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The Law is Not the Case: Incorporating Empirical Methods into the Culture of Case Analysis

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THE LAW IS NOT THE CASE: INCORPORATING EMPIRICAL METHODS INTO THE CULTURE OF CASE ANALYSIS

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A Japanese immigrant housewife, emotionally distraught by her husband's infidelity, decided to drown herself in the Pacific Ocean. Because Japanese culture instructs that mothers must never leave their children, she entered the ocean with her infant and toddler in tow. When both children died but she survived, the mother was prosecuted for murder. She pled guilty to manslaughter in return for one year in jail, a sentence that amounted to credit for time served.

I. INTRODUCTION

In her provocative book *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom*,[1] Professor Cynthia Lee contemplates some of the most important issues facing the criminal law in a heterogeneous society — the appropriate role of culture in the criminal courtroom, the tension between feminism and multiculturalism in criminal justice policy, and the influence of culture in shaping our notions of reasonableness, provocation, and self-defense. Professor Lee does more than simply raise the issues in a theoretical fashion; she concretizes these

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1. CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (2003).

abstract concepts in order to theorize how culture works to privilege certain defendants and to disadvantage others. In so doing, she attempts to account for variation in the outcomes of cases in which cultural issues are raised.

To analyze the relationship between culture and culpability, Lee identifies a small set of cases, the opening anecdote is one, in which cultural or minority defendants have successfully invoked their cultural practices to justify, to excuse, or to mitigate their criminal conduct. She then identifies a theory that she believes explains both the success of these select few (and others like them) and the failure of dissimilar defendants.[2] Applying this theory to the cases she has selected, Lee purports to show how the law works in this area and invites us to use this model to predict the fate of future defendants.

The case analysis method — drawing conclusions about the law from a handful of select cases — is a technique common to practicing lawyers and legal academics. It forms the basis of scores of law review articles each year and is the paradigm of both the common law approach to precedent and the case method of teaching. We identify a few cases that concern a given topic and then extrapolate from those opinions the pertinent rule of law. Lawyers argue to judges that this sprinkling of relevant cases provides clear guidance as to the outcome that should be reached in current and subsequent cases. Teachers suggest to students that once they read and digest these opinions, they should feel confident that they understand how this particular piece of the law works.

Is this really the case? Can anyone know the state of the law from reading a handful of select cases? Might there be hundreds of other cases out there that reach different conclusions? What if there is a bias in the way cases are reported and in which opinions remain unpublished? What if legal actors apply the published case standards in contrary or creative ways when making decisions about filing cases or making settlements? Do not all of these components shape the law in profound ways? If so, is it not our obligation as academics to explore these questions before drawing broad conclusions about what the law is?

I am not indicting the case analysis approach in precedent or in law teaching. Practicing lawyers must articulate arguments in terms that appeal to judges, a strategy that predominantly involves the invocation of similar or disparate holdings from prior published cases. Judges who are inclined

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2. Lee invokes interest convergence theory, an idea first developed by Derrick Bell, to argue that only those defendants whose use of culture resonates with or serves the dominant group's interests will triumph in the criminal court. I will examine the implications of this theory later in the Essay. *See infra* Part III.

to make rulings based on their understanding of precedent may have little use for evidence of legal actors' behavior or analysis in unpublished opinions, non-litigated disputes, or settled cases. Likewise, teaching our students to identify similarities and distinctions between old cases and new facts prepares them for future litigation challenges that exist within this common law framework.

The scholar's project, however, is fundamentally different from the practitioner's approach to winning cases or the teacher's approach to training students. We should be aware that constructing legal arguments in the context of one case, or teaching students how to do so, is distinct from making claims about what the law in a particular area really is, in all of its many forms and messy realities. The techniques of case analysis that are so useful in practice and teaching should be excised from academic legal scholarship unless we are certain that they suffice to provide the answers we seek.

Lee's theoretical approach to understanding the success or failure of cultural defenses thus inspires me to ruminate on the benefits and burdens of case analysis more generally, in light of other available research methods and modes of analysis. While I consider case analysis in the context of cultural defense jurisprudence, this Essay should be regarded as a case study of a more endemic problem in legal scholarship. In tackling such an area, my goal is not to overthrow centuries of legal analysis, but rather to explore how we, as legal scholars, might use social science techniques to more systematically investigate, document, analyze, and predict the state of a particular corner of the legal universe.

The argument proceeds in two parts. Part II considers empirical approaches to the question raised by Lee: how might we ascertain the relationship between culture and culpability? I discuss several basic techniques, both quantitative and qualitative, that scholars can use to supplement traditional case analysis in this area. Part III explains the importance of articulating theories that directly address institutional actors and motivations, not just correlations between variables, to further our understanding of how patterns emerge in the criminal justice process. I argue that passive accounts or abstract explanations of case outcomes do not adequately capture the complexities of the justice process, and therefore prove unsatisfying to those who wish to predict future events. I conclude by offering some comments about the relationship between law and social science and by expressing optimism about the future of legal scholarship.

II. THE DEPTHS OF THE LAW

The goal of systematic case analysis is to identify and to account for variation in outcomes among cases that address a common issue. In other words, given that the same claim is raised in all of these cases, what factors explain why some claimants succeed while others fail? Lee's work on cultural defenses to crimes offers us an opportunity to delve deeper into the institutional features and causal mechanisms of the criminal court to answer this kind of question. There are many institutional forces at work in the criminal justice process, few of which are typically manifest in the written opinion that may emerge in any particular case. Generalizing from a handful of published cases to explain broad criminal justice trends is, therefore, a tricky technique. While the theory that emerges might be provocative, the conventional legal scholar using this approach is sure to miss all kinds of interesting patterns and data that lurk beneath the surface of the chosen opinions.

Criminal courts are, after all, more than simply generators of legal opinions. They are organizations populated by actors who are motivated by infinite combinations of professional, personal, and institutional values. The ways in which these values play out in individual cases has concerned sociolegal scholars for decades, and a single theory explaining variation cannot simply be gleaned from the wording of appellate case decisions. This is true not only because judges rarely express clearly why they reach the decisions they reach, but also because scores of decisions made by others along the way can have a dramatic impact on which cases arrive at the appellate courts in the first place.

The outcome of a criminal case is a composite of many small decisions — the decision of the offender to commit the crime, of the police officer to investigate the crime and to forward the evidence to the prosecutor, of the prosecutor to transform the police report into an indictment, of the judge to bind the defendant over for trial, of the defense attorney to press for trial instead of pleading her client guilty, of the jurors to return a verdict, and so on. Each of these decisions comprise many smaller decisions. The police officer, for example, might take the offender into custody pending the filing of charges or the prosecutor might opt to file a felony instead of misdemeanor. Any one or all of these decisions might be influenced by the defendant's (assertion of) "culture." More importantly, because all of these decisions precede the appellate court's review of the case, they often disappear or become subsumed in the appellate court's final ruling on the matter. Consequently, to conclude that what the appellate court holds, and the rationale it offers to support that holding, is

the only decision that matters to a case's outcome may cause scholars to miss much of what made this case interesting.

The contours of any given case emerge through a prism of many decisions and decision-makers. If we want to explain the impact of culture on criminal case outcomes, then, we should look at the potential effect of cultural claims at all of these various decision points. Moreover, we should approach the question from multiple perspectives, using a variety of research methods and data sets, in order to create the fullest and most textured portrait of the relationship between culture and culpability. Social scientists call this multiple-approach technique "triangulation." With triangulation, different forms of quantitative data (such as that derived from surveys or case opinions) and different forms of qualitative data (such as that derived from interviews and focus groups) are used to supplement, to enhance, and to check one another in the interpretation of results. No one method is viewed as paramount; the value of the work stems from the scholar's ability to provide answers from many different sources.

I acknowledge at the outset that this sounds like a Herculean task. Few in the legal academy have the financial resources or time to conduct such an extensive empirical project on their own, and the drive to publish frequently may discourage many of us from committing to such an undertaking even once in our careers. But these negatives serve as disincentives only if we stick to our conventional ways of researching and writing. Legal scholars can easily use one or two of these research techniques to supplement traditional case analysis. While this approach certainly requires more time and effort than library research, it would not require a scholar to devote a lifetime to one project. Moreover, scholars might co-author more frequently, particularly with colleagues in the social sciences, as a way to share the research burden and to benefit from each other's insights. Lastly, different kinds of studies add different kinds of value — a scholar who conducts a portion of this research can meaningfully contribute to the conversation about what factors influence, and are in turn influenced by, the law. No one person (or study) needs to do it all in order to be useful.

My objective in the pages that follow, then, is to offer some clues as to how a legal scholar might pursue, systematically and empirically, an interest in cultural defense outcomes. I discuss four basic techniques for uncovering data, both quantitative and qualitative, and the contributions each of those techniques might make to the overall project. More specifically, I consider the ways in which quantitative analysis of large scale data sets derived from published appellate opinions, close examination of unpublished case files, and qualitative assessments of

interviews with criminal justice personnel can supplement case analysis. In writing this Essay, I am accepting the invitation extended by scholars such as Lee Epstein and Gary King,[3] Michael Heise,[4] and Craig Nard[5] to build bridges between law and social science that are sure to improve the quality of legal scholarship.

We should first assess the utility of case analysis — what I reference above as extrapolating from a few cases to draw conclusions about the field. This technique of parsing a handful of select cases does deserve a place at the table when we are analyzing legal issues. While exclusive reliance on anecdotal evidence (such as that derived from the selected handful) is unwise,[6] we can think of this process as an early form of content analysis: we pay close attention to a few opinions to see how judges express themselves or to identify potentially salient word choices and arguments. By closely scrutinizing a handful of opinions, we might draw hypotheses about which factors seem important and which questions

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3. Lee Epstein & Gary King, *Empirical Research and the Goals of Legal Scholarship: The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002). The authors note that:

> [To both empirical researchers and members of the legal community, empirical] research that offers claims or makes inferences based on observations about the real world — on topics ranging from the imposition of the death penalty to the effect of court decisions on administrative agencies to the causes of fraud in the bankruptcy system to the use of various alternative dispute resolution mechanisms — can play an important role in public discourse and can affect our political system's handling of many issues.

Id. at 4-6 (internal citations, quotations, and ellipses omitted).

4. Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807 (1999).

5. Craig A. Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue between the Academy and the Profession*, 30 WAKE FOREST L. REV. 347 (1995); *see also* Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J LEGAL EDUC. 323 (1989); Jeremy A. Blumenthal, *Law and Social Science in the Twenty-First Century*, 12 S. CAL. INTERDISC. L.J. 1 (2002-03).

6. Michael J. Saks, *Do We Really Know Anything about the Behavior of the Tort Litigation System — and Why Not?* 140 U. PA. L. REV. 1147, 1159 (1992) (warning against the use of anecdotal evidence).

> Anecdotal evidence is heavily discounted in most fields, and for a perfectly good reason: such evidence permits only the loosest and weakest of inferences about matters a field is trying to understand. Anecdotes do not permit one to determine either the frequency of occurrence of something or its causes and effects. They do no better in enlightening us about the behavior of the [actors or institutions we wish to study].

Id.

the courts seem to avoid or gloss over. But we must acknowledge the preliminary nature of these findings — the content analysis phase serves only as a pilot project for the larger study. It helps us to identify where interesting points of variation might lie in the larger data set and offers us guidance on where to look for answers to developing research questions.[7] Close scrutiny of a few cases therefore can be an important first step in research design.

Going beyond this first step — moving from theory-generating to theory-testing research — requires us to think broadly about available data and to invest significant resources in pursuit of the answers to the questions posed. In short, at this second stage of the project we need to build a large data set and quantitatively assess the cases that comprise it. Analyzing this large data set serves two principal functions. First, by scrutinizing a large number of cases we make sure that the few cases selected for the pilot project were not skewed or off base in issues, content, analytical frameworks, and the like. More importantly, by amassing a large data set we aim to secure a representative sample of the universe, and this representativeness both authorizes us to draw inferences about the larger population and allows other scholars to replicate our research at a later time.[8]

In considering cultural defenses, for example, we might begin our second stage analysis by assessing the relevance of culture to appellate courts that have published opinions in "cultural defense" cases. Published appellate opinions, available through online services or hard copy publications, are easy to obtain, and the collection of this type of data is fairly easy for later scholars to replicate. For example, we might conduct a Lexis or Westlaw search for all state court opinions that discuss the relevance of the defendant's culture in jury instructions, in evidentiary rulings, in prosecutorial argument, and in sentencing hearings.[9] Depending

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7. Lee's identification of eight or nine cases that raise cultural claims serves precisely this purpose. The cases Lee has spotlighted involve both male and female defendants, a host of different crimes, and a variety of cultures and ethnicities. She gives us the facts and the outcomes of these cases, as well as commentary that has been written about some of them, all with an eye towards highlighting potentially interesting points of variation. I see her work as a pilot project of sorts, a preliminary study that suggests questions for future research and analysis.

8. Heise, *supra* note 4; Nard, *supra* note 5 at 349.

9. To demonstrate the utility and variability of this approach, my research assistants conducted multiple searches using both Westlaw and Lexis. Search (1) targeted the Westlaw ALLSTATES database for cases in which a criminal defendant asserted an affirmative cultural defense in some form. The ALLSTATES database covers cases decided in all fifty states and the District of Colombia, from 1945-present. A broad search request for: *Cultur! Ethnicity /p Defense Mitigat! Justif! Excus! Acquit "Not Guilty" Misunderstanding & Homicide Assault "Sexual Offense" % "gang culture" "drug culture" "corporate culture" "blood culture" "firm culture"*

on the number of cases we find, we can use the universe of cases or collect a random sample (*i.e.*, after collecting the universe, we arrange the cases in chronological order and then select every Nth case for analysis, where N depends on the ultimate sample size desired).[10]

Once we have identified the cases that belong in the data set, we need to code and analyze the contents.[11] We could code, among other things,

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"cultural affairs" "prospective juror" "cultural resources" found a total of 344 cases, resulting in 185 relevant observations. A similar search was conducted in Lexis' "State Court Cases, combined" database, where the coverage varies by state; generally State Supreme Court coverage begins in the 1700s or 1800s, but depending on the state, Appellate Court coverage may have begun as recently as 1987. Searching for *(Cultur! OR Ethnicity) w/p (Defense OR Mitigat! OR Justif! OR Excus! OR Acquit OR "Not Guilty" OR Misunderstanding) AND (Homicide OR Assault OR "Sexual Offense") AND NOT "Gang culture" AND NOT "Drug culture" AND NOT "Corporate culture" AND NOT "Blood culture" AND NOT "Firm culture" AND NOT "Cultural affairs" AND NOT "Prospective juror" AND NOT "Cultural resources"* returned 404 initial cases. A more narrow Search (2) used the same databases but restricted coverage to headnotes, digests, overviews, and synopses, in order to identify cases where the cultural defense issue was sufficiently important to justify marquee status. In the Westlaw ALLSTATES file, the search terms: *sy,di(cultur!/10 defense misunderstand! excuse % "gang culture" "drug culture" "corporate culture" "blood culture" "firm culture" "cultural affairs")* yielded 16 results and 14 relevant observations. In Lexis' "All Court Cases, Combined" database, the search term: *OVERVIEW (cultur!/10 defense or misunderstand! or excuse and not "gang culture" or "drug culture" or "corporate culture" or "blood culture" or "firm culture" or "cultural affairs" or education!) or HEADNOTES (cultur!/10 defense or misunderstand! or excuse and not "gang culture" or "drug culture" or "corporate culture" or "blood culture" or "firm culture" or "cultural affairs" or education!)* returned 11 results and 6 relevant observations. Search (3) altered the original search in 3 ways: first, it added the concept of culture's relevance to the defendant's mental state (as an alternative to the use of culture as an affirmative defense); second, it included both federal and state cases; third, it looked for cases involving subcultures, in addition to ethnic cultures, as the basis for the defendant's claim. Using Westlaw's FCJ (Federal Criminal Justice-Cases) and MCJ (Multistate Criminal Justice – Cases) databases and the search term: *Cultur! Ethnic!/3 Defense Relevant % "Corporate Culture" "R.C. 2929.12,"* 84 cases were found, 61 of which were relevant (31 of the 84 results were from federal court; RC 2929.12 is an irrelevant statute that crops up in some cases). In Lexis's "Federal and State Cases — Selected Criminal Material" file, a search for: *Culture OR Cultural OR Ethnicity OR Ethnic W/S Defense W/S Relevant AND NOT "Corporate Culture"* yielded 38 cases and 19 relevant observations (7 of the 38 results were from federal court). These are just 3 examples of searches that a researcher might conduct to identify the range of published appellate opinions that discuss culture and culpability; as my results demonstrate, the search formula and database chosen can dramatically affect the number of cases retrieved.

10. The selection process also requires us to choose whether to simply eliminate cases found to be inappropriate, or to replace each eliminated case with the next in line.

11. Coding is generally defined as categorizing and sorting raw data into groups by assigning numbers to categories of variables. In surveys the categories are based on answers to questions; for example answer A to question 1 is coded as 1, answer B to question 1 is coded as 2, and so on. For open-ended questions such as might be asked in interviews (or for coding case reports), where the number of unique responses might be in the hundreds, the researcher tries to develop a coding scheme that properly captures the complete range of responses. In short, the idea behind coding is

demographic data on defendants and victims (including the precise culture at issue), the timing and method of raising culture as a defense, the crime at issue, and the outcome of the claim.[12] Once the data are coded, we can perform statistical analyses (regressions, for example) to determine whether any of the independent variables (timing, method, demographic data) produce changes in the dependent variable (claim outcome).

The virtues of the appellate court database are apparent: the researcher can code tens (or even hundreds) of variables to analyze large scale trends in judicial decision-making, assessing what courts in various jurisdictions have done with these issues and how these patterns have changed over time. If we code carefully enough, we may observe distinctions between what judges say they are doing in a given case (*i.e.*, the variables the judge identifies in the opinion as salient) and what factors statistically explain variation in the overall group of cases. This type of disparity may prove significant both to lawyers arguing future cases and to policymakers or academics lobbying for a change in the law itself.

Economists and quantitative scholars have recently taken this approach to analyzing law in a variety of areas, generating important findings for legal policymakers. For example, Kim Kraweic and Kathryn Zeiler[13] analyzed large data sets to challenge the conclusions reached by earlier scholars about the factors that matter most to courts deciding disclosure duty issues.[14] Lauren Edelman and her colleagues culled a sizeable database of federal employment discrimination cases to document courts' tendency to defer to employer-driven definitions of compliance with Equal

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to transform the data into a manageable form that will allow for quantitative analysis. ROYCE A. SINGLETON, JR. & BRUCE C. STRAITS, APPROACHES TO SOCIAL RESEARCH, ch. 15 (3d ed. 1999). For more information about techniques of quantitative analysis, see id. chs. 16-18.

12. Outcomes might include the giving of a requested jury instruction, the inclusion of a lesser included offense based on reasonable and adequate provocation, a change in the ultimate crime of conviction, a reduction in sentence length or complete acquittal. Given the number of ways we might measure "the success" of a cultural claim, we cannot use a single binary outcome variable; we would need to incorporate several different variables to capture success at varying stages.

13. Kimberly D. Kraweic & Kathryn Zeiler, Common Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories (2005) (unpublished manuscript, on file with author).

14. While Kraweic and Zeiler discuss the work of various scholars, their critique focuses principally on the work of Anthony Kronman and Kim Lane Scheppele. *See* Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 6 (1978); KIM LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 112 (1988); Kim Lane Scheppele, *It's Just Not Right: The Ethics of Insider Trading*, 56 LAW & CONTEMP. PROBS. 125 (1993).

Employment Opportunity standards.[15] Sam Kamin, in an effort to provide a more nuanced understanding of death penalty jurisprudence than previous scholars had offered, compiled and examined all death penalty decisions of the California Supreme Court between 1976 and 1996. He concluded that outcome variations in capital cases stemmed primarily from the Court's manipulation of its harmless error doctrine, rather than from changes in substantive capital punishment law.[16]

While the large-scale quantitative approach constitutes a big improvement over case analysis in terms of yielding reliable results,[17] we should be cautious about drawing conclusions about "the law" from this method alone.[18] Published appellate opinions represent only the tip of the iceberg of judicial decision-making, and they may not constitute a representative sample of opinions in an area.[19] Consequently, if our goal

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15. Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 436-39 (1999) (discussing methods).

16. Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 39 (2002); Sam Kamin, *The Death Penalty and the California Supreme Courts: Politics, Judging and Death* (2000) (unpublished Ph.D. dissertation, University of California) (on file with author).

17. In empirical work, "reliability" means the ability of future scholars replicating the study to find similar results; it measures the robustness of the results across time. "Validity" refers to the scholar's ability to capture the concepts she means to interrogate through the variables she has identified; it measures the fit between the abstract concepts and the variables tested. For a more thorough explanation, see Epstein & King, *supra* note 3, at 82-93; *see also* EARL BABBIE, THE PRACTICE OF SOCIAL RESEARCH (8th ed. 1998); SINGLETON & STRAITS, *supra* note 11.

18. Epstein & King, *supra* note 3 (contending that legal scholars tend to draw inferences that extend far beyond the data they collect and that many projects are poorly designed to address the questions posed by the researchers). My point is not to rehash their critiques, but rather to suggest ways to avoid these pitfalls in the future.

19. Joseph Colquitt has identified this phenomenon in the law of entrapment. Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389 (2004). According to Colquitt, the number of appellate opinions discussing entrapment does not accurately reflect the number of potential entrapment claims because charges are not always brought, cases do not always result in conviction after trial (because some are dismissed, others end in guilty pleas, still others result in acquittals), defendants do not always argue entrapment at trial or on appeal (even where the facts would support such a claim), and appellate courts do not always reach the entrapment issue, even when raised. These same trends would limit our ability to detect all potential cultural defense claims from appellate opinions. This phenomenon has been observed in civil litigation as well. For example, in her study of Family and Medical Leave Act litigation trends, Catherine Albiston demonstrated that strong cases for plaintiffs tend to drop out of the court system early on through settlements, while strong cases for the defense tend to get litigated and appealed. As a result, much of the appellate docket is dominated by strong defense cases, which generates a pro-defendant slant in most appellate opinions. Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 L. & SOC'Y REV. 869 (1999); *see also* Kevin M. Clermont & Theodore Eisenberg, *Empirical and Experimental Methods of Law: Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947; Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*,

is to develop a robust understanding of how judges actually grapple with cultural issues that come before them, we need to supplement the published opinion database with some grass roots research in a handful of randomly selected jurisdictions.

In this third stage of the research, we should systematically review and code courthouse case files and transcripts of every case (in the chosen jurisdictions over a given period) in which a defendant raised a cultural issue.[20] Careful reading of a jurisdiction's case files should yield a tremendous amount of information: specially tailored jury instructions, probation reports, and sentencing memoranda all might reveal ways in which cultural claims are handled at the trial court level.[21] While this is an expensive and labor-intensive effort, a deep, microanalytic assessment of the cases can complement the breadth that our earlier, macroanalytic review of all published appellate opinions yielded. In short, if we are interested in how the judiciary responds to assertions of culture by criminal defendants, we should examine the responses of many different judges in many different cases; we should not limit our inquiry to those judges who cared enough about the issue to publish their opinions in particular cases.

Yet I suspect that when scholars try to discern the influence of culture on culpability, they mean to ask more than simply: "What are judges doing with these kinds of claims?" I sense instead they want to investigate how various criminal justice decision-makers interpret and invoke a defendant's (assertion of) culture when assessing guilt or appropriate punishment. Knowing what judges do is thus only one component of getting a handle on what the law is, and the discovery of a broader set of

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52 BUFF. L. REV. 757 (2004). For a more theoretical discussion of how repeat players manipulate legal rules by controlling which cases get appealed, see Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

20. Scott Norberg took this approach in his study of consumer bankruptcy. Norberg collected and summarized data from seventy-one Chapter 13 cases filed in the U.S. Bankruptcy Court for the Southern District of Mississippi between 1992 and 1998 in order to assess how creditors fare and what factors account for their success or failure. Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L.J. 415, 418 (1999).

21. We might identify the pool of cases initially by examining all case files in a certain period that pertain to a certain crime — for example, all homicides and assaults filed between 1995 and 2000. After pulling and reading all of those files, we could separate the stack into two piles, those that involved assertions of culture and those that did not. Alternatively, we could begin by looking among all case files for surnames of defendants that appear to be non-Anglican in origin. This would provide only a rough estimate of which defendants might have raised cultural claims, and it may well be crudely racist to link ethnicity to surname. I mention it here only to suggest a starting point for the research project.

clues likely requires us to ask more complicated questions. The question posed by Professor Lee provides a perfect example. She asks: "[g]iven the general resistance to the use of cultural evidence in criminal cases, how can we explain the exceptional cases in which immigrant defendants and nonimmigrant defendants of color have been able to use culture to their benefit?"[22]

In order to establish how certain defendants "have been able to use culture to their benefit," we might pose the following queries to go beyond examining what judges do with cultural claims:

> Which institutions (police, prosecutor, judge, jury) are most receptive to cultural claims? Does it appear that some uses of culture are more persuasive than others? Are some defendants in a better position than others to advance a cultural argument? Does timing matter?

If we suspect that answers to these types of questions will offer a more nuanced portrait of the effects of culture in criminal cases, we need both to change our data set and to employ a different set of research methods, namely qualitative methods.[23] This fourth stage of the research process is necessary because qualitative methods offer us a different point of view than that provided by statistics alone. In a qualitative research project the scholar talks to decision-makers about their decision-making processes, thereby gaining access to the reasons behind facts that appear in published (or non-published) opinions. As Albert Alschuler has explained, qualitative studies help to "guide analysis and to permit an evaluation of the inherency of the problems."[24]

To begin the qualitative segment of the research, we must first recognize the significance of decisions made by criminal justice actors other than the judge. The most obvious of these actors is the prosecutor, the official who controls the look and feel of the charging document, which in turn sets the tone for how the case will proceed through court. To

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22. LEE, *supra* note 1, at 112.

23. I do not mean to suggest that use of a non-judge database and qualitative methods must go hand in hand; we could certainly do quantitative research with prosecutor files or qualitative research with judges. I collapse the two moves into one here simply for ease of reference and to avoid repetition.

24. Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1181 (1975); for other examples of qualitative methods in legal research, see Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 L. & SOC'Y REV. 275 (2001); DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE (2001); Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125 (2005).

gauge prosecutorial responses to assertions of culture by criminal defendants, we could (in the same jurisdiction selected from stage 3) explore files maintained by the District Attorney's office, looking for salient factors in police reports or other pieces of evidence that seem to account for particular filing decisions, or handwritten notes from filing deputies explaining their filing choices.[25] We could pore over prosecution manuals and training videos to learn how prosecutors are trained to deal with cultural issues. Of course, these approaches might also lead to quantitative data if we code to identify patterns of responses, but here I suggest reading for content and rhetorical style to gain access to how prosecutors think about these issues. Better yet, we could interview prosecutors in the jurisdiction to learn their professional and personal interpretations of the relevance of culture. We might identify respondents by demographic data, to see if cultural claims resonate more strongly, or in any event differently, based on the age, race, or gender of the prosecutor.

Keeping in mind that prosecutors represent only one portion of the criminal lawyers in any jurisdiction, we could interview members of the criminal defense bar as well. We might ask defense attorneys about their experience with "cultural" defenses and the techniques they use, if any, to put cultural issues before the court. We might ask them to describe how prosecutors, judges, probation officers, and jurors in their cases responded to cultural overtures, and whether in hindsight they might have gone with a different theory, articulated the claim in a different fashion, or abandoned the cultural claim entirely. While this approach is sure to produce a mountain of war stories, these stories can supplement the court files in critically important ways and offer insights into defense strategies for making the most of cultural claims.[26]

One can envision a variety of ways to test hypotheses about culture and crime, and of course one's choice of technique(s) depends heavily on the

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25. Prosecutors' files might include both cases that merited the filing of criminal complaints and those that were rejected.

26. Michael McCann, in his study of Equal Pay activists, demonstrated the importance of supplementing courthouse files with interviews. MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994). His study challenged the conclusions reached by other court scholars, most notably Gerald Rosenberg, that litigation often does very little to accomplish social change, even where the litigants succeed in court. *See* GERALD ROSENBERG, THE HOLLOW HOPE (1993). In talking with activists who ultimately lost their battle in the courts, McCann identified several ways in which the activists' deployment of legal and rights-based claims transformed cultural understandings of equality and convinced many employers to alter their pay scales.

questions one wishes to answer.[27] A scholar interested in the role of probation officers in influencing sentencing decisions might choose to focus her resources on the probation office and the local judiciary, while one who questions the impact of tailored jury instructions might stick to interviewing advocates and jurors. No single technique (or data set) is universally regarded as supreme, and most legal scholarship projects could benefit from the use of even one of these methods to supplement case analysis. The more we restrict our data collection methods, however, the more modest our claims should be about what we have actually found. If other sources of data exist, or if other analytical techniques might be used to assess the data we already have, we should acknowledge the constraints of the research and avoid sweeping inferences about the importance of our findings.[28]

My goal here is not to provide an exhaustive roadmap for the scholar interested in getting to the bottom of culture's relationship to culpability, and I do not mean to suggest that legal scholars should abandon what we have been doing for the past century or more in our scholarship. I argue instead that legal scholars should acknowledge the fundamental limits of case analysis for explaining what the law is outside of the litigation context, and I have tried to suggest some relevant steps we might take to go beyond the constraints imposed by that analytical method.

Moreover, I believe that the benefits of this approach will extend beyond the halls of academia. By collecting data as part of well-designed research projects, we can formalize the grapevine about how cultural defenses work in various jurisdictions across the country. We can amass and organize relevant and reliable information on which practitioners can draw when making decisions about which strategies to use in current or future cases. If a defense lawyer in Florida, for example, learns that defense lawyers in California have experienced more success asserting culture as a form of duress than as a form of temporary insanity, she may use that knowledge to craft a defense for her own clients. Alternatively, if our research shows that certain jury instructions have resulted in overturned convictions in some jurisdictions, prosecutors elsewhere can

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27. Much ink has been spilled by scholars of methodology to establish the benefits and burdens of these approaches, and no two scholars will approach a question the same way. But unanimity is not required: each technique offers its own advantages and contains its own set of limitations because each places the spotlight in a different place. Further, although use of an empirical method does not guarantee that the researcher will gain access to all potentially relevant information, I argue that empirical methods are better theory-testing devices than case analysis and extrapolation.

28. Epstein & King, *supra* note 3, at 7-9, 50-51.

examine the jury instructions used in their respective jurisdictions in order to correct any potential problems before they arise. Our empirical findings thus may have value for practitioners, even if they never argue to judges that empirical patterns are relevant or persuasive authority in the context of litigation itself.

III. THE POWER OF THE EXPLANATION

Empirical research into the multiplicity of ways criminal justice actors take culture into account should also encourage us to theorize in the active voice, rather than the passive, about how and why culture matters in the courtroom. This is not just a matter of linguistic style. Passive explanations, due to their inherent ambiguity, permit us to tell a variety of stories based on the same set of facts. They suggest that variation in results might be correlated with a particular fact or circumstance, but they leave us wondering about the inner workings of this relationship: does this fact or circumstance actually trigger the result, or do they just occur simultaneously? If there is a triggering effect, how does it work? Which actors are responsible for making it happen? Active hypotheses help us to avoid these theoretical pitfalls by requiring us to specify one particular story and to prove the mechanisms that get us from cause to effect in that story.

In her effort to reveal a deeper truth about the use of culture in criminal courtrooms, for example, Professor Lee suggests that "interest convergence theory" accounts for the difference between successful and unsuccessful cultural claims. Professor Derrick Bell first coined this phrase in 1980 as he was seeking to explain the differential success of various racial equality programs; he argued that "the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[29] Incorporating Bell's insight, Lee contends that defendants whose use of culture resonates with or serves the dominant group's interests are more likely to triumph in the criminal court.[30] The

29. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

30. Lee's reliance on interest convergence goes along with the theme of the entire book — that the criminal justice system, criminal law, and laws of provocation and self defense are implicitly supportive of dominant norms. LEE, *supra* note 1. These dominant heterosexual, male, white norms have achieved a state of hegemony, such that their existence seems natural in criminal law doctrines. Everything else looks foreign and must be justified through exhaustive argument in individual cases. For a "culture" type claim to succeed, it must appear to criminal justice actors that a finding in favor of the defendant actually serves the goals of the dominant group; the interests of

successful group includes Asian men who kill their unfaithful spouses, Hmong men who kidnap and rape their intended fiancées, and distraught Asian wives who attempt parent-child suicide as a response to their husbands' infidelity. Lee does not offer examples of immigrant defendants who failed in their claims; she provides instead examples of Caucasian defendants who had no cultural defense to raise and ultimately received harsh punishments.

Interest convergence theory explains differential outcomes only in the most abstract of ways: the claims of X defendants are more likely than the claims of Y defendants to succeed because of their differential compatibility with the dominant culture's norms.[31] Beyond this contention the theory has nothing to say. It fails to offer us an explanation of who is responsible for this result or how it happens. We might surmise, as Lee does, that in each of the success stories the defendant actively promoted his affinity with the dominant culture's norms. The rejected Asian husband, for example, invoked the American provocation tradition in the criminal law, the Hmong kidnapper made himself resemble the average date rapist, and the distraught Asian mother demonstrated her transcendent commitment to motherhood above self. A key decision-maker in the case then noticed this likeness, identified a need to protect the dominant culture, and responded with leniency.

But the theory itself does not insist on this pattern of occurrences in order to prove the hypothesis. Other facts or patterns might explain the outcomes in these cases, such as prosecutor incompetence or juror misunderstanding of the law.[32] Even if interest convergence is the right

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the defendant or of the defendant's own unique culture are secondary, subordinated, and unimportant.

31. In importing interest convergence theory into the cultural defense context, Lee builds upon the work of other scholars who have observed that defendants who make themselves appear similar to jurors, and thereby appeal to the same set of base values, fare better than those who emphasize their distinctiveness. *See* Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism,* 82 CAL. L. REV. 1053 (1994); Kay L. Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 L. & SOC. INQUIRY 39 (2003). Lee argues, however, that expression of similar values does not merely resonate with the jury; it triggers a reflex among criminal justice actors to protect the interests of the dominant majority. Interest convergence theory thus suggests that the motivation for dominant actors' behavior goes beyond empathy and moves into self protection.

32. In one famous case involving a Chinese husband who fatally beat his unfaithful wife with a hammer, the prosecutor failed to produce any evidence to rebut the defendant's claim of "my culture made me do it." *See* Alexis Jetter, *Fear is Legacy of Wife Killing in Chinatown: Battered Asians Shocked by Husband's Probation*, NEWSDAY, Nov. 4, 1989, at 26 (discussing New York v. Chen, no. 87-7774 (N.Y. Superior Court, Dec. 2, 1988)). Though the prosecutors later explained that they did not anticipate the judge would take such a claim seriously, they suffered heavy

story — the true explanation for all of these case outcomes — how does it work? Must the defendant at some point explicitly argue interest convergence, or can we assume the relevant criminal justice system actors will see the convergence themselves? With whom does the similarity resonate and at what stage? Does the prosecutor take account of dominant interests when filing or making plea offers? Does the judge refer to dominant values when he rules on the sufficiency of the evidence or designs a jury instruction? Does the jury invoke dominant values when it considers evidence and deliberates on the prosecution's theory of the case? Do we look for any or all of these actors consciously to draw links between the defendant and the dominant group, or is interest convergence largely a subconscious phenomenon?

This ambiguity is apparent in Lee's use of interest convergence to explain variation in the cultural defense cases. For example, she writes that the "Black Rage defense" (another cultural success story by her account) depicts Blacks as out of control criminals and thereby serves the interests of the dominant culture in keeping Blacks oppressed. "[The Black Rage defense] reinforces the belief that Black men in prison are there because they committed a crime. It reinforces the belief that an officer who shoots a Black man *reasonably* believes the Black man poses an imminent threat of death or serious bodily injury."[33]

While this claim is bold and certainly provocative, it offers us no insight into which population experiences this phenomenon or how it comes to be experienced in this way. Among whom are these beliefs reinforced? Among the defense bar, the group responsible for articulating the Black Rage defense in court? Among prosecutors who might offer sweet deals in response to such a claim? Among judges and jurors who hear these facts during a contested criminal trial and might respond with lenient verdicts or sentences? Or just among members of the general population, who have no control over the outcome of the criminal case?[34]

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criticism in the press for their inadequate response. Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in the Criminal Courts?*, 70 N.Y.U. L. REV. 36, 94-96 nn.221-26 (1995). Similarly, there is much evidence in the social psychological literature about jury behavior to suggest that juries frequently misunderstand jury instructions; the juries in cultural defense cases are not likely to be any different in this regard. *See, e.g.*, REID HASTIE ET AL., INSIDE THE JURY (1983); Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788 (2000); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224 (1996).

33. LEE, *supra* note 1, at 121.

34. If the reinforcement of this stereotype occurs among members of the general population, we might have good reason to question the overall wisdom of the Black Rage defense, as it likely produces more harm than good to society. Even if this argument is true, it does nothing to help us

Without identifying the institutional actor or the mechanism responsible for this convergence of interests, the theory itself loses explanatory power. It is appealing to those who are inclined to critique the criminal law and justice system as imperial, racist, or sexist, as it offers a convenient way to understand what otherwise appear to be unprincipled or inconsistent outcomes.[35] Nonetheless, the theory does little to explain, as a descriptive matter, what actually accounts for the success of certain "cultural" defendants or claims. Sociologists of culture or anthropologists would classify this theory as a soft description — a convenient, after the fact schema imposed from above — rather than a hard explanation that controls from the ground up how things got to be the way they are and how future events will likely turn out.[36]

My sense is that theories derived from case analysis commonly suffer from this malady. Because they are generated after the fact to fit a small series of cases and rely only on outsider observations of what those cases mean, case analysis theories leave us with little reason for optimism about their predictive abilities for future cases. While they have the capacity to be thought-provoking, they ultimately prove unsatisfying to scholars seeking a more robust explanation of how the law works.

IV. CONCLUSION

Professor Lee's work on culture and crime has inspired me to evaluate case analysis as a means to explain the contours and texture of a particular area of law. In so doing, I have argued several points about the relationship between theory and data in assessments of legal patterns and practices.

First, the case analysis method has limited application for the legal scholar interested in probing the depths of the law. While it provides appropriate answers to guide courtroom or classroom inquiries and is useful for generating theories, case analysis is too superficial to allow scholars to prove claims about what the law *is* in a broader context. Close

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sort out how the defense works in court or is invoked by criminal justice decision-makers, who are the sole determinants of legal culpability.

35. Derrick Bell first articulated interest convergence theory to challenge Professor Herbert Wechsler's assertion that the U.S. Supreme Court's decision in *Brown v. Board of Education* had no principled foundation; interest convergence, according to Bell, was the principle on which the *Brown* decision rested. Bell, *supra* note 29, at 522-25.

36. *See, e.g.*, Levine, *supra* note 31, at 42-46 (discussing Sherry Ortner, *Theory in Anthropology Since the Sixties*, 26 COMP. STUD. SOC'Y & HIST. 126-66 (1984) and *Patterns of History: Cultural Schemas in the Founding of Sherpa Religious Institutions*, *in* CULTURE THROUGH TIME: ANTHROPOLOGICAL APPROACHES (Emiko Ohnuki-Tierney ed., 1990)).

scrutiny of a selected group of cases is, however, an important first step in empirical research design, as it allows the scholar to formulate hypotheses that can later be tested.[37] Second, legal scholars can and should draw on tools commonly used by scientists to investigate the law from other perspectives. These tools, both qualitative and quantitative, offer us insights into how the law is understood, used, challenged, and reproduced by legal actors who invoke its tenets regularly, and therefore enable us to make more nuanced claims about what we have experienced in the past and the directions we ought to be heading. Such methods also inspire us to theorize more carefully about how the law works and who is responsible for maintaining or changing these operations. Finally, once we acknowledge that many kinds of data might potentially illuminate our research questions, we should find ourselves making more modest arguments about what our actual data show. We should be hesitant to make sweeping claims about the implications of our work, as untapped sources of information might later prove our contentions incomplete or inadequate.

The walls between the law and the social sciences are slowly eroding; conventional modes of legal analysis pose important questions but rarely offer powerful explanations of legal patterns on which present or future policymakers can rely without further proof. This is not to say that case analysis and conventional legal reasoning are unwise or obsolete, only that they should serve more limited functions than they have in the past. A diversity of research approaches should yield better and more robust understanding of the questions that challenge us to become scholars in the first place.

37. In other words, legal scholars can and should use case analysis to generate theories; they just should not use it to prove that these theories are true.