American Indian Law Review

Volume 35 | Number 2

1-1-2011

Defending the "Indefensible": Replacing Ethnocentrism with a Native American Cultural Defense

Megan H. Dearth

DEFENDING THE "INDEFENSIBLE": REPLACING ETHNOCENTRISM WITH A NATIVE AMERICAN CULTURAL DEFENSE

Megan H. Dearth[*]

I. Introduction

Throughout history, federal Indian policy has vacillated between separation and assimilation. Sometimes federal and state governments recognize and promote tribal sovereignty, while other times, the policy favors assimilation into the dominant culture over individualism.[1] Currently, the policy is one of self-determination, geared toward restoring inherent rights, including that of tribal self-government, back to the tribes.[2] Nevertheless, statutes fashioned in favor of assimilation are still very much in operation and come into conflict with efforts to encourage tribes to preserve and maintain their culture. The most egregious offenders are the statutes designed to afford criminal and civil jurisdiction to federal and state courts – the Major Crimes Act[3] and Public Law 280.[4] These acts give federal courts and some state courts jurisdiction over crimes and other offenses committed by Native Americans in Indian Country,[5] leaving tribal members vulnerable to injustice when charged and tried by arbiters unfamiliar with their individual laws and customs.[6]

---

* Second-year student, University of Oklahoma College of Law.

1. *See* Jace Weaver, *The Pendulum Swings of Indian Policy*, EJOURNAL USA, Spring 2009, at 16, 16-18, http://www.america.gov/media/pdf/ejs/0609.pdf (tracing the shifting federal policy toward Indians). *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995); Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777 (2006) [hereinafter Washburn, *Crossroads*]; Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 U. DAYTON L. REV. 437 (1998).

2. Weaver, *supra* note 1; *see also* Washburn, *Crossroads*, *supra* note 1, at 777.

3. 18 U.S.C. § 1153 (2006).

4. 28 U.S.C. § 1360 (2006).

5. 18 U.S.C. § 1153 (granting federal jurisdiction over Native Americans who commit felonies in Indian Country); 28 U.S.C. § 1360 (granting certain states criminal and civil adjudicatory jurisdiction over disputes that arise in Indian Country).

6. For academic discussion of these acts and their effects, see Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006); Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627 (1998); Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697 (2006).

State and federal courts currently have no protective process to account for the potential prejudice a Native American defendant may experience when haled into "foreign" courts. That there are no safeguards is curious given that current federal policy is geared toward tribal sovereignty and the preservation of Native American culture.[7] With this policy in mind, courts need protective mechanisms in place to eliminate ethnocentric prejudice both at trial and sentencing. First, prejudice may arise when a Native American's case is heard before a tribunal comprised of a judge or jury of the dominant Western society, prone to evaluate the tribal defendant's actions against a hypothetical reasonable-Western-defendant standard. When what is reasonable in Western American society differs from what is reasonable in Native American society, a tribal defendant may not receive a fair trial unless the decision-maker is educated with respect to cultural differences potentially impacting his behavior. Second, prejudice may surface in the criminal sentencing phase if there are no procedures that take into account precisely how cultural characteristics influence action or whether tribal punishment theory would be more appropriate to the circumstances.

One mechanism through which such protection could occur is the recognition of a formal Native American cultural defense. The cultural defense is "defined as 'a defense asserted by immigrants, refugees, and indigenous people based on their customs or customary law.'"[8] The underlying premise is that there should be "tolerance of foreign cultures due to a lack of moral basis for punishment."[9] A formal cultural defense for Native Americans creates an avenue for the introduction of evidence when necessary to protect the "distinct status of Indians in America."[10] Although there is no formally recognized cultural defense, some courts have allowed into evidence cultural characteristics of a defendant that may impact a moral basis for punishment.[11]

---

7. *But see* Michael P. Gross, *Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy*, 56 TEX. L. REV. 1195 (1978) (outlining the ways in which modern policy falls short of true self-determination and sovereignty).

8. Andrew M. Kanter, Note, *The Yenaldlooshi in Court and the Killing of a Witch: The Case for an Indian Cultural Defense*, 4 S. CAL. INTERDISC. L.J. 411, 413 (1995).

9. *Id.*

10. *Id.* at 414.

11. *See id.* at 413-14; Tamar Tomer-Fishman, *"Cultural Defense," "Cultural Offense," or No Culture at All?: An Empirical Examination of Israeli Judicial Decisions in Cultural Conflict Criminal Cases and of the Factors Affecting Them*, 100 J. CRIM. L. & CRIMINOLOGY 475, 482 (2010) (listing three high-profile cases where a cultural defense was examined: *People v. Kimura*, *People v. Moua*, and *People v. Chen*).

Literature on the cultural defense primarily discusses immigrants rather than Native Americans,[12] but the rationales reflect the same concerns. In fact, implementing a formal cultural defense for Native Americans is even more compelling than implementing a similar defense for immigrants. Those who live in Indian Country and abide by a separate set of laws and moral guidelines are especially prejudiced when haled into "foreign" courts – even more so than immigrants – because they do not avail themselves intentionally to the laws or customs of the dominant Western society.

This comment advocates for a formal Native American cultural defense. It asserts that such a defense promotes the legitimacy of tribal punishment theory, honors the unique relationship between the tribes and the federal government, and, most importantly, alleviates some of the prejudices resulting from Native American defendants being haled into "foreign" courts. Part II first outlines the traditional cultural defense and demonstrates how it aligns with the punishment theories of criminal law. It then examines various criticisms imposed upon the cultural defense, and thereafter provides counter-arguments thereof. Part III reviews the *Crow Dog* decision and reveals how the Major Crimes Act, Public Law 280, and the current Federal Sentencing Guidelines collectively create the need for a cultural defense for affected Native American defendants. Part IV demonstrates how the adoption of a cultural defense for tribal members tried in Public Law 280 state courts and in federal courts largely can alleviate the problems that attend these acts. It illustrates how a society's cultural mores and laws create a "reasonable person" standard, universally applicable to all defendants, regardless of individual characteristics or considerations. It then advocates three steps to implement the proposed Native American cultural defense. First, the Rules of Evidence should be amended to create a presumption of relevance for the admission of Native American cultural evidence. Second, the courts should view the illegal acts through the lens of a "reasonable Native American person" standard, rather than the traditional "reasonable person" standard that presupposes a Western American person. Last, the Federal Sentencing Guidelines similarly should be amended to promote the admission of Native American cultural evidence, such as prior tribal punishment or tribal punishment theory, to provide a downward departure from the sentence allotted for particular crimes.

12. Kanter, *supra* note 8, at 413.

II. Scope of the Traditional Cultural Defense

The cultural defense is what a defendant uses to show evidence of his cultural background and its relevance to his culpability.[13] Currently, a formal cultural defense is not legislatively authorized and "the case law dealing with cultural defenses is not yet well established."[14] Nonetheless, some courts allow cultural evidence to enter the courtroom to explain the case from the individual's cultural perspective.[15] At the same time, many judges are hesitant to allow a cultural defense in fear that it will be reversed on appeal or that it is "irrelevant."[16]

A. The Cultural Defense in the Courtroom

In a criminal case, a defendant may use a cultural argument during the guilt phase of sentencing "to negate a required element of a crime, to secure an acquittal, or to support an established defense such as insanity or provocation."[17] Defendants might also seek to use culture to justify a downward departure from the Federal Sentencing Guidelines during the sentencing phase.[18] Finally, cultural evidence may be used pre-trial to influence the prosecution's decision to "arrest, prosecute, or negotiate a plea."[19]

In a civil case, the cultural defense can be used when, for example, family courts are determining the status of parents as "fit" or "unfit," as well as whether a prenuptial agreement should be enforced when its terms otherwise would be unenforceable.[20] A person may also seek to exempt himself from a certain policy, such as government-mandated vaccination, for religious or

13. ALISON DUNDES RENTELN, THE CULTURAL DEFENSE 6 (2004). For general academic discussion of the cultural defense, see DUNDES, *supra*; Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317 (2006); Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911 (2007); James M. Donovan & John Stuart Garth, *Delimiting the Cultural Defense*, 26 QUINNIPIAC L. REV. 109 (2007).

14. Alison Dundes Renteln, *Raising Cultural Defenses*, *in* CULTURAL ISSUES IN CRIMINAL DEFENSE 772 (Linda Friedman Ramirez ed., 3d ed. 2010).

15. *Id.*

16. *Id.* at 771-72; RENTELN, *supra* note 13, at 23.

17. RENTELN, *supra* note 13, at 7.

18. *See id.*; United States v. Guzman, 236 F.3d 830, 831-32 (7th Cir. 2001) (seeking to depart from the Federal Sentencing Guidelines due to factors relating to her Mexican cultural heritage).

19. RENTELN, *supra* note 13, at 7.

20. *See id.*

cultural reasons.[21] Likewise, a plaintiff seeking money damages may use a cultural defense if a cultural condition makes the event more traumatic than what is "reasonable" to a person in the dominant Western society.[22]

When a party raises a cultural issue, the issues that generally arise on appeal relate to whether the trial court abused its discretion by (1) admitting or failing to admit such evidence because it is deemed relevant or irrelevant, (2) finding the evidence relevant, but failing to provide an adequate jury instruction as to the weight of the evidence, and (3) considering or failing to consider such evidence during the sentencing phase.[23] An established cultural defense restricts the discretion allowed by lower courts with regard to cultural evidence, and will reverse the common practice of barring such evidence.[24]

A common use of the cultural defense is in Asian American cases involving *oyako-shinju*, which is parent-child suicide. When intending to commit suicide, mothers murder their children under the view that "it is more cruel to leave the children behind with no one to look after them than it is for the mother to take them with her to the afterlife."[25] In *People v Kimura*, a Japanese American, "learn[ing] of the infidelity of her husband, [] attempted *oyako-shinju* . . . by wading into the Pacific Ocean with her two children."[26] Though her children died, "she survived and was charged with first-degree murder."[27] Kimura "had resided in the United States for several years," but "had not become assimilated" into the dominant culture because she "remained culturally isolated" within the bounds of her Japanese American society.[28] "[H]er homicide charge [later] was reduced to voluntary manslaughter"[29] after the Japanese American community gathered a 25,000-signature petition, begging "the Los Angeles County district attorney not to prosecute" because "her actions were based on a different worldview."[30] Although considered

21. *See id.*

22. *See id.*

23. *Id.*

24. *See id.* at 6.

25. Renteln, *supra* note 14, at 774.

26. RENTELN, *supra* note 13, at 25 (citing People v. Kimura, No. A-091133 (Los Angeles Super. Ct. Nov. 21, 1985) (unpublished opinion)).

27. *Id.*

28. *Id.*

29. *Id.* (noting that her punishment was "one year in county jail, . . . five years probation, and psychiatric counseling").

30. *Id. But see* Renteln, *supra* note 14, at 774-75 ("Six psychiatrists testified that Kimura was suffering from temporary insanity. Some based their conclusion on her failure to distinguish between her own life and the lives of her children. . . . [H]er attorney claimed that

illegal in Japan, *oyako-shinju* "is not unheard of as a means by which a family can avoid an otherwise unacceptable social predicament."[31]

Another case involved a recent immigrant to the United States who suffered from depression and intended to commit suicide.[32] Prior to the attempted suicide, her seven-year-old son told her that he did not feel loved by his father.[33] She thereafter killed her son before attempting to kill herself, and was charged with first-degree murder.[34] Without objection from the prosecution, the defense admitted cultural evidence via expert witnesses testifying that the defendant's Chinese culture influenced her decisions.[35] In Chinese culture, her son's perception that he was "unwanted," coupled with the fear that he would be alone after her death, left her no option but to kill her son before killing herself, so that they could depart to heaven and she could focus on caring for him in the afterlife.[36] The defense also sought to submit an instruction to the jury to use this cultural evidence to decide the mental element of the crime or "any other issue in the case."[37] The prosecution objected to the instruction, and the court sided with the prosecution for fear that such an "instruction would tell[] [the jury] that is the law."[38] The court of appeals, however, reversed the trial court's decision and found that the instruction applied to the evidence and defense of the case.[39] The court of appeals stated that, on remand, "the defendant is entitled to have the jury instructed that it may consider evidence of defendant's cultural background in determining the existence or nonexistence of the relevant mental states."[40]

---

the favorable plea bargain relied on the psychiatric testimony [but] commentators believe that cultural factors played a role in the process."); RENTELN, *supra* note 13, at 228 n.5 ("[T]he Defense Sentencing Report contains statements suggesting that Kimura suffered a cognitive impairment: Her severe mental and emotional illness prevented her from thinking or acting rationally. . . . Because of her mental condition and her cultural background, Defendant did not perceive her parent-child suicide as an illegal act.") (alteration in original) (internal quotation marks omitted).

31. RENTELN, *supra* note 13, at 25.

32. People v. Wu, 286 Cal. Rptr. 868 (1991).

33. *Id.* at 872.

34. *Id.* at 872-73.

35. *Id.* at 883.

36. *Id.* at 885.

37. *Id.* at 882-83.

38. *Id.* at 880 (alteration in original).

39. *Id.* at 887.

40. *Id.* For a more comprehensive discussion of the cultural defense in cases involving Asian women, see Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"*, 17 HARV. WOMEN'S L.J. 57 (1994).

B. Critiques of the Culture Defense

Critiques of the culture defense are usually based upon two grounds: "that newly arrived immigrants should be assimilated as rapidly as possible and that individualized justice leads to anarchic trends and increases in crime."[41] At the forefront of these objections is the "when in Rome, do as the Romans do" argument, derived from the assimilative principle that "everyone should be held to the same, single standard."[42] They argue that if a member of a cultural minority is, in some circumstances, held to a different standard, she essentially receives preferential treatment over those of the cultural majority, resulting in a violation of equal protection because it results in "[un]identical treatment under the law."[43] Furthermore, critics assert that this "special treatment" could weaken the justice system in general because it is "too confusing to have separate legal codes for different groups within the same national political system."[44] They maintain that this lack of uniformity could lead to anarchy because "individuals and groups could decide on their own with which laws they would comply [and] there would no longer be any certainty or predictability in the legal system."[45]

Another common worry about the implementation of a formal culture defense is that it undermines one of the overall purposes of criminal punishment – deterrence.[46] Deterrence, which "is sometimes referred to as the crime control model," centers on the "core idea [] that the law must sanction deviant acts to uphold the social order."[47] Punishment under this model is intended to deter "the defendant himself from committing another crime" or "to deter others in society from committing crimes."[48] Critics of the cultural defense are concerned that it "reduces culpability, . . . undermines the deterrence function of the criminal justice system, . . . [and that] [i]f a person is not punished for a culturally motivated act, . . . [it] may perpetuate the tradition with impunity."[49]

---

41. Kanter, *supra* note 8, at 424 (citation omitted).
42. RENTELN, *supra* note 13, at 193.
43. *Id.*
44. *Id.* at 192.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*

Another fear is characterized as the "boomerang effect." This is a fear that "gender norms of minority cultures" will influence the majority culture as well.[50] This might result from cases accommodating the "sexist practices" of cultural minorities, which "may well feed back into the majority culture."[51] Criminal defendants in the majority culture might argue the precedent set from these cultural minority cases, asserting that they too should have access to the defenses, which in turn could effectively "reshape" mainstream law.[52]

For instance, judges have already created an avenue for culture to be used in future domestic abuse cases.[53] In one case, a Japanese American sought to use the defense after he murdered "an African American woman with whom he had a relationship."[54] He argued on appeal that, because his state of mind was linked with his cultural background, "the jury should have been instructed 'to evaluate the sufficiency of provocation from the standpoint of a reasonable person in terms of the defendant's position as a Japanese American.'"[55] This type of "proposed jury instruction reflects the idea, increasingly made by minority defendants, that equal access to mainstream legal defenses requires consideration of cultural factors."[56] This may raise equal protection concerns because victims of "culturally motivated crimes" may "receive less protection than victims whose perpetrators happen to be from the mainstream community."[57]

Even if these types of cases are not used "as precedents in cases involving defendants of the dominant culture," critics of the cultural defense argue that the "boomerang effect[] can occur across minority groups."[58] For instance, "[a] federal appellate court held that cultural evidence may be admitted where

---

50. SARAH SONG, JUSTICE, GENDER, AND THE POLITICS OF MULTICULTURALISM 109 (2007).

51. *Id.*

52. *Id.* ("In seeking a jury instruction of provocation, a mainstream defendant could point to such cases and argue that if immigrants can have access to the provocation defense, then he should, too.").

53. *See id.* at 110-11.

54. *Id.*

55. *Id.* at 111 (quoting People v. Kobayashi, No. B157685, 2003 Cal. App. Unpub. LEXIS 2929, at *9-11, *32 (2d Dist. Mar. 26, 2003)). Despite that the appellate court "sidestepp[ed] the question of whether there is an equal protection and due process right to a culturally specific evaluation of the element of provocation," the case is "troubling since judges exercise considerable discretion on whether and how cultural evidence gets considered." *Id.* at 110-11.

56. *Id.* at 110.

57. RENTELN, *supra* note 13, at 193. Likewise, there are equal protection concerns where culturally motivated perpetrators are held to a different standard and receive mitigated punishment, while those without a cultural defense do not. *Id.*

58. SONG, *supra* note 50, at 111.

it is relevant to the defendant's culpability," and subsequently admitted religious evidence relevant to the defendant's culpability as "a co-conspirator in the murder of his sister's ex-husband."[59] This holding was later cited by another court.[60] That later court allowed a woman who brought a rape charge against her husband to use "cultural evidence to explain why she had been willing to agree to an arranged marriage and to stay with him despite a history of physical and sexual abuse."[61] Both cases "permitted juries to consider patriarchal traditions to explain and partially excuse people's behavior."[62] The fear is that members of the minority culture will learn that their behavior may go unpunished, engendering a negative deterrent effect – or perhaps even effective encouragement.[63]

In particular, *Santa Clara Pueblo v. Martinez*[64] has been cited as a decision that maintained a tribal patriarchal tradition, resulting in constitutional violations of tribal members.[65] In this case, a woman challenged the gender-discriminatory membership process of the Santa Clara Pueblo tribe, which denied "membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe."[66] The Court deferred to the interest of tribal sovereignty and held in favor of the tribe, reasoning that to find for the mother in this case may, in effect, "substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."[67] Critics of the cultural defense contend that if there are no limits to tribal sovereignty to protect the rights of individual tribal members, tribal authorities may embrace

---

59. *Id.* (citing Bains v. Cambra, 204 F.3d 964, 970 (9th Cir. 2000)).

60. *Id.*

61. *Id.* (citing People v. Hundal, No. F037541, 2002 Cal. App. Unpub. LEXIS 8619, at *6 (Cal. App. 5 Dist. Sept. 6, 2002)).

62. *Id.* at 112.

63. RENTELN, *supra* note 13, at 192-93.

64. 436 U.S. 49 (1978). For academic discussion of *Santa Clara Pueblo v. Martinez* and its subsequent jurisprudence, see Gloria Valencia-Weber, *Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333 (2004); Gloria Valencia-Weber, Santa Clara Pueblo v. Martinez*: Twenty-Five Years of Disparate Cultural Visions*, 14 KAN. J.L. & PUB. POL'Y 49 (2004); Shefali Milczarek-Desai, *(Re)Locating Other/Third World Women: An Alternative Approach to* Santa Clara Pueblo v. Martinez*'s Construction of Gender, Culture and Identity*, 13 UCLA WOMEN'S L.J. 235 (2005); Robert Laurence, *A Quincentennial Essay on* Martinez v. Santa Clara Pueblo, 28 IDAHO L. REV. 307 (1991-1992).

65. *See* SONG, *supra* note 50, at 115-20.

66. *Martinez*, 436 U.S. at 51.

67. *Id.* at 71-72.

gender-biased rules as an expression of tribal sovereignty, effectively usurping individual constitutional rights afforded to individual Indians through the Indian Civil Rights Act (ICRA).[68]

Other criticisms include the fear that the cultural defense "reinforces false, anachronistic stereotypes" because culturally motivated decisions "fossiliz[e] cultures as a reductive stereotype, and lead to inquiries into whether a defendant's identity sufficiently matches that stereotype to merit expert testimony."[69] These critics further argue that "a formal cultural defense" is unnecessary because "the legal system can incorporate cultural evidence via existing defenses."[70] Last, critics cite problems with line-drawing as a justification for rejecting a formal cultural defense.[71]

C. Silencing the Critics of the Cultural Defense

Proponents of the cultural defense assert that consideration of cultural evidence as a possible defense at all stages of a criminal case is unlikely to undermine the deterrence purpose of criminal punishment. In many cases, "[t]he severity of the punishment is inconsequential to deterrence."[72] Any punishment at all, "no matter how severe or light, would provide notice to the

---

68. *See* SONG, *supra* note 50, at 132; 25 U.S.C. §§ 1301-1303 (2006). For academic discussion of the Indian Civil Rights Act, see Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889 (2003); Elmer R. Rusco, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269 (1990); Robert Laurence, Martinez, Oliphant *and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411 (1988); Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OR. L. REV. 589 (1990); Robert Laurence, *Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 68 N.D. L. REV. 657 (1992); Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479 (2000); Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465 (1998).

69. RENTELN, *supra* note 13, at 193.

70. *Id.* at 194.

71. *Id.* at 193-94 ("Even if one could justify the use of the cultural defense on normative grounds, many would still object to the defense because of difficulties they anticipate with the implementation of the policy. A frequently mentioned criticism of the cultural defense is that it will be impossible to draw the line between legitimate and illegitimate uses of it. This is partly because some claim it is hard to prove the existence of specific customs. They also question whether second- and third-generation offspring of immigrant parents are sufficiently influenced by traditions to justify their use of the cultural defense.").

72. *Id.* at 195.

ethnic minority community that the conduct is not permissible."[73] Therefore, in the event that a cultural defense is used and merely results in a reduced sentence, it would provide no effective incentive for members of the group to repeat those acts in the future.[74]

Not only does empirical data question the deterrent effect of punishment, but "[t]he number of culturally motivated acts is a fraction of the total number of crimes."[75] Moreover, "fears of . . . increased crime are unfounded" in the context of a Native American culture defense because "the criminal law has little deterrent effect on individuals compelled to act by their culture."[76] Consequently, where a Native American is punished by a non-tribal court, there is no guarantee that the message will cross the cultural barrier at the reservation's edge to notify tribal members that such conduct will not be tolerated.[77]

But deterrence is not the only purpose of criminal punishment. If it were "the sole objective of punishment," it would "make no difference who is punished – guilty or innocent."[78] That the conduct is not to be tolerated would be conveyed to society, regardless of the guilt or innocence of the accused.[79] Apart from deterrence, another justification for criminal punishment is retribution, which posits that a wrongdoer should be punished as a matter of public morality – an eye for an eye.[80] The common phrase that "the punishment should fit the crime" suggests that criminal liability "should not be disproportionately severe or lenient."[81] When the cultural defense is used in Native American cases, retribution is ineffective when a tribal member is punished for actions considered reasonable or less culpable within the bounds

---

73. *Id.*

74. *Id.* ("[I]f a husband is convicted of manslaughter instead of murder, the general deterrence function of the law would still exist.").

75. RENTELN, *supra* note 13, at 194 ("[E]mpirical data does not prove that punishment deters crime; usually the issue is whether more severe punishment creates a greater deterrent, but it is the causal relationship that is in question.").

76. Kanter, *supra* note 8, at 426; *see also* RENTELN, *supra* note 13, at 194-95 ("If a member of a particular ethnic group believes strongly in the efficacy of folk medicine or the importance of traditional marriage practices, it stands to reason that he will try to preserve his way of life wherever he goes.").

77. *See* Kanter, *supra* note 8, at 426.

78. RENTELN, *supra* note 13, at 194.

79. *Id.*

80. JOHN KAPLAN ET AL., CRIMINAL LAW CASES AND MATERIALS 21 (6th ed. 2008); RENTELN, *supra* note 13, at 188.

81. RENTELN, *supra* note 13, at 188.

of her society. Where an individual acts unreasonably in light of the mainstream "reasonable person" standard, the conduct may nonetheless be "reasonable" in the eyes of her tribal peers. An individual is not deserving of the maximum penalty when the parameters of reasonableness set by her society are different from the majoritarian parameters used to formally judge her behavior.

Some opponents allege equal protection violations on account of "preferential treatment" for perpetrators of culturally motivated acts. But this ignores that the purpose of criminal law is to ensure that defendants receive just punishment, the determination of which focuses on the defendant's mental state, or *mens rea*.[82] "If there is any equal protection violation, it occurs when courts fail to consider cultural evidence, thus rendering them unable to assess accurately what has transpired in a given case."[83] Where this occurs and the cultural evidence is material to the defendant's *mens rea*, the courts are unable to fairly evaluate the defendant's motivations, unlike a defendant of the mainstream culture, whose motivations should theoretically align with the uniform "reasonable person" standard. Without uniform guidelines directing courts to take cultural factors into consideration when trying and convicting Native Americans for crimes committed in Indian Country, the principles of criminal punishment are undermined.

Some critics of the cultural defense argue that it is important to assimilate behavior regardless of cultural barriers. But this view ignores many veritable realities. First, it is unrealistic to believe that cultural groups will collectively give up cultural traditions simply because those traditions are condemned by mainstream society. Second, this assimilative attitude goes against legal pluralism and modern federal Indian policy. "Pluralism" promotes the idea that the American justice system respects equality and "the rights of others to simply be different."[84] Without this concept, "cultural values that diverge from mainstream norms" are quashed, resulting in a "single orthodoxy – a result repugnant to the American political paragon."[85]

With regard to Native American tribal practices and beliefs, the promotion of legal pluralism is momentous on account of the sovereign status of tribal nations within the United States. Although past federal policies toward Indians have at times engendered "legal confusion regarding the effects of cultural practices," the modern era of tribal self-determination promotes

82. *Id.* at 196.
83. *Id.*
84. Kanter, *supra* note 8, at 422-23.
85. *Id.* at 423.

development of tribal governments and recognition of the inherent value of Indian cultural practices.[86] Despite that the *Santa Clara Pueblo* Court upheld a patriarchal rule that infringes on the basic rights of tribal members, the Supreme Court nonetheless sent a message that federal involvement should be limited with respect to the political functions of tribes.[87] It therefore seems contradictory that principles of cultural preservation and self-government remain at the political level, while there are currently no mechanisms to protect cultural identity in the courts. Consequently, this "sends out a broader message that Indians must trade their cultural ways in exchange for foreign criminal codes."[88]

III. Establishing the Necessity of a Cultural Defense for Native Americans

Currently, there is no formal culture defense established in any state or by the federal government.[89] The impact that culture will have on a particular case is left to the discretion of state and federal judges.[90] And when it comes to the criminal sentencing process, federal law presumes that Native American tribal punishment theory has no place in determining the appropriate sentence for tribal peoples.[91] Due to the unique status of tribes as wards of the federal government under the trust doctrine,[92] protection through an established cultural defense is necessary both for the federal government to fulfill its

---

86. *Id.*

87. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978) ("[T]he tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty, are in many ways foreign to the constitutional institutions of the federal and state governments.").

88. Kanter, *supra* note 8, at 424.

89. RENTELN, *supra* note 13, at 23.

90. *Id.* Although some courts have entertained cultural arguments, judges often find cultural evidence "irrelevant." *Id.*

91. *See* U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL 454 (2010) [hereinafter FEDERAL SENTENCING GUIDELINES MANUAL], *available at* http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/2010_Guidelines_Manual_Full.pdf.

92. Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 651 (2000) (noting that the "'trust doctrine' fixes the tribes as wards dependent on the federal government for sustenance and protection from the states and themselves"). For more academic discussion of the trust doctrine, see Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471; Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975); Gavin Clarkson & David DeKorte, *Unguarded Indians: The Complete Failure of the Post-*Oliphant *Guardian and the Dual-Edged Nature of Parens Patriae*, 2010 U. ILL. L. REV. 1119.

protective obligations and so that tribal cultural differences, which are encouraged by federal policy,[93] are considered.

Moreover, tribal punishment theory or prior tribal punishment should have an impact on the sentencing process. Recognition of tribes as domestic dependent nations is recognition of their inherent sovereignty as independent political entities.[94] Many tribes have their own political systems, made up of law-making bodies, courts, and police organizations.[95] In fact, at the birth of the self-determination era, President Nixon spoke to Congress about the importance of "creat[ing] the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."[96] This includes the goal of a "new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community."[97] Nixon charged Congress to "make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support."[98] Congress responded with legislation to further that goal, which strived to increase the proficiency of tribal courts to resolve disputes and to punish criminal conduct in ways they deem appropriate.[99] In response,

---

93. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 221, 224 (5th ed. 2005). For example, the American Religious Freedom Act of 1978, 42 U.S.C. § 1996 (2006), shows "recognition by federal policymakers of the continuing existence and vitality of Indian religions. It constitutes [] a symbolically important acknowledgment of Indian religious tenets." GETCHES ET AL., *supra*, at 221. Moreover, "Congress has taken steps to protect the cultures of Native Americans" by enacting the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2006), to protect "tribal burial sites and rights to items of cultural significance." GETCHES ET AL., *supra*, at 224.

94. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 519 (1832) ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights.").

95. For example, the Navajo Nation currently governs more than 250,000 members. *History*, OFFICIAL SITE OF THE NAVAJO NATION (Jan. 17, 2011, 11:42 AM), http://www.navajo.org/history.htm. The government is structured in three-branches, consisting of an executive, judiciary, and legislative branch, comprised of eighty-eight delegates who "represent[] 110 Navajo Nation chapters." *Id.* While in session, it is likely that delegates will speak Navajo, and the Navajo Nation prides itself in "retain[ing] its valuable cultural heritage while forging ahead with modern progress." *Id.*

96. Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. DOC. NO. 91-363, 91st Cong. (July 8, 1970), *reprinted in* GETCHES ET AL., *supra* note 93, at 218-19.

97. *Id.*

98. *Id.*

99. *See* Indian Tribal Justice Act, 25, U.S.C. §§ 3601-3631 (2006) (authorizing increased federal funding of Indian tribal courts); Indian Civil Rights Act, 25 U.S.C. § 1302 (2006) (1986

tribal courts "are developing in leaps and bounds," many "expand[ing] the use of traditional law" in combination with "unique tribal law."[100]

As it stands now, however, tribal law or punishment theory does not have much of a place in the American criminal courts during the sentencing process. There is currently an "opt in" provision that operates to bar capital sentences,[101] reflecting the legitimate concern for tribes that find capital punishment contrary to their culture.[102] There is no other opportunity, however, for tribal punishment theory or other cultural factors to play a part in the sentencing process.

A. How a Native American Gets into Federal or State Court Because of a Dispute Occurring in Indian Country

Although tribes are considered sovereign nations,[103] the federal government, through its plenary power, has "unilateral power . . . to legislate specifically regarding native peoples, lands, and governments."[104] But despite

---

amendment) (increasing the criminal penalties available to Indian tribal courts from $500 to $5000). Also, the Court has recognized the importance of tribal courts to the maintenance of tribal sovereignty. Williams v. Lee, 358 U.S. 217, 221-22 (1959) (finding that, absent congressional directive, tribal courts retain exclusive jurisdiction over disputes in Indian Country because reservation Indians have the right "to make their own laws and be ruled by them").

100. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 2 (1997).

101. 18 U.S.C. § 3598 (2006).

102. Jon M. Sands, *American Indian Culture and Federal Crimes*, *in* CULTURAL ISSUES IN CRIMINAL DEFENSE, *supra* note 14, at 911 ("The reasons for such a reluctance among the Indian tribes to opt in for the death penalty and the 'three strikes' legislation deals with issues concerning tribal sovereignty, implementation, culture, and world view. The issues troubling to the tribes [include that] . . . [c]apital punishment is considered contrary to most Indian tribal cultures and religions.").

103. *See generally* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

104. Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 587 (1989); *see also id.* at 588-90 ("Plenary power involves more, however, than the ability to impose a federal overlay of regulations onto tribal life. In stark fact, it means that congressional whim ultimately can control fully the tribal exercise of sovereign powers. Under the ruse of plenary power, Congress can strip tribes of specific governmental powers, force state jurisdiction onto unconsenting and unwilling native governments, unilaterally abrogate native treaties, or choose even to end the existence of tribes as federally recognized entities. Congressional exercise of its plenary power frequently is said to be subject to the restraints of the Constitution and the federal-Indian trust doctrine, through the mechanism of judicial review.

that Congress enjoys plenary power over Indian affairs, the federal courts in many instances share concurrent jurisdiction with tribal courts.[105] This concurrent jurisdiction has been abridged, however, by the enactment of certain federal statutes that remove substantial jurisdictional authority from the tribal courts, landing reservation Indians in non-tribal courts.

The first way that a Native American ends up in non-tribal court is through the Major Crimes Act,[106] which allows the federal government to prosecute Native Americans who commit one or more of an enumerated list of major crimes.[107] Prior to the Act, there was no statutory vehicle for state or federal court jurisdiction over an Indian who commits a crime against another Indian in Indian Country.[108] The Act came as a result of the Supreme Court's decision in *Ex parte Crow Dog*.[109] The *Crow Dog* Court, in reviewing a trial court's finding against the defendant's petition for *habeas corpus* relief, found that the Indian Country Crimes Act[110] did not give the federal government jurisdiction over an Indian defendant who commits a crime against another Indian in Indian Country.[111] Instead, the Court found that the Act – which continues to regulate criminal activity of non-Indians in Indian Country today – applied only to non-Indians accused of crimes in Indian Country,[112] and that the federal government therefore had no jurisdiction over crimes committed

---

These restraints, however, ultimately are ineffective defenses to counter the congressional power of 'complete defeasance.' Moreover, these restraints do not prevent Congress from acting, but only permit the subsequent remedy of money damages in selected instances.") (citations omitted).

105. Nancy Thorington, *Civil and Criminal Jurisdiction Over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State, and Federal Governments*, 31 MCGEORGE L. REV. 973, 994 (2000).

106. 18 U.S.C. § 1153.

107. *Id.*

108. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1190 (1990) (noting that, at the time *Ex parte Crow Dog* was decided, "Indian reservations were considered federal enclaves where federal criminal laws applied, except for a statutory exception denying federal jurisdiction over crimes committed by one Indian against another Indian").

109. 109 U.S. 556 (1883).

110. 18 U.S.C. § 1152.

111. *Crow Dog*, 109 U.S. at 571.

112. *Id.* For academic discussion of *Ex parte Crow Dog* and its subsequent jurisprudence, see SIDNEY L. HARRING, CROW DOG'S CASE (1994); Sidney L. Harring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191 (1989); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779 (2006); B.J. Jones, *Tribal Courts: Protectors of the Native Paradigm of Justice*, 10 ST. THOMAS L. REV. 87 (1997).

by one Indian against another Indian in Indian Country, regardless of the severity of the offense.[113] Congress responded to the decision by enacting the Major Crimes Act to allow the federal courts to exercise jurisdiction over serious crimes committed by and against tribal parties in Indian Country.[114]

The second way that a Native American ends up in non-tribal court is through Public Law 280.[115] Historically, states were unable to impose their laws or values within the bounds of Indian Country through the exercise of civil or criminal jurisdiction over Native Americans for illegal acts committed in Indian Country.[116] Due to the actions of Congress in enacting Public Law 280, however, certain states may now exercise criminal and civil adjudicatory jurisdiction over disputes that arise in Indian Country.[117]

B. Crow Dog *Rationale – Prejudice Imposed Upon a Native American Defendant Tried Under the "Reasonable Person" Standard*

Justice Matthews, in delivering the opinion of the Court in *Crow Dog*, discussed the problems that would arise were the Court to allow the prosecution of an Indian defendant under the Indian Country Crimes Act.[118] First, he noted the problems that inhere in extending judicial authority "over aliens and strangers [and] over the members of a community, separated by race [and] tradition."[119] In addition to the unfairness that may arise from a lack of knowledge or prior warning of these impositions, Justice Matthews stressed the unfairness of judging Native Americans by a majoritarian standard.

---

113. *See Crow Dog*, 109 U.S. at 572.

114. William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 33-34 (2005) ("The 1883 case of *Ex parte Crow Dog*, in which the U.S. Supreme Court overturned the federal conviction of an Indian charged with the murder of another Indian, induced Congress to extend the complete coercive power of federal criminal law to the reservations. Determined to rectify the 'savage nature' of tribal law, Congress applied 'white man's morality' with the Major Crimes Act of 1885 to expressly establish concurrent federal jurisdiction over major felonies committed by Indians on reservations regardless of the status of their victims.").

115. 28 U.S.C. § 1360 (2006).

116. *See generally* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

117. 28 U.S.C. § 1360. Six states have enacted Public Law 280: Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id.*

118. *See Crow Dog*, 109 U.S. at 570-72.

119. *Id.* at 571.

> [This] judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[120]

After the Court's ruling, the defendant, Crow Dog, was released to return to his tribe, which had already found him guilty of murder and ordered him to pay restitution to the family.[121]

Congress immediately responded to the *Crow Dog* decision by passing the Major Crimes Act, granting the federal government jurisdiction over Indians who commit one of a list of enumerated crimes, even within Indian Country.[122] The impetus for allowing the federal government to regulate serious crimes in Indian Country is that tribes were not providing "strong enough" punishment for those who committed offenses.[123]

Regardless of whether the tribes welcome a federal or state court's prosecution or adjudication of their members' actions, Justice Matthews' words nonetheless still ring true – Native Americans face a substantial prejudice when haled into "foreign" court to be tried by "foreign" arbiters. The decision-makers are part of the dominant Western culture and have preconceived notions of what is lawfully reasonable. This cultural disconnect makes a Native American defendant who takes certain actions in Indian Country – actions that may be legally and culturally accepted within the bounds of the separate society – subject to the judgment of people unfamiliar with potential important cultural distinctions. Without any notification, a trier of fact is forced to determine the defendant's culpability by comparing his or her actions against the dominant culture's interpretation of reasonableness, which could result in an unfair trial for a Native American defendant.

120. *Id.*
121. *See* GETCHES ET AL., *supra* note 93, at 157.
122. *Id.* at 157-58 (quoting Harring, *supra* note 112, at 223).
123. *See* HARRING, *supra* note 112, at 101.

For example, in *State v. Williams*,[124] the defendants were married, both Native Americans, and parents to a fourteen-month-old son who became ill with what they thought was a toothache.[125] They gave the baby aspirin, hoping that it would help.[126] The condition worsened to the point where the baby could not eat, and died within two weeks after developing pneumonia.[127] "They did not take the baby to a doctor because of fear that the Welfare Department would take the baby away from them."[128]

The trial court assessed the parents' behavior based on the reasonable person standard.[129] The court found that the parents should reasonably have known that the child was in need of a physician's care, and because a parent has a statutory and common law duty to provide medical care to his or her child,[130] the parents breached their duty by not taking the child to the hospital.[131] Although parents are afforded a "reasonable" amount of discretion in caring for their children, they must meet the same standard of care as would "an ordinarily prudent person, solicitous for the welfare of his child and anxious to promote its recovery."[132] The court asserted that the parents therefore reasonably should have known that medical care was necessary, and should have taken the necessary steps to make sure medical care was provided to the child.[133]

Although the court relied on an objective "reasonable person" standard, ignoring the individual characteristics of the Native American defendants,[134] this comment argues that the court created an injustice to the parents, in that no considerations were given to the parents' fear that their child would be taken away from them – a fear supported by Washington's disproportionately high rate of social workers finding cause to take Indian children away from their parents when compared to non-Indian children.[135] Therefore, the parents in this case fairly may have thought they were acting reasonably in neglecting

124. 484 P.2d 1167 (Wash. Ct. App. 1971).
125. *Id.* at 1169-70.
126. *Id.* at 1170.
127. *Id.* at 1173.
128. *Id.* at 1170.
129. *Id.* at 1174.
130. *Id.* at 1172-74.
131. *Id.* at 1174.
132. *Id.* at 1173 (quoting People v. Pierson, 68 N.E. 243, 244 (N.Y. 1903)).
133. *Id.* at 1174.
134. *See id.*
135. KAPLAN ET AL., *supra* note 80, at 393.

to take their child to the doctor in light of the high probability that a social worker assessing their parenting skills might take their beloved son away from them – a less common or legitimate fear for a person in the dominant society.[136] Had these parents been tried in tribal court, with jury members that could assess their actions compared to the "reasonable person" standard established within the bounds of their community, the outcome may have been different. The possibility exists that their fears could have been deemed "legitimate" in response to the external influence of social workers on those in their society. Likewise, had the state court jury been informed of these legitimate concerns within the bounds of tribal society, perhaps the very jury that convicted them may have reached a different outcome.

In certain circumstances, safeguards need to be implemented so that Native Americans committing illegal acts in Indian Country are awarded as fair a trial when haled into a federal or state court as any non-Indian defendant receives. A non-Indian defendant is afforded the luxury of a decision-maker that continually abides by familiar laws and cultural norms, balancing his actions against what is reasonable in *his* society. A Native American defendant is not currently afforded a similar luxury when haled into a non-tribal court. As guardian to the Indians, the federal government must ensure that the judicial process accounts for any important cultural distinctions that may impact a decision-maker's perception of a Native American defendant's culpability.

C. The Current Sentencing Guidelines Leave Little Room for Cultural Influences to Apply in the Sentencing Process

Although Native American tribes are encouraged and do have their own criminal courts, the tribes do not necessarily always apply the same general principles of criminal punishment as federal and state courts, such as deterrence and retribution.[137] Rather, a common pattern to emerge among tribal justice systems is to place "emphasis on restitution rather than retribution and on keeping harmonious relations among the members of the community."[138] For example, before Crow Dog was haled into federal court on a murder charge, his tribe, the Brule Sioux Nation, punished him by the law of the tribe, ordering him to pay restitution to the victim's family.[139] The

136. *Id.*

137. *See* O'Connor, *supra* note 100, at 3.

138. *Id.*

139. *See* HARRING, *supra* note 112, at 104 ("The process that occurred in the homicide case of Crow Dog, that of a tribal council meeting to arrange for a peaceful reconciliation of the parties with an ordered gift of horses, blankets, money, or other property, was one of a number

Brule Sioux's response to the murder was to mend the tribal society as a whole, based upon rehabilitative principles. "The goal was the termination of the conflict and the reintegration of all persons involved into the tribal body" because, in the Brule Sioux life-way of hunting "and the perpetual migration that it entailed, to succeed, all people had to work together and to conform to one system of rules."[140]

The Major Crimes Act and its legislative history indicate a congressional belief at the time that "Indian tribal-, family-, or clan-level retribution was unacceptably barbarous."[141] Nonetheless, Congress sought to protect Native Americans from being "arrested for petty offenses, taken very far away from [their] reservation[s], and subjected to great hardships."[142] A proposed amendment to include misdemeanor jurisdiction in the Major Crimes Act as a means to subject Native Americans to federal jurisdiction was stricken, leaving only the list of enumerated crimes.[143] This was due in part to the "hardship that would be occasioned for petty offenses that were not thought of as offenses within Indian tribes."[144]

As time passed and federal policy shifted toward assimilation, some states were afforded the opportunity to impose their criminal codes and punishment theories on Native Americans in Indian Country through the enactment of Public Law 280.[145] In these states, a Native American can be prosecuted for committing acts *prohibited*, as opposed to *regulated*, by state law, regardless of whether the activity is considered "criminal" or even culturally accepted by the tribe.[146] And in federal court, as the law stands, Native American cultural

---

of conflict resolution mechanisms available to the Sioux."). Tribes and other courts may punish for the same offense without violating double jeopardy. United States v. Wheeler, 435 U.S. 313, 329-30 (1978) ("[S]ince tribal and federal prosecutions are brought by separate sovereigns, they are not 'for the same offense,' and the Double Jeopardy Clause thus does not bar one when the other has occurred.").

140. HARRING, *supra* note 112, at 104.

141. William V. Vetter, *A New Corridor for the Maze: Tribal Criminal Jurisdiction and Nonmember Indians*, 17 AM. INDIAN L. REV. 349, 406 (1992).

142. *Id.* at 407 (citing 15 CONG. REC. 935 (1885) (remarks of Rep. Ellis)).

143. *Id.* at 407-08.

144. *Id.* at 408. The other reasons provided for excluding misdemeanors were "the increased opportunity for fraud against the federal government" and that "the Department of the Interior's Court of Indian Offenses handled 'trivial violations.'" *Id.*

145. 28 U.S.C. § 1360 (2006).

146. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 211 (1987) (finding that California does not have the jurisdiction under Public Law 280 to penalize a tribe for operating bingo halls because bingo is a regulated, as opposed to a criminalized, activity).

factors, such as acceptable behavior or appropriate punishment in tribal society, are not invited into sentencing determinations under the Federal Sentencing Guidelines.[147]

In 1987, in response to the 1984 Sentencing Reform Act,[148] Congress enacted the Federal Sentencing Guidelines, which "provide[] for the development of guidelines that will further the basic principles of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation."[149] The Act's primary objectives are to achieve "honesty . . . [and] reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders," as well as "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity."[150]

The Federal Sentencing Guidelines were to be applied strictly by judges in every case, differing markedly from previous guidelines, which gave judges wide discretion in sentencing.[151] In 2005, the Supreme Court restored some discretion to judges in its *United States v. Booker*[152] holding that mandatory application of the Federal Sentencing Guidelines is unconstitutional.[153] The Federal Sentencing Guidelines therefore are merely advisory, but it is nonetheless necessary for judges to formulate a sentence according to the Guidelines and to give an explanation that may be reviewed by an appellate court to justify upward or downward departures.[154]

Currently, section 5H1.10 of the Federal Sentencing Guidelines provides that "Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status

147. *See generally* 18 U.S.C. § 3553 (2006).

148. *Id.* § 3551.

149. FEDERAL SENTENCING GUIDELINES MANUAL, *supra* note 91, at 1.

150. *Id.* at 2.

151. *Id.* at 3.

152. 543 U.S. 220 (2005).

153. *See id.* at 233-36.

154. *Id.* at 264-65. For academic discussion of *United States v. Booker* and its subsequent jurisprudence, see Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker*: More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 ARIZ. ST. L.J. 425 (2006); Steven L. Chanenson, Booker *on Crack: Sentencing's Latest Gordian Knot*, 15 CORNELL J.L. & PUB. POL'Y 551 (2006); Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665 (2006); Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341 (2006); Ian Weinstein, *The Revenge of* Mullaney v. Wilbur*:* United States v. Booker *and the Reassertion of Judicial Limits on Legislative Power to Define Crimes*, 84 OR. L. REV. 393 (2005); M.K.B. Darmer, *The Federal Sentencing Guidelines After* Blakely *and* Booker*: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533 (2005).

. . . are not relevant in the determination of the sentence."[155] Before *Booker*, courts deemed the consideration of cultural factors beyond the pale because of the mandatory application of section 5H1.10, rendering the consideration of any cultural factors in the sentencing process an abuse of discretion.[156] In *United States v. Guzman*, a pre-*Booker* case, an illegal alien from Mexico "pleaded guilty to participating in a conspiracy to distribute methamphetamine," and the district judge departed downward from the Guidelines after considering cultural factors influencing her behavior.[157] The judge found that "Mexican cultural norms" influenced her behavior because her boyfriend was also involved and "she was pregnant with his child."[158] On appeal, the government argued that "cultural heritage can never be a basis for a downward departure"[159] because the Guidelines dictate that race and national origin, among other factors, "are not relevant in the determination of a sentence."[160]

The court of appeals agreed with the government and found that the district court abused its discretion in its downward departure because the Guidelines specifically state that national origin has no bearing on a defendant's sentence, and evidence produced in this case was disguised to use as proof of national origin.[161] The court reasoned that a danger exists in "recognizing cultural heritage as an independent ground for departure" because it "perpetuat[es] stereotypes and . . . strip[s] whole classes of potential crime victim[s] of the full protection of the law."[162] For example, such danger could manifest itself where a request is made for a downward departure after a defendant murders a homosexual because "the defendant had been culturally sensitized to believe that a sexual overture from another man was a lethal challenge to his masculinity."[163] Moreover, a defendant may argue that the patriarchal values

155. FEDERAL SENTENCING GUIDELINES MANUAL, *supra* note 91, at 454.

156. *See generally* United States v. Guzman, 236 F.3d 830 (7th Cir. 2001).

157. *Id.* at 831.

158. *Id.* at 831-32 ("The presentence report recommended a downward departure for her . . . because Mexican cultural norms dictated submission to her boyfriend's will. Moreover, she had taken up with him in defiance of her family's wishes and it would have been humiliating for her to break up with him and return to her family - especially since she was pregnant with his child yet they were not married.").

159. *Id.* at 832.

160. *Id.* (quoting FEDERAL SENTENCING GUIDELINES MANUAL, *supra* note 91, at 454).

161. *Id.* at 833.

162. *Id.*

163. *Id.*

of his culture motivated him to "beat[] his wife for talking back to him" and therefore justifies a downward departure.[164]

The dissenting judge, however, found that cultural heritage and national origin are not "coterminous,"[165] and that evidence of cultural heritage will justify a departure when its influence is "strong enough to place the defendant's situation outside the heartland of cases in which a defendant's personal characteristics might be expected to influence behavior."[166] The judge directed that although these district courts must "thoroughly justify" a departure based on cultural heritage,[167] it nonetheless can be relevant.

Although after *Booker*, the Guidelines are advisory and there is therefore no *per se* abuse of discretion when a judge, in imposing a criminal sentence, deviates from the Guidelines,[168] "some courts still resist downward variances based on cultural heritage."[169] In fact, "at least three Circuit Courts have concluded that considering a defendant's culture runs afoul of the Guidelines."[170] The Eighth Circuit, however, has carved out its own downward departure exception for Native Americans.[171] In *United States v. Big Crow*, it noted that the prohibition on considering race and national origin in the Federal Sentencing Guidelines does not include "blindness,"[172] and departed from the Guidelines to impose a lighter sentence on a Native American criminal defendant who had shown a consistent effort to overcome an adverse environment.[173] The court found convincing the letters from the elders of his tribe that he "has a positive reputation in his community and is well-liked by his employers and area law enforcement personnel."[174]

---

164. *Id.*

165. *Id.* at 836 (Ripple, C.J., concurring in part, dissenting in part).

166. *Id.* at 838-39.

167. *Id.* at 839.

168. *See e.g.*, Gall v. United States, 522 U.S. 38, 58-60 (2007).

169. Marcia G. Shein, *Cultural Issues in Sentencing*, *in* CULTURAL ISSUES IN CRIMINAL DEFENSE, *supra* note 14, at 944.

170. *Id.* at 944-45.

171. *See* United States v. Big Crow, 898 F.2d 1326, 1331 (8th Cir. 1990) (finding it "appropriate" that the district court's reason to depart from the sentencing guidelines included the defendant's "excellent employment record and his consistent efforts to overcome the adverse environment of the Pine Ridge reservation").

172. *Id.* at 1332 n.3 ("[T]he requirement of neutrality . . . is not a requirement of blindness.") (alteration in original) (internal quotation marks omitted).

173. *Id.* at 1332.

174. *Id.* The Eighth Circuit proved that its *Big Crow* holding was no "anomaly" when it affirmed downward departures for a defendant's ability to overcome adverse circumstances. United States v. One Star, 9 F.3d 60, 61 (8th Cir. 1993) ("One Star has strong family ties and

Although the Eighth Circuit has taken steps to account for the disparities that Native Americans face in federal court, such action "is limited to Indian defendants whose situations are factually distinct."[175] The result is that the use of the *Big Crow* line of cases as precedent or persuasive authority is unlikely to take hold. Moreover, a clear exception for Native Americans runs afoul of the plain language of the (albeit advisory) Federal Sentencing Guidelines, making the use of a cultural defense a somewhat difficult legal position to defend.[176]

"Cases involving Native Americans present immediate problems for federal courts."[177] This is because

> [b]oth the Indian tribes and the [federal] government intended the reservation system to be separatist, [and] [i]n many respects the relationship between tribal and the American legal systems reflect the notion of separatism. For example, despite the clear intention of the [] 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.[178]

Prior to the adoption of the discretion-limiting Guidelines, "federal judges tried to take into account Indians' different culture and the distinct societal background presented by the tribes" when imposing sentences upon Native American defendants.[179] Effectively, the sentencing judge "bridge[s] the gap between two distinct and different cultures."[180]

---

responsibilities and a good employment record. The court found it appropriate to consider these factors in light of the unusual mitigating circumstances of life on an Indian reservation."); United States v. Decora, 177 F.3d 676, 679-80 (8th Cir. 1999) ("[I]t is the combination of the difficulty of life on the reservation and the extraordinary and unusual nature of Decora's educational record and community leadership that allows for the departure.").

175. Timothy J. Droske, *Correcting Native American Sentencing Disparity Post-Booker*, 91 MARQ. L. REV. 723, 755 (2008).

176. *Id.* at 756 ("*Big Crow* and its progeny . . . are a clear affront to the Guidelines' mandate that race, sex, national origin, creed, religion, and socio-economic status are not relevant in the determination of a sentence.") (internal quotation marks omitted).

177. Palcido G. Gomez, *The Dilemma of Difference: Race as a Sentencing Factor*, 24 GOLDEN GATE U. L. REV. 357, 376 (1994).

178. *Id.* at 377.

179. Jon M. Sands, *Departure Reform and Indian Crimes: Reading the Commission's Staff Paper with Reservations*, 9 FED. SENT'G REP. 144, 144 (1996) [hereinafter Sands, *Indian Crimes*].

180. Gomez, *supra* note 177, at 376 (alteration in original) (internal quotation marks

Evidence shows that federal judges, prosecutors, and public defenders "have developed a unique sensitivity to the [tribal] sense of justice."[181] For instance, tribal cultures often find appropriate criminal punishment to include mediated settlements that result in the defendant receiving counseling or offering restitution to family members, often by "giving livestock and tending to the injured family."[182] A public defender testified before the Committee on the Judiciary,[183] explaining that the Navajo sometimes find mediated settlements a more appropriate form of punishment than imprisonment.[184] In fact, she tried a case where her client "was charged with killing his uncle," and the victim's family requested that the defendant not be punished with imprisonment.[185]

These "considerations seem especially critical given that the tribes are separate political sovereigns, whose jurisdiction is that of domestic nations."[186] In fact, one scholar commented on the irony that, although "[t]he concept of separatism is well founded, . . . the American legal system readily takes tribal disputes from the reservation and places them on the desks of federal judges."[187] Recognition of "radically different world views" are represented in treaty negotiations, as "whites and Indians still maintain realities that are worlds apart."[188] But despite that "[t]he differences in world views are reflected in the divergent legal systems," the recognition of these separatist legal systems often emerge more in theory than in practice.[189]

The Sentencing Commission, at the time the Federal Sentencing Guidelines were formulated, was "aware of the role Indian culture played in Indian offenses."[190] The Commission heard testimony "about the culturally different and unique context presented by Indian crimes in Indian Country,"[191] and was

---

omitted).

181. *Id.* at 378.

182. Sands, *Indian Crimes*, *supra* note 179, at 146.

183. Gomez, *supra* note 177, at 378 n.108.

184. *Id.*

185. *Id.* ("[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.'") (alteration in original).

186. Sands, *Indian Crimes*, *supra* note 179, at 144.

187. Gomez, *supra* note 177, at 377-78.

188. *Id.* at 377.

189. *Id.* at 377-78.

190. Sands, *Indian Crimes*, *supra* note 179, at 145.

191. *Id.*

urged to consider "the special circumstances that surround sentencing an Indian offender and a sensitivity to the tribe's sense of justice."[192] This testimony consequently "struck a chord" with Supreme Court Justice Breyer, who was the Commissioner at the time.[193] "His solution was to urge courts to exercise their discretion to depart in the Indian cases," recognizing the importance that culture plays when sentencing these defendants.[194] He did not, however, think it necessary to write a specific guideline for unusual community practices. Instead, he suggested authorizing a policy whereby judges may depart from the Guidelines at their discretion.[195]

When the Federal Sentencing Guidelines were adopted, cultural factors were "subsumed" within the 5H prohibitions on the consideration of race and national origin.[196] This reality, coupled with the fact that "federal sentences are often harsher than their state counterparts," results in Indian defendants tried in federal court for crimes committed in Indian Country receiving "disproportionately harsher sentences than if they were non-Indian or had committed their crimes off the reservation."[197] This sentencing disparity is a consequence not only of the unique jurisdictional arrangements, but also of "socioeconomic conditions, as well as many tribes' geographic isolation, Indian culture, and underlying racial tensions with the surrounding population."[198] Despite the disparity, however, relevant cultural factors will rarely be considered in light of the current structure of the Federal Sentencing Guidelines.

IV. Advocating a Cultural Defense for Native Americans

Because of the federal government's protective obligations as guardian of the tribes,[199] as well as the federal policy toward self-determination, there should be a formal Native American cultural defense for tribal members tried in non-tribal courts. This will assuage the fears of lower courts that their decisions will be overturned as an abuse of discretion for considering such

192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *See* Droske, *supra* note 175, at 724 (citation omitted).
198. *Id.* at 740.
199. Guzman, *supra* note 92, at 651.

evidence in sentencing.[200] The proposed rule should provide strict and explicit criteria to guide a trier of fact in controlling the entrance and presentation of cultural evidence.

A. The Federal Rules of Evidence Should Create a Presumption Favoring the Admission of Cultural Evidence in Native American Cases

Although courts occasionally allow the admission of Native American cultural evidence, the current evidentiary structure makes it likely that such evidence, even when related to a fundamental issue in the case, will be deemed "irrelevant" and excluded in criminal and civil cases.[201] In many instances, however, the evidence is extremely probative and furthers efforts to ensure that the justifications for criminal punishment, such as deterrence and retribution, are served.[202]

Judges that find this type of culture evidence "irrelevant" do so for different reasons. First, some judges promote a single, national standard by which to try defendants to engender uniformity in the law.[203] Other judges simply may not understand the cultural differences because they likely come from the dominant society and are unfamiliar with the practices of indigenous and minority cultures.[204]

Because federal statutes require federal and some state judges to hear cases with Indian parties,[205] it is important that these judges do not allow their cultural unfamiliarity to disrupt an Indian defendant's right to a fair trial. To promote uniformity in admitting this type of evidence in federal courts, the rules should therefore be amended to promote the admission of relevant cultural evidence into trials involving Native American parties.

A protective measure to allow the admission of otherwise inadmissible evidence is not unusual. For instance, the Federal Rules of Evidence protect the admission of prior sexual misconduct in sexual assault and molestation cases due to the unique and sensitive circumstances in those crimes.[206] Likewise, Native American defendants need protection because they are

---

200. RENTELN, *supra* note 13, at 206.

201. *Id.* at 5-6.

202. *See id.* at 187-88; *id.* at 6 ("In general, justice requires looking at the context of individuals' actions.").

203. *Id.* at 192-93 ("One major practical concern is the fear that the absence of a uniform legal code will lead to anarchy. . . . These commentators contend that equality means identical treatment under the law.").

204. *See id.* at 185-87.

205. 18 U.S.C. § 1153 (2006); 28 U.S.C. § 1360 (2006).

206. *See* FED. R. EVID. 412.

members of a considerably vulnerable minority, continually brought into courts that do not represent the values and traditions of their societies, and because they too have unique and sensitive circumstances not currently appreciated by the courts. To create a balance of fairness, a safeguarding presumption favoring admission of culturally relevant evidence should be in place to ensure that their rights are protected.

1. Cultural Evidence Is Relevant

Evidence is considered relevant when it has "any tendency" to prove or disprove an issue in the case that is "of consequence."[207] Accordingly, there is a very low threshold to satisfy a finding of relevance.[208] Cultural factors commonly influence behavior, and are thus often relevant in a criminal or civil case.[209] For example, in a civil case, cultural evidence can be relevant to the determination of damages, and may justify a greater award when cultural factors are implicated.[210] In the criminal context, courts may find an abuse of discretion by the trial court for rejecting the admission of cultural evidence when, for example, it relates to the mental element that the prosecution had to prove for conviction, as in the *Wu* case.[211] The *Wu* court reasoned that Asian immigrants who live within the bounds of an Asian community may not have

207. FED. R. EVID. 401.

208. David Crump, *On the Uses of Irrelevant Evidence*, 34 HOUS. L. REV. 1, 15 n.58 (1997); Peter Nicolas, *"They Say He's Gay": The Admissibility of Evidence of Sexual Orientation*, 37 GA. L. REV. 793, 797 (2003) (noting that Rule 401's threshold for admissibility "sets an extremely low standard").

209. *See* Renteln, *supra* note 14, at 771.

210. *See* RENTELN, *supra* note 13, at 202 ("In some of the other cases the plaintiffs seek monetary damages. This was the object of relatives who sued when medical examiners performed unauthorized autopsies, of the young Roma girls when police conducted a search with an invalid warrant, and of the teenage Orthodox Jewish girl who jumped off the ski lift. The argument is predicated on the notion that because of their background, the particular incident was more traumatic than for the person of the dominant culture. Hence, the plaintiff is entitled to a larger damage award than the ordinary plaintiff would receive."); *id.* at 205 ("[T]he ethnic minority plaintiff argues that given the greater magnitude of the injury, the damage award should likewise be correspondingly greater. The trauma caused by the 'cultural offense' warrants more restitution. This argument was advanced in the case of the Orthodox girl who leapt off the ski lift, the Hindu man who mistakenly was served a beef burrito, and the families whose deceased relatives were improperly prepared for funeral rites.").

211. People v. Wu, 286 Cal. Rptr. 868, 882 (Cal. Ct. App. 1991).

the opportunity to acculturate into mainstream society and conform their actions to what is "reasonable."[212]

Native Americans who grow up on tribal reservations are extremely analogous to the defendant in *Wu*, who was sheltered from the dominant society by her immersion in her own culture, just as reservation boundaries may shelter Indian defendants from outside cultural influence. Yet, policy favoring the accommodation of their cultural beliefs and norms is even more compelling than for recent immigrants because recent immigrant defendants made the choice to avail themselves to the laws and customs of the dominant culture, while Native Americans do not purposefully avail themselves to those laws and customs when they remain within the bounds of the reservation. In other words, they do not choose to be part of dominant culture, but rather adhere to tribal law and exist under the auspices of a separate sovereign. Cultural evidence therefore will often be relevant to a Native American's case in criminal and civil court, and should be recognized as such under federal law so that those who do not choose to assimilate into mainstream society receive adequate safeguards when judged by anyone but their own.

2. The Probative Value of Cultural Evidence Outweighs Potential Prejudice

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."[213] The probative value of cultural evidence outweighs potential prejudice because the evidence demonstrates an influence on the defendant's state of mind, and thus perhaps motive, due to the principle of "enculturation." Enculturation is the notion that one "learns from the society in which he or she is born" by subconsciously adopting the values of the group, which in turn "affects both cognition and behavior."[214] Individuals can nonetheless act independently from cultural conditioning and can acquire their own "moral judgments," but enculturation does "predispose[] individuals to act in certain ways."[215]

These predispositions are always subject to modification by either "acculturation" or "assimilation."[216] Acculturation occurs when "two

212. *See id.* at 885-87.
213. FED. R. EVID. 403.
214. RENTELN, *supra* note 13, at 12.
215. *Id.* at 13.
216. *Id.*

autonomous cultural groups" come in contact with one another.[217] Assimilation, on the other hand, is "the process by which individuals adopt the value system of the new culture."[218] Most Native Americans growing up within the bounds of the reservation experience enculturation, but, at the same time, may experience acculturation to mainstream Western values. For instance, watching television[219] or interacting with non-Indians while traveling off-reservation likely expose the Native American to types of behavior more familiar to the dominant society.

Despite that acculturation may enable the Native American to "pass in the mainstream," it will rarely amount to complete assimilation.[220] People "retain strong commitments to their traditions," so it is "unrealistic to expect" that those types of interactions would allow a Native American to conform his behavior to meet the dominant society's standard of reasonableness in all respects.[221] For example, the Major Crimes Act is a means to assimilate Native Americans by imposing upon them ideals of the dominant culture with respect to which crimes ought to be punished severely. This assimilation in punishment, however, has not necessarily transformed tribal criminal justice theory over time.[222]

Many cases discussing the cultural defense involve immigrants who act in a way deemed criminal by Western standards, but that would either receive a mitigated sentence or would not be considered criminal at all in their home countries.[223] The basic idea is that a person is inherently shaped by his culture, and residing in another culture does not automatically assimilate that person's worldview or behavior.[224] Native Americans that grow up in Indian Country are similar to those defendants who recently immigrated to the United States and still lived within the bounds of a community that followed all the customs of their home countries. Tribal members who live on the reservation, are active in the community, obey tribal laws, and adhere to tribal custom do not have the opportunity – or perhaps even the desire – to participate in the dominant culture. Despite that mainstream culture may seep into tribal life to

217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *See e.g.*, Gomez, *supra* note 177, at 378 n.108. The Navajo, for example, modernly have adhered to retributive principles in criminal sentencing. *Id.*
223. *See e.g.*, RENTELN, *supra* note 13, at 25.
224. *See id.* at 12-13.

subliminally condition tribal members in some ways to act and think as non-Indians do, tribal culture still dominates.[225] Moreover, it seems contradictory that federal policy ostensibly promotes self-determination and the preservation of traditional tribal law and custom, but does not protect these cultural differences in the justice system.

Tribal members living on the reservation may not be sufficiently assimilated to appreciate the "reasonable person" of the dominant society, but instead adhere to their own standards of reasonableness within the bounds of their legal and cultural societies. In fact, that is precisely what self-determination is – recognizing, appreciating, and promoting the unique nature of tribal law and custom, which includes a similarly unique standard of reasonableness to be judged in light of those laws and customs. The result is that cultural evidence will often be extremely probative to determinations of "reasonableness" when Indian defendants are tried in "foreign" courts.

3. Denying the Admission of Cultural Evidence Creates an Unfair Prejudice to the Native American Defendant

Currently, under the Federal Rules of Evidence, if a piece of evidence is relevant, it is admissible so long as the risk of unfair prejudice does not substantially outweigh its probative value.[226] By precluding the admission of "propensity" evidence through the Rules,[227] Congress was adopting a "common-law tradition . . . [that] disallow[s] resort by the prosecution to any kind of evidence of a defendant's character to establish a probability of his guilt," based on the "overriding policy" of preventing "confusion of issues, unfair surprise and undue prejudice."[228] Like the admission of propensity evidence, the *inadmission* of *relevant* cultural evidence can unfairly prejudice a Native American defendant because, without the admission of such evidence, he is being judged by those unable to inherently appreciate the nuances of possible cultural motivations. While the rule precluding "propensity" evidence prevents unduly prejudicial information from entering the courts, the preclusion of cultural evidence effectively engenders prejudice.

The Court in *Crow Dog* cautioned of the prejudice that arises when a defendant is judged by those who are not his peers or by "the customs of

225. *See* Patrice H. Kunesh, *Constant Governments: Tribal Resilience and Regeneration in Changing Times*, 19 KAN. J.L. & PUB. POL'Y 8, 8 (2009).

226. FED. R. EVID. 403.

227. FED. R. EVID. 404(b).

228. Michelson v. United States, 335 U.S. 469, 475-76 (1948).

[another] people."[229] The standard by which the Native American is judged "makes no allowance for [his] inability to understand it."[230] The Major Crimes Act, passed in response to the *Crow Dog* decision, does not account for this potential prejudice. Congress has not since drafted any legislation to create a safeguard for Native American defendants who are potentially prejudiced when they are judged by a "foreign" standard of "reasonableness."

Amending the Federal Rules of Evidence to create a presumption of relevance favoring the admission of cultural evidence would reduce the prejudice that a Native American defendant experiences when tried by a "foreign" court, unfamiliar with the culture motivating his behavior. When a non-Indian is tried in a non-tribal court, the standard is already tailored to what is "reasonable" in light of the laws and customs of the dominant culture. A presumption favoring the admission of Native American cultural evidence would, in effect, level the playing field of "objectivity" by determining the "reasonableness" of a tribal defendant's actions in light of the laws and customs of his tribal culture.

Although it can be argued that the admission of Native American cultural evidence could prejudice a case by wasting time or confusing the jury, such concerns are outweighed by the potential prejudice that could result from determinations of "reasonableness" that are not in accord with the defendant's societal norms. Without any education in Native American culture, the trier of fact could find the defendant culpable for reasons other than the merits of the case, perhaps through reinforcement of negative stereotypes of Native Americans as "savage," or based on a perceived need to assimilate the defendant into the dominant culture. If the trier of fact is educated on the link between the defendant's cultural and legal heritage, the negative stereotypes could be replaced with understanding, and the trier of fact could decide on the merits of the case.

4. Proposing a Protective Amendment

To ensure that cultural evidence relevant to the Native American defendant's acts is admitted, one option is for the Indian defendant to present evidence prior to trial, based on a preponderance standard, establishing (1) that he is a Native American, (2) "that the belief is a legitimate part of community practice," and (3) "that the defendant actually believed and was motivated by

229. *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883).
230. *Id.*

the tradition."[231] If that standard is met, the trier of fact can then determine the weight to be placed on such evidence in relation to the facts and merits of the case.[232]

To prove that the belief actually exists, the Indian defendant can present expert witnesses or tribal leaders to educate on the cultural implications of the case.[233] Concerns arise that expert witnesses may be "hired guns for lawyers on either side," and that tribal leaders may "succumb to pressures to misrepresent their culture in order to save a relative or friend."[234] The problem, however, is not always that the cultural evidence will be discounted as partisan, but rather that it is not presented at all – "the main problem . . . [is] the proclivity of judges to exclude cultural information as irrelevant."[235]

The adversarial process is designed to bring concerns about biased experts in front of triers of fact for them to assess the weight to be placed on that evidence.[236] "[T]o guarantee the caliber of expert witnesses," lists of reputable experts on different tribes and customs can be compiled.[237] After the credibility of the expert has been established, the trier of fact can review the evidence to determine if and how the cultural beliefs influenced the defendant's behavior, as well as the resultant extent of damages.

B. The Standard of "Reasonableness" for Native American Defendants Should Be a "Reasonable Native American Person"

There is no concrete definition of "culture" because it is a fluid concept that arises from the interaction of those who share the same "language, history, and values."[238] Likewise, the concept of "reasonableness" has no purely objective identity because its definition includes one person's assessment of another's actions. The "reasonable person" standard used to evaluate criminal and civil liability is assessed in light of a person of the ordinary "race, class, sexual orientation, and gender."[239] Although the reasonable person theory contemplates that the decision-maker will evaluate the defendant's actions against this objective standard, the reality is that decision-makers will

231. Kanter, *supra* note 8, at 430; RENTELN, *supra* note 13, at 207.
232. *See* Ewing v. Burnet, 36 U.S. 41, 50-51 (1837).
233. *See* Kanter, *supra* note 8, at 431.
234. RENTELN, *supra* note 13, at 206 (internal quotation marks omitted).
235. *Id.*
236. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 595-96 (1993).
237. RENTELN, *supra* note 13, at 206.
238. SONG, *supra* note 50, at 18.
239. CYNTHIA LEE, MURDER AND THE REASONABLE MAN 206 (2003).

subjectively "put themselves in the shoes of the defendant and decide whether they would have felt or acted the way the defendant did."[240]

Recognizing the special status of tribes as "sub-communities" in the United States with their own sets of laws, courts, and enforcement processes, it is imperative to legally recognize the established standards of care acceptable to these communities. In fact, it sends mixed signals to do otherwise, in light of all of the legislation directed toward self-determination. When states try people in their courts, they are able to craft their own rules and decide their cases with respect to standards deemed acceptable by members of that state. So too are tribes allowed when trying cases in their own courts. Tribes are limited, however, in the types of suits over which their courts may assert jurisdiction.[241] Because of the limited nature of tribal court jurisdiction under current law, federal judges should be educated on tribal laws and customs to further the principles of justice.

It is fair to say that the more similarities the defendant shares with the trier of fact, the more the trier of fact "is likely to see the defendant's beliefs and actions as reasonable."[242] Because a purely subjective standard of reasonableness would, in effect, "collapse" this American standard and tradition,[243] it is crucial to maintain a level of objectivity. That does not mean, however, that Native Americans should become victims of misguided judgments based on the standards of another society, whose conception of "reasonableness" depends on "foreign" beliefs and customs.

The judicial system's concept of "reasonableness" derives from the dominant culture, which reflects mainstream American politics, religion, and accepted behaviors.[244] For example, defendants may perhaps successfully mitigate a charge from murder to manslaughter if they "are provoked into a

240. *Id.*

241. For scholarly discussion on the limits of tribal jurisdiction, see Frank R. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329 (1989); Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539 (1997); Laurie Reynolds, *"Jurisdiction" in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. REV. 359 (1997); Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993).

242. LEE, *supra* not 239, at 206.

243. *Id.* at 206-07.

244. *See id.* at 109-10.

heat of passion" by a spouse's infidelity.[245] But many states do not accept that a person is legally provoked by "mere words," precluding the lessening of a charge where a defendant is provoked by verbal harassment.[246] Despite the refusal to allow "mere words" to constitute sufficient provocation, "some courts draw a distinction between informational words (i.e., words that convey information that, if observed directly, would provoke the reasonable person into a heat of passion) and insulting words."[247] This increased leniency in sentencing for "cuckolds who kill their partners"[248] is based upon a norm that is "so embedded in American culture that we Americans do not perceive [it] as cultural per se,"[249] despite that, in effect, the charge is mitigated through a cultural defense. Therefore, despite that a person has participated in wrongdoing, the dominant society has decided that a particular set of circumstances render that defendant less deserving of extended punishment.

Medical neglect cases similarly illustrate how a purely objective approach to "reasonableness" without consideration of cultural factors is itself unreasonable.[250] Some of these cases arise when parents, for religious reasons, fail to seek medical treatment for their children, who consequently suffer or die.[251] Courts generally do not recognize any religious defense to such parental neglect, based on a deep-seated belief that there should be "little sympathy for a free exercise defense in criminal prosecutions, especially those involving children."[252] Yet, lawmakers, representing the interests of their constituents, have enacted statutory exemptions to protect parents of the Christian Science faith.[253] These parents can escape prosecution when they entertain faith-based healing for their children, instead of conventional medical treatment, and the child consequently suffers harm or death.[254] Christian Scientists do not believe in disease, maintaining that it is "an illusion created by God."[255] They believe that if they "seek[] medical help, they will undermine the efficacy of faith

245. *Id.* at 110.
246. *Id.* at 31-32.
247. *Id.* at 32.
248. SONG, *supra* note 50, at 97.
249. *See* LEE, *supra* not 239, at 110.
250. *See generally* RENTELN, *supra* note 13, at 61-67.
251. *Id.* at 65.
252. *Id.* at 66.
253. *Id.*
254. *Id.*
255. *Id.* at 65.

healing."[256] Based on the recognition of these beliefs, legislatures have altered the standard of reasonableness to be used by their courts.

The values and beliefs embedded in the dominant culture have spoken through state legislatures to reflect that a particular course of conduct is reasonable when certain factors are present, such as when Christian Scientist parents choose religion over medical care for their children. An examination of the cultural considerations of non-Indian society reveals how Indians raised according to tribal law and custom could be, and often are, disadvantaged when haled into "foreign" courts. Perhaps their laws and customs have rendered their reactions to certain circumstances "reasonable" within their cultural bounds, despite the dominant society's disagreement with these findings. And without enough political power to speak at a non-tribal legislative level (as did the supporters of the Christian Science religion), these defendants will unfailingly experience an uphill battle in "foreign" courts until their cultural considerations are factored into punishment schemes.

To combat this unfairness, Congress legislatively should mandate that Indian defendants tried in non-tribal courts are to be judged under a "reasonable Native American person" standard that contemplates their unique values and customs. This mandate should require that the trier of fact be provided relevant information about the defendant's tribal culture to ensure that the trier of fact is equipped to evaluate a tribal defendant's actions in light of cultural considerations.

C. Congress Should Grant a Downward Departure in the Federal Sentencing Guidelines for Native Americans When Cultural Considerations Affect Their Actions

Currently, the Federal Sentencing Guidelines are not drafted to allow or encourage departures therefrom for Native Americans based on cultural factors, such as tribal punishment theory.[257] Rather, the "advisory" Guidelines prohibit departures based on race or national origin.[258] To "reflect the uniqueness of Indian culture and respect for Indian sovereignty,"[259] and to provide unanimity in the processes of courts sentencing Native American defendants, the Commission should formulate a departure that respects the

256. *Id.*

257. *See* FEDERAL SENTENCING GUIDELINES MANUAL, *supra* note 91, at 454.

258. *Id.*

259. Sands, *Indian Crimes*, *supra* note 179, at 146.

policy of self-determination by encouraging the promotion of tribal laws and customs.

Although "the guidelines cannot consider every factor, nor all the different combinations of factors,"[260] the Guidelines should be amended to provide a framework under which judges can consider cultural factors to justify a departure in Native American criminal sentencing. Otherwise, courts are prevented from "honestly and openly" using factors such as race and culture (which could include an examination of tribal punishment theory or prior tribal punishment) to "obtain fair, just and lenient sentences within the framework of the guidelines."[261]

The current Federal Sentencing Guidelines, coupled with the split in judicial authority, engenders confusion with respect to whether cultural factors, including tribal punishment theory and the confines of culturally acceptable behavior, may influence the sentencing process. Moreover, the trust relationship between the tribes and the federal government requires that the government fulfill protective obligations to the tribes and individual Indians.[262] In furtherance of these protective duties, the Federal Sentencing Guidelines should be amended to ensure that all tribal defendants receive fair trials that respect and consider their unique cultural circumstances.

For example, when a defendant seeks to use the cultural defense in the guilt phase, the defendant should have to prove that he is a Native American and that the cultural reason for departure is based upon a legitimate belief within his tribal society. Along with showing that the reduced sentence is appropriate, he should also be required to show that deterrence would not be reduced.[263] In turn, this will allow the policy interest of deterring criminal conduct to hold some weight in the analysis. At the same time, it will allow the trier of fact to consider cultural factors in sentencing, thereby promoting both self-determination and principles of fairness.

When the Native American criminal defendant is on trial for a serious crime, such as first degree murder, and his tribe favors restitution to imprisonment, the defendant must then demonstrate how a punishment of restitution will not encourage him or others to commit a similar act in the future. And, if the "foreign" court determines that restitution is inappropriate and instead imposes imprisonment, that the tribe previously punished the defendant should factor into determining the length of such imprisonment. For instance, in a case like

260. *Id.*
261. *Id.*
262. Guzman, *supra* note 92, at 651.
263. Sands, *Indian Crimes*, *supra* note 179, at 146-47.

Crow Dog, where the defendant was ordered by the tribe to pay restitution to the victim's family as criminal punishment,[264] the judge should grant a downward departure from the Guidelines, so long as restitution is a legitimate tribal punishment. In a tribal society where rehabilitation is the most important principle of criminal punishment,[265] the federal government should respect that tribal policy even when the tribal defendant is tried in a court outside reservation boundaries.

On the other end of the spectrum, however, are certain activities that are not considered criminal at all by tribes, but are nonetheless prosecuted by Public Law 280 states and the federal government. That the defendant's tribe does not find the activity "criminal" should be a mandatory consideration in determining an appropriate sentence – or whether to punish at all. Requiring judges to consider Native American cultural factors in the sentencing process will protect Native Americans from forced assimilation. Where conduct is tradition within the community but is illegal under the law of the dominant society, consideration of cultural factors will protect tribal members who simply wish to participate in tribal traditions.

Although the consideration of Native American culture in the sentencing process is important in light of federal Indian policy, the Guidelines should reflect the unique circumstances in which the need for a departure will arise, and should accordingly limit its use. Such a limitation will prevent criminal defendants from abusing the departure when it is not warranted. The amendment to the Federal Sentencing Guidelines should be reflective of these concerns. The following is a humble attempt to craft statutory language to insert into the Guidelines:

Consideration of Native American Cultural Factors in Sentencing

(a) Native American cultural factors that may affect a defendant's criminal actions shall be considered and may justify a downward departure from these guidelines, provided that the defendant proves:

(1) his or her status as a tribal member;

(2) that his or her actions were motivated by a legitimate belief within his or her tribal society;[266]

(3) that the resulting sentence effectuates deterrence.

---

264. HARRING, *supra* note 112, at 104.

265. *See, e.g.*, *supra* notes 182-85 and accompanying text.

266. Subsection (a) of the proposed amendment to the Guidelines resembles that proposed by Kanter, *supra* note 8.

(b) In examining cultural factors affecting a Native American defendant's criminal actions, courts shall consider both tribal punishment theory and prior tribal punishment.
(c) This section is unaffected by section 5H1.10.

Similarly, Public Law 280 should be amended to impose this principle upon state court judges. This would, in effect, put into law, as well as give notice to triers of fact, that although the Guidelines are meant to be "uniform" to prevent disparity in sentencing, federal policy promotes the legitimacy of tribal governments to govern their members. This includes the right to impose their own punishment theories upon their members, which should carry over into the non-tribal sentencing process. Promoting the use of tribal punishment theory or other cultural factors to influence tribal member sentencing furthers not only the policy of self-determination, but also the federal government's trust obligations.

V. Conclusion

A formalized cultural defense for Native Americans does more than protect the individual – it protects tribal sovereignty and self-determination. It is the tribal society that controls the concept of "reasonableness" to which its members adhere. The relevance and probative value of evidence should thus be determined in light of cultural considerations. The Federal Rules of Evidence should be amended to account for Native American cultural factors in the admission of evidence. When a Native American enters a non-tribal court, safeguards must be in place to protect the entrance of all evidence that is relevant to that party's behavior or any other issue that is of consequence to that particular case.

For those cases in which cultural evidence is admitted, the defendant should be judged not by the "reasonable person" standard of the dominant society, but by a "reasonable Native American person" standard, considering the evidence and the defendant's actions in light of the values of his individual tribe. Triers of fact must therefore add a subjective layer to an otherwise objective standard.

Last, the Federal Sentencing Guidelines and Public Law 280 must reflect the legitimacy of tribal punishment theory. The determination of a Native American defendant's criminal sentencing should include prior or preferred tribal punishment, which may warrant a downward departure from the Guidelines in some cases. Collectively, these changes to the sentencing structure will further the policy of self-determination, increase confidence in non-tribal courts among Native Americans, and reduce prejudice to Native Americans tried in courts whose values may differ markedly from their own.