275 (8th Cir. 1991); *United States v. Desormeaux*, 952 F.2d 182 (8th Cir. 1991); *United States v. Lowden*, 905 F.2d 1448 (10th Cir. 1990).

91. See, e.g., *United States v. Restrepo*, 936 F.2d 661 (2d Cir. 1991); *United States v. Natal-Rivera*, 879 F.2d 391 (8th Cir. 1989).

92. See, e.g., *United States v. Yu*, 954 F.2d 951 (3d Cir. 1992); *United States v.*

tencing criteria.⁹³ A sentencing judge's consideration of an offender's race may be entirely consistent with Congress' intent. It is not racist, for example, to consider the effects of an offender's race in the case of a bi-racial twenty-one year-old male, an honor student, adopted by a white family at three months, convicted as a first-time offender of armed robbery for holding up a bank with a BB gun.⁹⁴ That's not racism. To the contrary, when the system prohibits sentencing judges from considering race and other factors in appropriate cases, we unleash a warped sense of justice.⁹⁵

Natal-Rivera, 879 F.2d 391 (8th Cir. 1989); *United States v. Rasag*, 1 Fed. Sent. R. 200 (D. Nev. 1988).

93. Judges are struggling to develop a notion of when consideration of socioeconomic status is appropriate. *See, e.g.*, *United States v. Genao*, 831 F. Supp. 246 (S.D.N.Y. 1993); *United States v. Valdez-Gonzalez*, 957 F.2d 643 (9th Cir. 1992); *United States v. Lopez*, 938 F.2d 1293 (D.C. Cir. 1991).

Compare *United States v. Hatchett*, 923 F.2d 369 (5th Cir. 1991), *remanded*, 765 F. Supp. 349 (W.D. Tex.), *aff'd without op.*, *United States v. Soto*, 952 F.2d 400 (5th Cir. 1992). In *Hatchett*, District Court Judge Nowlin refused the defendant's request for a downward departure because Hatchett had not availed himself of "many advantages . . . [such as] . . . the opportunity to . . . acquire an education." Judge Nowlin explained that "folks who have had the advantages and . . . still don't conform their conduct to the law are going to be punished perhaps to a greater extent in this court . . ." *Id.* at 372. *But see* *United States v. Hatchett*, 741 F. Supp. 622 (W.D. Tex. 1990), *aff'd in part and vacated in part*, 923 F.2d 369 (5th Cir. 1991) (a sua sponte decision supplementing the sentencing record in which Judge Nowlin defends his remarks as "lectur[ing]"). *Id.* at 623.

See also *United States v. Onwuemene*, 933 F.2d 650 (8th Cir. 1991); *United States v. Rodriguez*, 882 F.2d 1059 (6th Cir. 1989). In *Onwuemene*, Judge Heaney vacated the defendant's sentence and remanded the decision after the sentencing judge commented that "[t]his country was good enough to allow you to come in here and confer upon you . . . benefits . . . and . . . opportunities . . . [w]e have got enough criminals . . . without importing any." *Onwuemene*, 933 F.2d at 651. In *Rodriguez*, the Sixth Circuit Court of Appeals affirmed an upward departure based on numerous factors. However, the court indicated that two of the factors articulated by the district court were impermissibly considered. *Rodriguez*, 882 F.2d at 652. The district court had commented that the defendant's status as an immigrant burdened him with a "special duty" to become a "productive member of society" and to learn English. *Id.* at 1066. The Court of Appeals ruled consideration of these factors improper. *Id.*

94. *See* *United States v. Prestemon*, 929 F.2d 1275 (8th Cir. 1991). Nor is it sexist for a sentencing judge to account for gender in the case of a 36 year-old woman, a first-time offender, who grew up in "a socio-economic minefield," and as a single parent successfully raised three children without public assistance, when she succumbed to the wishes of her boyfriend to accompany him to New York City to buy narcotics and they were arrested by undercover agents. *See* *United States v. Handy*, 752 F. Supp. 561 (E.D.N.Y. 1990).

95. *See, e.g.*, *United States v. Big Crow*, 898 F.2d 1326 (8th Cir. 1990) (Wollman, J., concurring in part, dissenting in part). David Big Crow was convicted of assault with a dangerous weapon and assault resulting in serious bodily injury resulting from an incident involving several companions and a night of heavy drinking on the Pine Ridge Res-

In particular, cases involving Native Americans present immediate problems for federal courts.⁹⁶ Federal Courts have exclusive jurisdiction over Indians charged with committing major crimes within reservations.⁹⁷ Traditionally, federal judges have used the sentencing process to consider if the relevant cultural differences of Indian offenders were a mitigating factor.⁹⁸ The sentencing judge, in effect, "bridge[s] the gap between two distinct and different cultures."⁹⁹ The intent of the federal guidelines is to reduce the disparity generated by this type of judicial intervention. Yet, it is in the arena of sentencing Native American offenders that attorneys and commentators can mount the strongest challenge to the race-neutral notions of the federal

ervation. The government appealed a downward departure from a guideline range of 37-46 months to a sentence of 24 months imprisonment. The 8th Circuit Court of Appeals affirmed. However, Judge Wollman dissented, stating that § 5H1.10 precluded departure in this case. This, despite the fact that Judge Wollman considered Big Crow's sentence fair. "[A]s an abstract matter I have no disagreement with the sentence imposed by the district court . . . some things . . . are better left alone, and Big Crow's sentence is one of them." *Id.* at 1332-33. He concluded that courts "should not approve departures that, however appealing they may be in their result, subvert . . . [the] goal [of eliminating unwarranted disparity] and the spirit of the Guidelines." *Id.*

96. Letter from Fredric F. Kay, Federal Public Defender, District of Arizona to The Honorable William W. Wilkins, Chairman, The United States Sentencing Commission (Aug. 9, 1989)(on file with author); letter from The Honorable Richard M. Bilby, Chief Judge, United States District Court, District of Arizona to The Honorable William W. Wilkins, Chairman, The United States Sentencing Commission (Aug. 12, 1989)(on file with author). According to Mr. Kay, a disproportionate number of federal crimes, especially violent crimes, involve Indians. Mr. Kay's letter urges the Commission to be "sensitive to the unique problems on the reservations." Judge Bilby's letter stresses the "need to revisit the question of alcoholism on the reservations and the impact on the guidelines."

See also letter from The Honorable William W. Wilkins, Jr., Chairman, The United States Sentencing Commission to The Honorable Richard M. Bilby, Chief Judge, United States District Court, District of Arizona (Aug. 30, 1989)(on file with author). Judge Wilkins informed Judge Bilby that the Commission rejected alcoholism as a mitigating factor after extensive debate and consideration. Judge Wilkins also related that the Commission was "not unmindful" of the number of violent offenses committed on Indian Reservations. However, Judge Wilkins wrote, "the Commission concluded that it would be contrary to our statutory mandate to draft guidelines which set forth two separate standards of justice - one for American Indians and another for everyone else."

97. Indian Major Crimes Act, 18 U.S.C. § 1153 (1988). The "major crimes" include murder, manslaughter, kidnapping, incest, various crimes involving assault, arson, burglary, and robbery. *Id.*

98. Donna Chavez, Testimony before the Committee on the Judiciary, *supra* note 85, at 178.

99. C.F. Tallis, *Sentencing in the North*, in *NEW DIRECTIONS IN SENTENCING* 306 (Grosman ed. 1980)(commenting on Canadian judges in Canada's Northern Territories). Federal judges, especially in the Southwest, appear to play the same role. *See generally* Donna Chavez, Testimony before the Committee on the Judiciary, *supra* note 85.

guidelines.¹⁰⁰

Both the Indian tribes and the government intended the reservation system to be separatist.¹⁰¹ In many respects the relationship between tribal and the American legal systems reflect the notion of separatism. For example, despite the clear intention of the Indian Major Crimes Act to bring all major crimes into federal court, there is still a strong interest in allowing tribes to control their own dispute resolution mechanisms.¹⁰²

The concept of separatism is well founded; treaty negotiators for both sides recognized each other's "radically different world views."¹⁰³ Generally, whites and Indians still maintain realities that are worlds apart.¹⁰⁴ The differences in world views are reflected in the divergent legal systems.¹⁰⁵ Yet the American

100. Indian defendants need not attack § 5H1.10 to argue for disparate treatment at the sentencing stage. A downward departure could be based upon a Native American's political status. *See, e.g.*, *United States v. Antelope*, 430 U.S. 641, 646 (1976); *Morton v. Mancari*, 417 U.S. 535, 552-53 & n.24 (1974). Congress has sanctioned disparate treatment of Native Americans based on political status and culture. *See, e.g.*, Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963. .

101. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW, NATIVE SOCIETIES IN A CONSTITUTIONAL DEMOCRACY* 14-16 (1987).

102. *Id.* at 120.

103. *Id.* at 15.

104. Robert A. Williams Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 Wisc. L. REV. 219, 293 (1986).

105. *See generally* Donna Chavez, Testimony before the Committee on the Judiciary, *supra* note 85. Tribal legal systems vary among individual tribes. However, many tribal legal systems resemble Professor Griffiths' "family model." *See generally* Griffiths, *supra* note 59. In a family, sanctions involve more than punishment, deterrence, protection, and rehabilitation. "[A]ny process between [a parent and a child] will reflect the full range of their relationship and the concerns growing out of it." *Id.* at 373.

As within a family, the ultimate goal of sanctions within many tribal systems is a reconcilability of interests between the tribal community and the offender. *See Id.* at 373, 387 n.99. Tribal sanctions, unlike many of the sanctions meted out in state and federal courts that seek to exile the offender, *id.* at 378, contemplate a continuing relationship. *See generally* Donna Chavez, Testimony before the Committee on the Judiciary, *supra* note 85; Tova Indritz, Testimony before the Committee on the Judiciary, *supra* note 85; Michael Katz, Testimony before the Committee on the Judiciary, Subcommittee on Criminal Justice (Denver, Colorado, November 5, 1986) (Mr. Katz is a Federal Public Defender in Denver, Colorado). In fact, the imposition of tribal sanctions often involves local community input. Donna Chavez, Testimony before the Committee on the Judiciary, *supra* note 85, at 165.

Tribal systems embrace additional features that distinguish them from the American criminal justice system and, at the same time, cause them to resemble Professor Griffiths' model. For example, the model American criminal process is compartmentalized into distinct phases. *See* Griffiths, *supra* note 59, at 376. The arrest, trial, and sen-

legal system readily takes tribal disputes from the reservation and places them on the desks of federal judges.

Fragmentary evidence suggests that, prior to the sentencing guidelines, federal judges performed their function well.¹⁰⁶ In cases involving Navajo offenders not only federal judges, but also some prosecutors and public defenders have developed a unique sensitivity to the Navajo sense of justice.¹⁰⁷ The federal sentences of Navajo offenders reflect this sensitivity.¹⁰⁸ The federal sentencing guidelines threaten the development of this delicate balance.

Because the guidelines require sentencing judges to be neutral with regard to race,¹⁰⁹ sentencing judges are less likely to consider the unique circumstances that surround sentencing an Indian offender. Nevertheless, the sentencing guidelines' departure provisions provide an avenue for federal judges when justice requires that they bridge the gap between cultures.

tencing phases each have different functions and different rules. The family model lacks this "conceptual compartmentalization." *Id.* Likewise, "traditional Navajo people do not necessarily break their perception of justice into discrete phases of the criminal process which would allow the separation of the idea of sentencing from accusatory and trial phases." Donna Chavez, Testimony before the Committee on the Judiciary, *supra* note 85, at 165.

Language and other customs provide additional evidence of how tribal legal systems reflect the different world views of many Indian tribes. For example, the concept of "guilty" cannot be expressed in the Eskimo language. W.G. Morrow, *Administration of Justice and Native People, Symposium on the Law and Native People*, 38 SASKATCHEWAN L. REV. 16, 20. Also, the Innu and Indian cultures in Canada's Northwest Territories did not have jails. Tallis, *supra* note 99, at 305.

106. Donna Chavez, Testimony before the Committee on the Judiciary, *supra* note 85, at 178.

107. *Id.* at 164; *see also* Tova Indritz, Testimony before the Committee on the Judiciary, *supra* note 85; Michael Katz, Testimony before the Committee on the Judiciary, *supra* note 105.

108. Donna Chavez, Testimony before the Committee on the Judiciary, *supra* note 85; Tova Indritz, Testimony before the Committee on the Judiciary, *supra* note 85. Both Ms. Chavez and Ms. Indritz testified concerning what they called "cultural restitution." Ms. Indritz best described the concept:

[T]he tribe will, sometimes through the tribal courts, or sometimes not, have arranged sort of a mediated settlement between families, and the victim's family says, "We don't want this guy to go to prison" . . . I had a case last fall where my client was charged with killing his uncle, and the family all got together and said, "You know, we lost one person. It was partly his fault, and we don't want this kid to go to jail."

Id. at 240.

109. *See supra* notes 16-19 and accompanying text.

The departure provisions of the federal sentencing guidelines are destined to be much litigated.¹¹⁰ Their limits are still undefined¹¹¹ and provide fertile grounds for effective lawyering skills. Arguing that race or ethnic culture is a basis for departure certainly pushes those limits. Yet, especially in prosecutions of Indians, the departure provisions appear to provide a passage to justice.¹¹²

110. See *supra* note 69.

111. See generally Selya & Kipp, *supra* note 69.

112. In fact, the Commissioners discussed using the departure provisions in cases involving Indian offenders. Tova Indritz, Testimony before the Committee on the Judiciary, *supra* note 85, at 240-42. But the Commissioners didn't appear to agree on how sentencing judges should use the departure provisions:

MS. INDRITZ: (after describing an incident where a family agreed upon a unique arrangement regarding a murder) [We need] . . . more opportunity for discretion on the part of the trial judges, who really are the only ones who can take into account the particular facts which may seem unusual or may not be so unusual.

COMMISSIONER BREYER: Well, you have something unusual to the country as a whole, but nonetheless of the particular community it may be premeditated crimes are less common and provoked more common, even though it's unusual in that community, in which case we don't have to write a guideline I wouldn't think[,] that governs all kinds of family relationships which may be common in some parts of the world, and not in others.

MS. INDRITZ: I think that's the reason there should be more room for discretion.

COMMISSIONER BREYER: Depart.

CHAIRMAN WILKINS: Allow for departure, brother against brother, friend against friend, acquaintance against acquaintance, drinking buddies against drinking buddies. I mean it's a whole group of cases you are talking about. But they have to know, "Judge, this is not something we wrote guidelines for." It has to be more than that.

. . . .

COMMISSIONER BREYER: Well, the thing to do is to write a departure policy, and you could look at that and try to figure out what other things ought to be in there.

That's possible. I mean you could have an escape clause, you know, and say, "We haven't thought of everything," and time will - time and monitoring and appellate court decisions and just looking and seeing what happens that will identify it for us.

Id.

But see letter from The Honorable William W. Wilkins, Jr., to The Honorable Richard M. Bilby, Chief Judge, (on file with author)(suggesting that the Commission had considered the problems on Indian reservations). Whether it has done so adequately is another issue.

III. CASES TAINTED BY RACIAL BIAS

Sentencing judges using the federal guidelines need not be racially neutral in the class of cases where racial bias has provided an inaccurate picture of either the defendant's case or the defendant's criminal history.

Racism is still epidemic in our society;¹¹³ it is reflected throughout the criminal justice system, from the decision to report criminal activity until the parole decision, and beyond.¹¹⁴ Sentencing judges should consider race a mitigating factor and depart from the range specified by the sentencing guidelines in two additional situations: first, where it is likely that racial discrimination has occurred at previous stages of the criminal process; and second, where racial bias has made it likely that the defendant's criminal history improperly magnifies the seriousness of his crime or the likelihood that he will commit future ones.

At the final stages of the criminal process, race neutrality could petrify, and may even amplify the effects of discrimination that have occurred at earlier stages in the process. The bias begins, even before the decision to arrest, with the allocation and distribution of law enforcement resources.¹¹⁵ Law enforcement agencies often "direct their attention to only a limited range of

113. See, e.g., *Race: Our Dilemma Still*, NEWSWEEK, May 11, 1992, at 44.

114. See generally MARC MAUER, *THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM* (1990); AMERICAN BAR ASSOCIATION, *THE STATE OF CRIMINAL JUSTICE, AN ANNUAL REPORT* (1993) [hereinafter AMERICAN BAR ASSOCIATION ANNUAL REPORT]; *Developments in the Law - Race and the Criminal Process*, 101 HARV. L. REV. 1473 (1988). I leap over a major cause of racial bias in the criminal justice system, the description of criminal activity itself. See DONALD J. BLACK, *THE MANNERS AND CUSTOMS OF THE POLICE* 22-23 (1980). Generally, our society is quick to classify fringe activities of racial minorities as criminal. At times, "the mere fact of an act's unconventionality, by itself, attracts legal repression . . ." *Id.* at 23; see also MAUER, *supra*, at 6; Kleck, *supra* note 11, at 784.

115. Heaney, *supra* note 47, at 774. I do not discuss how racial bias effects what criminal activity the public reports to the police. Ordinary citizens act as the first screening devices by calling or writing the police with information. Also, "[t]he degree of police concern with vice of various kinds . . . reflects the demands of the larger public, as expressed in newspaper stories and editorials, statements and protests by organizations, and pressures brought to bear upon politicians who have the capacity to influence police administrators." BLACK, *supra* note 114, at 18 n.14. Racial bias affects both types of public input.

the conduct that outwardly qualifies as vice.”¹¹⁶ Often that range includes the acts of minorities while excluding those same acts when the actors are “social elites.”¹¹⁷ Even the most common crimes “attract the most law when they occur in a larger context of unconventionality.”¹¹⁸

Individual police officers augment the bias already established by law enforcement agencies. By unconscious decisions involving what crimes to investigate and on-the-spot decisions involving who is arrested for what act, officers walking the beat contribute to the systematic racism. Departments give individual officers latitude to decide which crimes to investigate.¹¹⁹ Often, the officer’s decision is not racially neutral;¹²⁰ rarely is it reviewable.¹²¹ While little data exists about the relevant factors in individual officers’ choice to investigate a specific crime, studies indicate that race is a significant factor in the decision to

116. BLACK, *supra* note 114, at 23. There is no better example than the one Black supplies:

In the case of narcotics enforcement, for instance, [law enforcement agencies] show little or no interest in the use of illicit drugs by people who are in other respects conventional in lifestyle. Thus, although physicians as a group have an exceptionally high rate of opiate addiction, the police do not develop informers within the medical profession. Furthermore, even when they learn of a physician who is an addict, they rarely make an arrest or subject the individual to other indignities that “street addicts” so often experience.

Id.

117. *Id.*

118. *Id.* Black suggests that crimes such as prostitution, homosexuality, gambling, and after hours drinking are considered recreational for one class of people and illegal for others. *Id.*

119. *Id.* at 10. This is true not only of patrol officers during the time that they are not actually responding to calls from the public, but also of detectives whose major responsibility is to investigate criminal action that patrol officers have brought to their attention. *Id.* at 14-15.

120. Dannefer & Schutt, *supra* note 15, at 1123. In fact, race may be the most important factor in police dispositions. *Id.* See also Don Jackson, *Police Embody Racism to My People*, N.Y. TIMES, Jan. 23, 1989, at A25. Mr. Jackson, an Afro-American police officer took a leave from the Hawthorne California Police Department in Hawthorne, California to investigate reports of police racism. On January 14, 1989, officer Jackson was stopped by white police officers from the Long Beach Police Department. The officers arrested Jackson and in the process shoved his head through a window. The incident was filmed by reporters from KNBC-TV who were following Jackson in an unmarked van. Jackson calls police “the most prominent reminder” of the Black American’s “second-class citizenship.” *Id.*

121. RESEARCH ON SENTENCING, *supra* note 5, at 42.

arrest.¹²² The data does not conclusively show racial bias, but police continue to arrest minorities at a higher rate than non-minorities.¹²³ Discrimination appears particularly acute if the offender is a juvenile.¹²⁴

The bias continues throughout the process. Race influences the decision whether and how to charge someone who has been arrested.¹²⁵ It influences the way the prosecutor maneuvers her forces, the way jurors evaluate the defendant's version, what eye-witnesses saw, and the community's reaction to the crime. By the time minority offenders reach the sentencing stage they "face more serious charges, [are] more often induced to plead guilty, [are] less able to make bail and thus organize a successful defense, and have restricted access to good legal representation."¹²⁶ This stage by stage discrimination cumulates: minority offenders receive generally more severe sentences than others.¹²⁷

122. PETERSILIA, *supra* note 34, at 1; BLACK, *supra* note 114, at 95.

123. AMERICAN BAR ASSOCIATION ANNUAL REPORT, *supra* note 114, at 9-10. Black suggests that the reason why blacks are arrested at a higher rate than whites is not due to discrimination but rather is a "function of the relatively higher rate at which black suspects display disrespect toward the police." BLACK, *supra* note 114, at 95. Of course, perceptions of disrespect may not be racially neutral. In a postscript written ten years later, Black discusses studies showing "that the police are more likely to give traffic tickets to blacks . . . more likely to arrest blacks under conditions later viewed as inadequate to justify prosecution . . . more likely to use penal and coercive tactics when they handle disputes involving blacks . . . and more likely to shoot and kill blacks." *Id.* at 107.

There is no discrimination on the basis of race if blacks and other minorities are arrested at greater rates because they commit more crimes. Generally, studies focusing on self-reported crimes indicate that "nonwhites and lower-class persons are not really more delinquent but are just more likely to be arrested." Paul E. Tracy Jr., *Race and Class Differences in Official and Self-Reported Delinquency* in FROM BOY TO MAN, FROM DELINQUENCY TO CRIME 87, 118. However, a study by Mr. Tracy did not duplicate these findings. *Id.* at 119.

124. AMERICAN BAR ASSOCIATION ANNUAL REPORT, *supra* note 114, at 11-12; PETERSILIA & TURNER, *supra* note 12, at 26. "Minority youths are more likely to be arrested and formally prosecuted than whites, who are more likely to be released to their parents' custody." *Id.* See also BLACK, *supra* note 96. Black reports that police officers tend to be "moralistic" with juvenile offenders, "frequently lecturing them about their misconduct and seeking to show them the selfishness and foolishness of their behavior." *Id.* at 25. Not surprisingly, police tend to be moralistic with juveniles whose racial background is similar to their own. "There is some evidence, for instance, that white officers are more moralistic toward white juveniles than toward black juveniles, though their formal dispositions of blacks may be more severe." *Id.* at 25 n.19.

125. PETERSILIA, *supra* note 34, at 19, 89.

126. *Id.* at 19.

127. Liska & Tausig, *supra* note 57, at 199. For example, the sentences of minority defendants are more likely to include imprisonment. See, e.g., Stephen Klein et al., *Race and Imprisonment Decisions in California*, 247 SCIENCE 812 (1990). Klein and his col-

And, the existence of a prior record is a red flag should the offender ever again come before a sentencing judge. Most judges believe that an offender with a prior record is "a different kind of a person . . . either incorrigible or an habitual criminal . . . ; [i]n either case . . . thought to merit more severe treatment."¹²⁸ It is as though the criminal justice system places minority offenders on a separate "track." And, the more contact they have with the system, the more difficult it is to escape. A Navajo Indian describes the path:

There are alcohol related problems leading straight into the jails and from the jails into the court system; and from the court system into the Big Slammer, into the State Penitentiary of New Mexico.¹²⁹

The Federal Sentencing Commission undertook "to enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system."¹³⁰ Eliminating race as a factor, they believed, would help realize that goal.¹³¹ But,

leagues report that, despite California's Determinate Sentencing Act, Latinos convicted of drug crimes are more likely to be sentenced to imprisonment. *Id.* at 816.

128. WHEELER ET AL., *supra* note 25, at 13-14. See also Marjorie S. Zatz, *Race, Ethnicity, and Determinate Sentencing*, 22 *CRIMINOLOGY* 147 (1984). Ms. Zatz conducted a study of almost five thousand sentences handed out during the first year of determinate sentences in California. She found that the effect of a prior record on the length of sentence differed significantly among racial groups. For example, the effect of two prior prison commitments was significantly harsher on Chicanos than either Whites or Blacks. *Id.* at 163.

129. UNITED STATES COMMISSION ON CIVIL RIGHTS, NEW MEXICO ADVISORY COMMITTEE, *THE FARMINGTON REPORT: A CONFLICT OF CULTURES* 51 (1975).

130. Federal Sentencing Commission, *FEDERAL SENTENCING GUIDELINES MANUAL* (1987), at 1.2. Apparently the Commission initially misread Congress' basic purpose for enacting the Sentencing Reform Act in 1984. A subsequent amendment makes it clear that by embarking on sentencing reform, Congress' objective was not to reduce crime, but rather to "combat crime." Federal Sentencing Commission, *Federal Sentencing Guidelines Manual* (1991), at 512, amend. 307 (emphasis added).

131. See *Symposium: Equality Versus Discretion in Sentencing*, *supra* note 2. At the symposium, Commissioner Ilene Nagel commented on pre-guideline sentencing decisions:

[S]ome district court judges systematically treated [B]lack and [H]ispanics more harshly while others used the court to promote a system of alleged justice, where minorities were given light sentences as an accommodation to past societal wrongs . . . Race, sex, and social class of the offender, rather than being neutral and irrelevant to sentence determinations, exacerbated or mitigated the levels of punishment, in no consistent way, and for no justifiable reasons.

the guidelines fail.

The guidelines fail because the Commission views sentencing as a compartmentalized procedure that terminates the criminal process, not as a phase dependent on the other stages of the process, from arrest to parole. Compartmentalization, a useful aid in managing the complexities of the criminal process,¹³² can blind us to the cumulative effects of bias. If we continue to limit the information that a judge is permitted to use without re-arranging other aspects of the procedure we risk compromising the administration of justice. Sentencing reformers argued that many judges use extra-legal factors such as race inappropriately.¹³³ Therefore, the reformers adopted rules and guidelines to require judges to be neutral with regard to race and other extra-legal factors.

However, neutrality at the sentencing phase may be counterproductive.¹³⁴ If a judge is uncompromisingly racially neutral at the sentencing stage she freezes in place any previous negative discrimination that has already taken place. Sentencing judges should not ignore this discrimination, but rather confront it and do what they can to compensate for it.¹³⁵ Judges must use

Id. at 1815-16. *But see* Heaney, *supra* note 47. Judge Heaney compared judicial sentencing disparity before and after the Federal Sentencing Guidelines. Disparity existed before the guidelines, "but . . . 'its occurrence was infrequent, happenstantial, and idiosyncratic.'" The guidelines, on the other hand, have "produced sentence disparities, which . . . are 'regular [and] predictable. . . .'" *Id.* at 774 (quoting Chief Judge G. Thomas Eisle, United States District Court for the Eastern District of Arkansas). *See also* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 188-89, n.64, 65 (1991).

132. Minow, *supra* note 1, at 34. *See also* Steven Koh, Note, *Reestablishing the Federal Judge's Role in Sentencing*, 101 HARV. L. REV. 1109 (1992). Koh argues that a major obstacle to the success of the pre-guideline system was a failure of the various actors to communicate among themselves. "The various actors, each with a particular informed perspective," were encouraged, on behalf of a system of individualized justice, to check, and balance the positions of other actors with his own. However, lack of communication among the actors led to a process dominated by second-guessing and, as a result, unwarranted disparity. *Id.* at 1114-15.

133. *See supra* notes 12 & 131 and accompanying text.

134. Minow, *supra* note 1, at 70. "[T]he state has chosen to preserve existing institutional arrangements that benefit some rather than others; doing nothing, or authorizing employers, juries, and other decisionmakers to do nothing, is no less of a choice." *Id.* at 70 n.278.

135. Rose M. Ochi, *Racial Discrimination in Criminal Sentencing*, 24 THE JUDGES' J. 6, 54 (1985). Traditionally, judges have used the sentencing process to compensate for racial bias that occurred at earlier stages in the criminal procedure. Dannefer & Schutt, *supra* note 15, at 1129.

their unique position within the criminal justice system, gathering and considering all information germane to just and fair punishment.¹³⁶

There are basically two types of cases where racial bias may have provided the sentencing judge with an inaccurate portrait of the defendant. The judge should treat both similarly. The first type is where racial bias has occurred in previous stages of the defendant's case. Upon an initial showing that racial bias affected previous stages in the criminal process,¹³⁷ the sentencing judge should determine whether the case would take on a different posture had there been no racial discrimination. If the judge's answer is yes, she should then depart downward from the otherwise applicable guideline range.

The second type of case concerns situations where racial bias has made it likely that the defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that he or she will commit further crimes.¹³⁸ The sentencing judge should consider each entry in the defendant's criminal history and determine (1) whether reliable information indicates that racial bias influenced the entry, and (2) whether the entry contributes to an over-representation of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes. The sentencing judge should use this information to guide her

136. Traditionally, a sentencing judge's access to information was unlimited. See *supra* note 56.

137. The proposed Fairness in Death Sentencing Act of 1991 provides a model system of inferences, burdens, etc., that a judge may use upon an initial showing of racial bias. H.R. 2851, 102d Cong., 1st Sess. (1991). See also Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 REV. L. & SOC. CHANGE 777 (1990-91). Tabak reviews the Fairness in Death Sentencing Act and comments on the adequacy of its procedural elements. *Id.*

138. The guidelines provide some guidance. GUIDELINES MANUAL, *supra*, note 4, § 4A1.3, at 277. Section 4A1.3, Adequacy of Criminal History Category, is a policy statement that authorizes sentencing judges to depart from the otherwise applicable guideline range when "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." GUIDELINES MANUAL, *supra* note 4, at 277. This includes "cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes." GUIDELINES MANUAL, *supra* note 4, at 278.

departure.

IV. CONCLUSION

Despite the laudable objective of limiting discretion and assuring neutral treatment, the federal sentencing guidelines may at times create unfairness. They destroy two traditional roles of sentencing judges - bridging cultural gaps and compensating for prior racial bias - leaving a vacuum where previously at least some judges were able to impose just and fair sentences. Until modifications respond to this quandary, only a broad and unconventional view of the departure provisions can begin to address the dilemma that confronts many minority defendants - the dilemma of difference.