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I want to thank Professor David Zlotnick and the Editors of the Roger Williams University Law Review for giving me this opportunity to offer my own speculative thoughts on the deep roots of regional sentencing variation in America and what they may tell us about our current sentencing practices and aspirations. I am a law professor and a criminal defense lawyer, not a historian. It is with some trepidation that I stand before you to suggest that our very persistent regional sentencing variations have roots in the political struggles of Reformation England and the cultures of the subgroups that populated the first American colonies. I rely upon others for the historical proof, as you will see, but I think I do have standing to argue to you that we should consider whether or not there is room, even in federal sentencing, to account for deeply embedded regional variations in our basic conceptions of why and how we should punish. Aware as I am of the dangers of essentializing and the ugly history of regional variation in American penal practices, I still want to ask whether Pennsylvanians really should be expected to punish transgressors in exactly the same way as Virginians. I will suggest to you that perhaps we should respect a modicum of regional variation and not seek to eliminate every vestige of regional legal culture in America.

I have long been interested in the hydraulic pressure of discretion in federal sentencing. I started practicing in the

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Southern District of New York in the twilight of the old law regime. I was in that relatively high volume federal defender practice when *Mistretta*[1] brought the fractious lower courts into line and made everyone grapple with the Guidelines in day-to-day practice. Like all of my colleagues, I sought every chink and groove in the seemingly smooth edifice of the Guidelines and asked every judge in front of whom I appeared to release a bit of the now dammed up waters of discretion to bathe each of my clients in the cool waters of mitigation. Many were happy to release a trickle and often, at least in the beginning, we splashed around a good deal at sentencing.

As harsh as many of those sentences seemed to me, I came to understand that sentences in the Southern District of New York were often more moderate than sentences in many other federal courts. I learned that experienced lawyers might transfer a case under Rule 20[2] to Philadelphia or Minneapolis, but would think twice about sending a case up to Boston and would think long and hard before sending a client down to Virginia or South Carolina. The deals were better and the sentences more lenient, in a seemingly predictable way, in some places.

When I went into the academy, as we say about the wonderful opportunity to teach, I tried to look at variation and disparity in a more systematic way. In 1998, I looked at the treatment of downward departure cases under the then recent *Koon*[3] standard and found that at that time, the Second Circuit had never met a downward departure it did not like, while the Fourth Circuit had not yet seen a downward departure of which it could approve.[4]

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1. Mistretta v. United States, 488 U.S. 361 (1989) (upholding the Sentencing Guidelines against constitutional challenge on separation of powers grounds).

2. Rule 20 permits a defendant arrested in a district other than that in which the charges are pending to resolve the case in the district of arrest, with the consent of prosecutors in both districts. FED. R. CRIM. P. 20. Although disposition in the district of arrest is not always available, it is generally only strategically desirable if the defendant has reason to believe he or she will receive better treatment in the district of arrest.

3. United States v. Koon, 518 U.S. 81, 116 S. Ct. 2035 (1996) (holding that abuse of discretion is the proper standard of review of district court decisions to depart downward from the U.S. Sentencing Guidelines and applying that standard to reverse some departure grounds and affirm others in the case of the two police officers convicted in the beating of Rodney King).

4. Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion:*

Next I looked at rates of cooperation departures under §5K.1.1 and found tremendous local variation.[5] In 1999, I found that there were five times as many cooperation departures in the ten highest cooperation districts as compared to the ten districts with the lowest rates of cooperation.[6]

Of course neither of these snapshots of particular practices permitted me to say much about overall sentence length and severity. As we all know, federal sentencing is a complex system with many moving parts. My aim in that work was to understand two mechanisms which permitted localization of results.[7] I could not say anything about the impact on overall sentencing patterns for a number of reasons. For example, studying Circuit Court cases only tells one how the appellate court ruled on the cases that were appealed. In a district in which the prosecutor agrees to many downward departures, there may be very few cases appealed, but those that are appealed will tend to be weaker and may be more likely to be reversed.

Thus a high rate of reversals of downward departure could be evidence of harsh overall sentencing achieved through few agreed-upon departures and restrictive appellate review or it could be evidence of lenient overall sentencing, achieved through many agreed-upon departures and appellate rejection of the relatively few and weaker departure arguments rejected by the prosecutor and pressed by defense lawyers. This is just one example of how complex federal sentencing is and how dangerous it can be to generalize from the appellate cases or from raw sentencing statistics. More recent and more methodologically sophisticated work suggests that much interdistrict variation turns on caseload type and caseload volume.[8] Another important and more

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Koon's Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines, 79 B.U. L. REV. 493, 495-96 (1999) (finding that some of the circuits reversed virtually no district court departures under the abuse of discretion standard).

5. *See generally* Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563 (1999) (discussing the broad prosecutorial discretion in the area of substantial assistance departures and the court's role once the prosecutor makes a substantial assistance departure motion).

6. *Id.* at 602-03.

7. *Id.* at 568-69.

8. Katherine Tang Newberger, *Caseload Matters: Caseload Composition as an Explanation for Regional Sentencing Differences*, 15 FED. SENT'G REP.

theoretical take on these questions is recent work that thoughtfully discusses how much and what kinds of variation are desirable within our federal structure.[9] We need to deepen our understanding of sentencing through sophisticated empirical work and careful theoretical work to help us think about variation and disparity in the post-*Booker* world.

My topic, however, is neither the details of federal sentencing, nor the theory behind our federal structure. Today I want to draw a very broad picture and see if any of you share my sense of recognition. As I look at the post-*Booker*[10] landscape, I note that if a defendant does not want to receive a "Guideline sentence," and many do not, the old lore holds true. Stay in the Second, Third, D.C., Sixth or Ninth Circuits.[11] Those are the circuits below the national average for post-*Booker* sentences within the guidelines.[12] If your case is in the First, Seventh or Eighth Circuits, you are not too much above the national average, but as you move south and west, the average goes up in this order: The Fourth Circuit, followed by the Tenth, with the deep south Fifth and Eleventh Circuits having the highest rates of compliance with the now advisory Guidelines.[13] I recognize, of course, the dangers of equating Guidelines compliance with harsh sentencing. It is, however, a defensible generalization with many exceptions. There are draconian judges whose instincts are moderated by the Guidelines, but they are less common than the judges who would,

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197 (2003) (finding that the types of cases prosecuted in a given district or region explains a portion of regional sentencing variations). This article is part of a symposium issue of the Federal Sentencing Reporter that included an illuminating panel discussion of regional sentencing variations, moderated by Professor Daniel Freed, 15 FED. SENT'G REP. 165 (2003).

9. Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137 (2005) (arguing that while some local variation is an acceptable step away from the uniformity of federal law, much of the current variation is unacceptable and proper regulation requires analysis of all sources of variation, including prosecutorial discretion).

10. United States v. Booker, 125 S. Ct. 738 (2005) (excising portions of Federal Sentencing Guidelines that made them binding to remedy a violation of Sixth Amendment right to jury trial).

11. U.S. SENTENCING COMM'N, SPECIAL POST BOOKER CODING PROJECT, GUIDELINE APPLICATION TRENDS, NATIONAL AND CIRCUIT 7-11, Data through Sept. 30, 2005, www.ussc.gov/Blakely/PostBooker_101305.pdf (last visited Dec. 19, 2005).

12. *Id.*

13. *Id.*

from time to time, exercise more leniency than the Guidelines would suggest.

The overall compliance rate of the Circuit in which the sentence occurs may not be a strong predictor, and it may well be overwhelmed by information about the particular district or district judge, but absent other information, the criminal defense lawyer in me would prefer that my client be sentenced in the Circuits that have lower rates of post-*Booker* compliance with the Guidelines. The compliance rates follow the standard lore pretty closely, and that is the coincidence that really got me thinking. In fact, the pattern of compliance rates fits the story I want to tell perfectly – so perfectly that I think it will intrigue you as it has really intrigued me. Why has it so long been true that New York and Pennsylvania have different, and less severe, sentencing practices from New England, which differ again from the Upper Midwest and from the South, where sentencing practices remain harsher, even putting aside the well known death belt map?[14] Why have twenty years of sentencing reform failed to eradicate this pattern? Perhaps these deep differences are a part of the reason those reforms have foundered. My suggestion to you is that each region retains a distinctive idea of what constitutes a transgression worthy of criminal punishment and how transgressions should be punished. The remarkable part is that the ideas are hundreds of years old, have recognizable roots in the mists of English history and have persisted through centuries of change and ferment. Let me tell you the story of how and why that may be.

In telling this story, I rely upon the wonderful book, *Albion's Seed: Four British Folkways* in America, by David Hackett Fischer.[15] This application of Prof. Hackett Fischer's ideas to our current sentencing regime is entirely my own and I want to be clear that this wonderful book is a serious work of history and makes no claims about the relationship between colonial America and post-*Booker* Guidelines compliance rates. What Prof. Hackett Fischer does argue is that Colonial America was settled in four great waves of migration from Great Britain to North America

14. *Id.*

15. DAVID HACKETT FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA (1989).

during the seventeenth and early eighteenth centuries.[16] Each wave of migration brought a distinct cultural subgroup from Great Britain, characterized by a set of folkways. Prof. Hackett Fischer tells us that a folkway is:

> . . . the normative structure of values, customs, and meanings that exist in any culture. This complex is not many things but one thing, with many interlocking parts. It is not primarily biological or instinctual in origin, as Sumner believed, but social and intellectual. Folkways do not arise from the unconscious in even a symbolic sense–though most people do many social things without reflecting very much about them . . .
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> A folkway should not be though of in Sumner's sense as something ancient and primitive which has been inherited from the distant past. Folkways are often highly persistent, but they are never static . . .[17]

Prof. Hackett Fischer then lists twenty-four elements that are included in every folkway.[18] These include patterns of written and spoken language, family structure and function, regulation of gender relationships and religious practice.[19] Most importantly for our purposes, he also discusses Order Ways, which he describes as, "ideas of order, ordering institutions, forms of disorder, and treatment of the disorderly."[20] Although other aspects of folkways are relevant, Order Ways are central to how each group defined transgressions against civil authority and punished them as crimes.[21]

Prof. Hackett Fischer argues, very convincingly I think, that each of the four groups, the Puritans in New England, the Quakers in the Delaware Valley, the Cavaliers in the Coastal South and the Lowland Scots in the Upland South, brought a distinctive set of folkways.[22] More importantly, recognizable

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16. *Id.* at 785-88.
17. *Id.* at 7-8.
18. *Id.* at 8-9.
19. *Id.*
20. *Id.* at 9.
21. *Id.* at 11 n.10 (listing empirical indicators used to discuss order ways).
22. *Id.* at 9-11.

traces of those folkways remain evident in modern America in each of those regions and in the parts of the country settled by each of those cultures.[23] Clearly the persistence of these folkways is a very complicated question in contemporary America, but let's see if the story Prof. Hackett Fischer tells rings as true to you in the area of contemporary federal sentencing as it did to me.

The story of the great British migrations to America is also the story of the religious and political ferment of seventeenth century England. As we all know, the Puritans came to America to escape the religious intolerance that was a major part of the political repression that led to the English Civil War and the execution of Charles I in 1649. Perhaps somewhat less well-known today[24] is that when England became more Puritan-friendly upon the death of Charles I and Puritan migration to America decreased, England also became a much more difficult place for supporters of monarchy like the Royalists, or Cavaliers, who staged their own great migration to Virginia during Cromwell's rule in the Commonwealth period. The Mason Dixon line is a nineteenth century creation, but its roots go back to England. In seventeenth century England, the Puritans were persecuted by, and later persecuted, the Cavaliers. Those animosities were not forgotten by those who came to America. Deep as the common bonds forged by the Revolution and over two

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23. The Puritan folkways spread through upstate New York and into parts of the Upper Midwest, while the Quaker folkways spread into other parts of the upper Midwest. The Lowland Scots folkways of the Upland South spread into much of what we call the Sunbelt today, while the Gulf Coast received a stronger measure of the Cavalier coastal south folkways. HACKETT FISCHER, *supra* note 15, at 812-16.

For the provocative argument that New York City and its metropolitan area retain significant traces of its Dutch heritage which set it apart from both New England and Delaware, see, RUSSELL SHORTO, THE ISLAND AT THE CENTER OF THE WORLD: THE EPIC STORY OF DUTCH MANHATTAN AND THE FORGOTTEN COLONY THAT SHAPED AMERICA (2004).

I would be remiss if I did not acknowledge to this audience Rhode Island's special place as the home of dissent and toleration in New England in an intolerant Colonial New England, a history whose traces can still be felt in the Ocean State. A useful and short biography of the state's founder, highlighting his struggle to separate from the Massachusetts Bay Colony, is, Edwin S. Gaustad's book *Roger Williams*. EDWIN S. GAUSTAD, ROGER WILLIAMS (2005).

24. Perhaps we have been less interested in celebrating our royalist roots than in celebrating our dissenting roots.

hundred years of living as one nation are, sectional differences, the fracture of the Civil War and the regional stresses that persist today have deep roots. The differences are not limited to Boston and Virginia. As we shall see, each of the four groups mentioned above brought something distinctive to America and traces of each remain identifiable.

The Puritan folkways regarding punishment reflected their desire for order, understood as social unity.[25] For them, the greatest virtue was obedience to the will of the community, which in turn reflected the will of heaven.[26] Their great love of obedience and the intensity of their striving for order led to the somewhat paradoxical fact that theirs was, and by some measures remains, the American subculture that combined relatively less violence with relatively harsher punishment.[27] Their culture encouraged and achieved a relatively high degree of obedience, so they had relatively less need for violent enforcement of the law, yet their horror of disobedience led them to punish it severely.[28]

One measure of the strength of this folkway is seen in the kind of criminal cases prosecuted in the Puritan courts. In New England, crimes against public order, such as Sabbath breaking, were the most common kind of cases.[29] This reflected both the Puritan view that social unity was the proper measure of order, and also their desire to enforce group norms.[30] Property crimes came next and crimes of violence were last in order of frequency on the docket.[31]

While striving for order as social unity appears to have successfully limited individual violence and strengthened the idea that criminal offenses were an affront to the group, rather than an individual, the strength of Puritan devotion to group unity fueled the tendency to punish harshly.[32] The Puritans famously enforced social order by burning witches at the stake, hanging and flogging Quakers and publicly humiliating adulterers. The Puritans lived

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25. HACKETT FISCHER, *supra* note 9, at 189-96 (discussing Puritan order ways).
26. *Id.* at 189-90.
27. *Id.* at 192.
28. *Id.*
29. *Id.* at 191-92.
30. *Id.* at 189.
31. *Id.*
32. *Id.* at 192.

in a world in which peace reigned among men, but state violence was readily visited upon those who transgressed against group norms.

The Cavaliers who settled Virginia brought a distinctly different idea of order.[33] Theirs was a Royalist and Anglican influenced hierarchical notion of order.[34] Violations of order offended either the authority of a superior or the honor of an equal, not the norms of the group.[35] In either case, violation of public order offended an identifiable individual, not the unified social order.[36] This aristocratic, hierarchical and individualist social order was enforced with both frequent state violence and customary, private violence.[37] Superiors were entitled, and perhaps expected, to use violence against their social inferiors and social equals could use violence against each other.[38]

The courts were not as busy in Virginia as they were in New England and they heard a different mix of cases.[39] Violent crimes occurred more frequently than crimes against property.[40] The Virginia courts heard very few cases involving offenses against public order and morality.[41] This paints an overall picture of the criminal justice system in colonial Virginia as part of a larger system in which both official state violence and state-sanctioned private violence were used to maintain social hierarchy and redress affronts to personal dignity, honor and power.[42]

The Quakers brought a third distinctive set of ideas of order and transgression to the New World when they came to Philadelphia and the mid-Atlantic region in the late seventeenth and early eighteenth century.[43] The Quakers saw order as social peace, rather than social unity or preservation of hierarchy.[44] For the Quakers in America, social peace was realized when

33. *Id.* at 398-405 (discussing Cavalier order ways).
34. *Id.* at 398.
35. *Id.* at 401.
36. *Id.*
37. *Id.* at 400.
38. *Id.* at 400-03.
39. *Id.* at 404.
40. *Id.*
41. *Id.*
42. *Id.* at 404-05.
43. *Id.* at 584-89 (discussing the Delaware order ways).
44. *Id.* at 584.

individuals did not intrude upon others and the government left each person alone.[45] The colonial courts of the mid-Atlantic region saw very few prosecutions for crimes against public order and morality; most that *were* prosecuted were cases involving defiance of the local elected peace-keeping officers.[46] Those same courts heard roughly equal numbers of cases involving violations of private rights and crimes against persons, in contrast to New England, where private right cases predominated and the South, where violent crimes predominated.[47]

Most notably, the Quakers reduced the number of capital offenses from more than two hundred to just two in the early eighteenth century.[48] They also adopted penal practices oriented toward rehabilitation, rather than punishment.[49] In those instances where state violence *was* used, it was to punish crimes against the peace of another rather than violations of social unity or hierarchy.[50] The Quakers' view of order as peace, combined with their belief in individual conscience, led to a system of relatively less harsh punishment, often deployed in defense of individual autonomy and more oriented toward rehabilitation.[51]

The fourth wave of migration to the New World was that of the Lowland Scots, often called the Scots-Irish, who came throughout much of the eighteenth century.[52] These people came seeking economic opportunity and settled the upland South, or backcountry, inland from the rich coastal lands settled by the Cavaliers.[53] This group had its origins in the border lands between England and Scotland, a region characterized by a long history of unremitting hostility between the formerly dominant Scots and the rising English. Long characterized by border wars and resistance to growing English authority, these settlers brought a fierce individualism and strong commitment to family, clan and locality.[54] Order in the backcountry was imposed by the

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45. *Id.* at 585.
46. *Id.* at 586-87.
47. *Id.*
48. *Id.* at 587.
49. *Id.* at 589.
50. *Id.* at 588.
51. *Id.* at 588-89.
52. *Id.* at 608-09.
53. *Id.* at 633-34.
54. *Id.* at 605-14 (discussing the geographic and social origins of those

individual, and society was characterized by a very capacious private sphere in which civil authority did not operate.[55]

The backcountry idea of transgression was an extreme form of the Cavalier notion that crime was predominately a violation of personal, rather than group, rights. Largely unmitigated by ideas of hierarchy and authority, backcountry order was defined by the *lex talionis*,[56] and enforced by both state and private violence. In the backcountry, crimes of violence predominated in the courts, far outnumbering crimes against property and crimes against the moral order.[57] In these courts, property crimes were often punished more harshly than crimes of violence, which were an accepted part of the culture.[58] In the backcountry, crime was personal and best redressed by swift violence; official action was an unattractive second best.[59]

In this broad summary of one small part of a very careful and impressive piece of scholarship, I know I have not done justice to Prof. Hackett Fischer. My broad story of hierarchical Cavaliers, authoritarian Puritans, peaceful Quakers and violent, libertarian backcountry settlers, reduces a very complex phenomenon to such vague generalities that some may find the picture unrecognizable or of no explanatory value. For me, however, this picture offers some explanation of the great persistence of regional sentencing variations in America.

The broad pattern of harsher sentences and greater devotion to the letter of the Guidelines, which distinguishes the South and Sunbelt from other parts of the country, carries echoes of the folkways of the Cavaliers and lowland Scots.[60] The primacy of

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who settled the Upland South).

55. *Id.* at 765-71 (discussing backcountry order ways).

56. *Lex talionis* is Latin for law of retribution or perhaps law as retribution. The idea is often traced to the Code of Hammurabi and the Biblical injunction, "an eye for an eye." While there is a vivid debate about whether the ancient principle is best understood as a mitigating reform, imposing specific and graduated penalties rather than simply imposing death for all offenses, in modern usage the idea is best understood as a relatively stark kind of retributivism. *Id.* at 765.

57. *Id.* at 768.

58. *Id.*

59. *Id.* at 765-66.

60. Weinstein, *supra* note 5, at 633-42 (statistical appendix listing means for overall sentences and percentages of guideline departures by district and state).

retribution as the main justification for punishment reflects their continued devotion to the *lex talionis*. Harsh sentencing also reflects a relatively greater preference for violence, now channeled into state-imposed punishment, as an appropriate response to disorder.

I also suggest that the continued willingness of courts to impose sentences within the Guidelines is, in part, a carryover of devotion to a more hierarchical notion of social order in which positive rules carry even greater force.[61] Hierarchical ideas of social order may well have made it easier for all of the actors in the system to accept very lengthy sentences for relatively lower level players in narcotics and financial fraud cases, echoing as it does the folkway of greater willingness to impose harsh penalties upon lower status people. The idea that crime is an affront to the honor of each individual victim, rather than the group as a whole, also helps explain the greater attraction of the victims' rights movement in those parts of the country and the continued vitality of the more straightforward idea of retribution in the *lex talionis*.

In contrast, New England, the Mid-Atlantic states and their colonies throughout much of the upper Midwest, continue to rely on the state to sanction violators in order to uphold ideas of social order as unity or peace.[62] This conception of disorder provides less fuel for harsh sentencing than the personal ethos of the Cavaliers; the tendency to focus on the offender in relation to society takes the focus off the offender/victim dyad. The relatively less violent cultures of New England, and particularly the Mid-Atlantic region, begot less state-sanctioned violence in the form of harsh punishments, but there is a story to be told about the transmission of the Puritan taste for extreme violence to support social order, which lingers on in somewhat harsher sentencing in New England.

Perhaps the clearest way that this history continues to inform American sentencing is in the vibrancy of restorative justice as a

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61. I suspect there is also a story to be told about the role of religious fundamentalism in encouraging plain meaning arguments in American law, but Professor Hackett Fischer might suggest that we consider whether contemporary fundamentalism (which has deep roots but is distinctively influenced by innovations dating from the turn of the twentieth century) is a cause or a consequence of the pre-existing folkways.

62. Weinstein, *supra* note 5, at 633-42.

sentencing idea in the Mid-Atlantic and upper Midwest.[63] Although unevenly distributed, the interest in restorative justice has clear roots in the Quaker penological ideas of rehabilitation and reintegration of the offender. Beyond restorative justice, it is also the case that sentences appear to remain most lenient in Pennsylvania and parts of the Midwest, reflecting the old Quaker idea of order as peace and the strong Quaker distaste for violence.[64]

Of course there is so much more to be said about our nation, its history and how we got to our present condition. I particularly want to reemphasize the tentative and broad nature of this piece, which I mean to provoke thought, not prove an argument. I note again, as I did at the outset, the grave dangers of essentializing, or trying to explain complex phenomena by one or two variables, particularly when the phenomena are views on order and authority and the explanation has the flavor of race or national origin. I explicitly deny any claim that modern American judges or lawyers hold a particular view on sentencing because they are members of a particular ethnic subgroup. I have made no effort to study the backgrounds of any judges and lawyers, nor do I understand Prof. Hackett Fischer to be making a claim about racial or ethnic background. Quite the reverse, it seems to me that the power of his argument is the very remarkable claim that in modern, mobile, diverse America, discernible differences persist between Richmond and Boston, even though the people who live in those places and execute the laws have changed so much.[65]

I also hope it goes without saying that there is much more that unites us as Americans than divides us as residents of one region or another. There is clearly an American Criminal Justice System, with dominant ideas about order and authority, but it often speaks with a recognizable local accent. Those often minor variations, on which I have focused in this essay, are surprisingly persistent and may have very deep roots. They reflect small but

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63. *Id.*

64. *Id.*

65. American mobility may offer one explanation for the persistence of some of these differences, as individuals move to regions of the country where others who share their views already live. The Cavaliers and Quakers may have gotten the ball rolling, but perhaps mobility explains some of the persistence of these attitudes.

important differences in our ideas of what it means to transgress and why we punish, differences deeper and more nuanced than which of the four traditional reasons for punishment we prefer. Deeper than our commitment to retribution or rehabilitation is how we think about the social order and our place in it. Do we see ourselves in relation to, and included in, a social order that made us all equal before God, as did the Puritans and the Quakers? Do we see ourselves in opposition to it, as did the Lowland Scots or very much in terms of our hierarchical place in the established social order, as did the Cavaliers? Each answer may lead us to punish crime differently, as I have argued above, and also to emphasize different kinds of transgressions in our criminal law. Regional attitudes about income and alcohol tax enforcement may, in part, reflect these differences.

It also bears noting that I have only talked a little bit about four regions settled by English speakers in the early history of our nation. I offer no speculation about the impact of other cultures in those regions or in other parts of the country. The west coast has a long Latino tradition, Louisiana has always had the influence of its Civil Law past and we are now integrating many new Americans who bring folkways from Asia and Africa. There are stories to be told in each of those regions and new stories, yet to be lived, of how those folkways will combine or interact with those already here.

But with all those caveats, and recognizing that there are many different levels of analysis, it still seems valuable to recognize that the great American experiment in combining diverse groups has always been characterized by the pull of great unifying moments and the push of compromises that permit sectional, and other, differences to coexist in our federal structure. That story can be told about big issues on which compromise was ultimately impossible and unwise, like slavery, and about other matters on which ongoing compromise is the only viable solution, such as sectional differences on international trade policies. Much ink has been spilled arguing that sentencing is a matter of principle and that disparity is a simple injustice which cannot be tolerated. It seems to me that local control and variation is the cornerstone of American criminal law and although I recognize the importance and appeal of a uniform federal law, there may well be deeply embedded limits to uniformity.

The Guidelines came into being at a time when untrammeled judicial discretion was no longer tolerable, as it rubbed up against the pull of equal treatment. The Guidelines were just one part of the tremendous nationalization of our criminal law in the second half of the twentieth century, realized through federalization, Model Penal Code recodification and the emergence of criminal law as a great political issue at all levels of government. The trend toward greater uniformity in our criminal law was itself just one aspect of the great homogenization of American culture that characterized the post-World War II period.

But nationalization and the move to uniformity can usher in a responsive, or corrective, sentiment for sectionalism. Seen in this light, *Booker* was a corrective to an excessive push for national uniformity. Just as untrammeled discretion became intolerable, so too did the irritation caused by the conflicting sensibilities about punishment in different parts of the country. New Yorkers were never happy with attempts to compel them to punish crime in exactly the same way as Virginians, who were no more happy to have New York or Massachusetts ideas of order and punishment forced upon them.

I have argued elsewhere that *Booker* can be understood as the latest installment of the Supreme Court effort to police the boundaries among the branches and restore judicial authority after a period of legislative and executive ascendancy in criminal law and sentencing.[66] Today I have argued to you that the same legal developments are also an effort to rebalance the power of regional and national visions of our criminal law. Being citizens of one nation and subject to federal law, citizens of Boston and Richmond could not go on sentencing defendants in federal court as if each judge were a representative of a sovereign, state-based district. But correcting that problem did not erase the fundamental regional differences a federal state can celebrate, if it can find the right middle ground between total rigidity and completely individualized sentencing.

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56. Ian Weinstein, *The Revenge of* Mullaney v. Wilbur: U.S. v. Booker *and The Reassertion of Judicial Limits on Legislative Power to Define Crimes*, 84 OR. L. REV. 393 (2005).