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FOREWORD

NEW EXPLORATIONS IN CULTURE AND CRIME: DEFINITIONS, THEORY, METHOD

*Kenneth B. Nunn**

I. INTRODUCTION

Culture, in all its myriad of definitions, is critically important to the events that take place within our criminal courts. Certainly, culture is present in ways that are obvious, like the use of the so-called “cultural defense” in its many variations. Culture is also present in ways that are not obvious. Culture influences who will be arrested, charged, convicted, and what sentence they will receive. Indeed, the invisible hand of culture drives the process of criminalization and helps to determine which acts we will sanction through criminal statutes.

It was a distinct pleasure when Professor Cynthia Lee approached me with the idea of putting together a symposium to explore the importance of culture in the criminal law. Lee is chair of the ABA Multicultural Woman Attorneys Network. I chair the Criminal Justice Section’s Committee on Race and Racism in the Criminal Justice System. As its name implies, the Race and Racism Committee understands that racism in the criminal justice system is an established reality, just as racism in the broader society is an established reality.¹ Rather than bemoan this reality, the Race and Racism Committee seeks to educate judges, defense attorneys, prosecutors, and other participants in the criminal justice process on how to reduce racial impacts and help ensure a functioning

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1. See Coramae Richey Mann, *The Contribution of Institutionalized Racism to Minority Crime*, in *ETHNICITY, RACE AND CRIME: PERSPECTIVES ACROSS TIME* 259 (Darnell F. Hawkins ed., 1995) (arguing racism is pervasive across “every level of contemporary human existence”). Racism in the broader society may in fact be the source of racism in the criminal justice system. See Michael J. Lynch & E. Britt Patterson, *Thinking About Race and Criminal Justice: Racism Stereotypes, Politics, Academia, and the Need for Context*, in *JUSTICE WITH PREJUDICE* 1, 17 (Michael J. Lynch & E. Britt Patterson eds., 1996) (“The criminal justice system is not an isolated institution that influences the remainder of society by the way it behaves. It is a reflection (as well as a coproducer) of broader social institutions”), cited in James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A “Not Exactly,” Equal Protection Analysis*, 37 *HARV. J. ON LEGIS.* 105, 136 n.219 (2000).

criminal justice system that is fair to all. Lee's proposed symposium fit into this agenda nicely.

I would like to offer my thanks to the many people whose assistance was essential in making this symposium a reality.² Dean Bob Jerry at the University of Florida Levin College of Law was enthusiastic about hosting the symposium when I first approached him with the idea. Jerry was quick to offer financial, administrative, and in-kind support, for which we are very grateful. Most of the administrative work for the conference fell within the efficient hands of Sandra Yamate of the ABA Commission on Racial and Ethnic Diversity in the Profession. Regina Smith and Sharon Tindall, also of the Commission, provided key assistance. I am grateful for the assistance of Patrice McFarlane of the ABA Criminal Justice Section staff. A special thanks goes to Barbara DeVoe at the Levin College of Law for on site assistance and for making all of the travel arrangements.

I would be remiss if I did not thank the officers and staff of the *University of Florida Journal of Law and Public Policy* for their hard work on this symposium issue. I would especially like to thank current Editor-in-Chief Jessica DeBianchi, outgoing Editor-in-Chief Kevin McCoy, and David Applegate, immediate past Editor-in-Chief of the *Journal*, for guiding this issue to completion. I also wish to thank former Editor-in-Chief Daniel Smith, who graciously agreed to publish the proceedings of this symposium. Finally, I would like to thank the participants in this symposium, who brought their intellectual talents to bear on several important questions posed at the intersection of culture and crime. I summarize their contributions below.

Professor Elaine Chiu³ contests the widely held belief that culture does not operate within the criminal law.⁴ She points out that several accepted doctrines within the criminal law have a cultural base, including the concept of motive, and most justification defenses. Chiu convincingly shows how the dominant Anglo-American culture influences the rule of retreat, the defense of habitation, and the rule permitting deadly force as a defense to rape.

Professor Janet Hoeffel⁵ identifies three types of problems that can arise in cases involving cultural evidence. According to Hoeffel, such cases can contribute to the stereotyping of a defendant's culture, endorse

2. The symposium was sponsored by the ABA Multicultural Woman Attorneys Network, the ABA Commission on Racial and Ethnic Diversity in the Profession, the ABA Commission on Women in the Profession, the ABA Criminal Justice Section, the ABA Section on Individual Rights and Responsibilities, and the University of Florida Levin College of Law.

3. Chiu, *infra* note 55.

4. *See id.*

5. *See* Janet C. Hoeffel, *Deconstructing the Cultural Evidence Debate*, 17 U. FLA. J.L. & PUB. POL'Y 303 (2006).

sexist practices that benefit male defendants accused of crimes against women and children, and allow inconsistent and subjective uses of cultural defenses resulting in arbitrary case outcomes. In Hoeffel's view, these problems are not caused by cultural insensitivities, as many commentators assume, but by poor advocacy by lawyers and the inherent limits of the substantive criminal law. To the extent that problems in cultural evidence cases reflect broader societal difficulties in appreciating and respecting difference, Hoeffel questions whether the criminal justice system is the appropriate venue in which to address these concerns.

Professor Nancy Kim⁶ argues that defendants from cultural minority groups are treated unfairly because the criminal law fails to account for cultural differences when defining the mental elements of crimes. Kim argues that this bias could be corrected if mens rea was interpreted to account for "blameworthiness" in addition to "intentionality." Kim proposes a three-step approach to reforming mens rea. The first step would look at the defendant's intent. The second step would analyze the defendant's purpose, or what Kim calls "purposive intent." The third step would analyze the defendant's motive, or what Kim refers to as the defendant's "contextualized purposive intent."

In her presentation,⁷ Lee employs Derrick Bell's interest convergence theory to explain why some uses of the cultural defense are successful when most are not. Bell's interest convergence theory holds that advances in civil rights are more likely to take place when the advance promotes independent white interests as well. Likewise, Lee argues that cultural defense claims are more likely to succeed in court when they mesh with dominant cultural norms already ensconced within the criminal law. According to Lee, these claims succeed because they use cultural evidence to assert recognized defenses that reinforce patterns of dominance found in the majority culture, or alternatively, because they reinforce perceptions of the minority culture as inferior in some way.

Professor Kay Levine⁸ makes several points concerning the appropriate methodology for the study of law and culture. She cautions that case analysis has limited value in determining the degree of influence that culture has on the law. Levine demonstrates how legal scholarship could benefit from greater use of social sciences' qualitative and quantitative methods of analysis. Levine advocates evaluation of cultural claims in law

6. See Kim, *infra* note 57.

7. Lee presented a paper at the symposium, but due to circumstances beyond the *Journal's* control, withdrew it prior to publication. She makes similar arguments in CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (2003), ch.4.

8. See Kay Levine, *The Law is Not the Case: Incorporating Empirical Methods into the Culture of Case Analysis*, 17 U. FLA. J.L. & PUB. POL'Y 283 (2006).

through use of the technique of “triangulation,” which compares and contrasts quantitative and qualitative data in the interpretation of results.

Professor Camille Nelson⁹ offers a multicultural feminist critique of the cultural defense. Nelson recognizes the tension between advocates of the cultural defense, who value inclusiveness and respect for non-Western cultural traditions, and feminists who often see these cultural traditions as oppressive of women and children. Nelson seeks to balance this tension by using multicultural feminism to query “whether the use of culture can be advantageous to marginalized women and their families.”

In the remaining parts of this Foreword, I want to offer some general thoughts about crime and culture to compliment the particular concerns raised by the contributors to this symposium. In Part II, I offer a definition of culture somewhat broader than that employed by the scholars collected here. I next consider the relevance of culture, as I have defined it, to law generally and to criminal law in particular. Finally, I examine how my definition of culture might contribute to the scholarly project of each the authors we present here. In Part III, I follow Levine’s lead and offer my own comments about methodology and research possibilities in this important area of interdisciplinary legal scholarship.

II.

“Culture” can be defined in a myriad of ways.¹⁰ Culture can be defined as the structure of social organization found in a distant society or unfamiliar ethnic group.¹¹ Culture can also be defined as familiarity with a system of social etiquette.¹² Culture may mean the state of artistic production in a given place or time.¹³ There is high culture and low culture, popular culture, and metaculture.¹⁴ For my purposes, I shall use the term culture in its broad anthropological sense.¹⁵ More specifically, I

9. See Nelson, *infra* note 56.

10. Some of the differing conceptions of culture are examined in Cary Nelson et al., *Cultural Studies: An Introduction*, in CULTURAL STUDIES 1, 4 (Lawrence Grossberg et al. eds., 1992).

11. See Patricia Marshall & Barbara Koenig, *Accounting for Culture in a Globalized Bioethics*, 32 J.L. MED. & ETHICS 252, 260 (2004).

12. See Ilhyung Lee, *In Re Culture: The Cross-Cultural Negotiations Course in the Law School Curriculum*, 20 OHIO ST. J. ON DISP. RESOL. 375, 387 n.52 (2005).

13. See Naomi Mezey, *Approaches to the Cultural Study of Law: Law as Culture*, 13 YALE J.L. & HUMAN. 35, 41 (2001).

14. See generally HERBERT C. GANS, POPULAR CULTURE AND HIGH CULTURE (1999).

15. See SARAH JOSEPH, INTERROGATING CULTURE 9 (1998) (describing the broad anthropological view of culture as “representing the whole way of life of a people”).

adopt the view of culture used within the field¹⁶ of cultural studies.¹⁷ For adherents to cultural studies, culture is a site for contestation over the meaning of the events and objects that constitute our lives.¹⁸ According to Stuart Hall, one of cultural studies' leading figures, culture is "the production and exchange of meanings . . . between members of a society or group."¹⁹ Likewise, Naomi Mezey defines culture as "any set of shared signifying practices — practices by which meaning is produced, performed, contested, or transformed."²⁰ Mezey goes on to assert:

[C]ulture is both a semiotic system with its own logic and coherence and the practices that reproduce and contest that system — practices that are contradictory and always in flux. Bearing in mind [Raymond] William's claim that the emergence of the modern concept of culture is "a process, not a conclusion." I want to emphasize the process of cultural practice as one of making, reproducing, and contesting meaning.²¹

The struggle over meaning, then, is the essence of culture. Culture is the medium of exchange for the human condition. Culture allows us to contest the significance of the ideas, objects, identities, and practices we find in our world. The struggle over its meaning actually produces culture. As Joan Howarth insightfully opines:

We understand ourselves and our world through the images and concepts available to us through our culture. As cultural studies and television scholar John Fiske puts it, "[c]ulture is a struggle for meaning as society is a struggle for power." Culture is a site where unequal social divisions along race, gender, class, and age lines, for example are established and contested.²²

16. I intentionally use the term "field" here, since cultural studies advocates would deny cultural studies the status of a "discipline." See Nelson et al., *supra* note 10, at 1-2 ("cultural studies is not merely inter-disciplinary; it is actively and aggressively anti-disciplinary").

17. For a concise history and overview of cultural studies see Kenneth B. Nunn, *Illegal Aliens: Extraterrestrials and White Fear*, 48 FLA. L. REV. 397, 398-402 (1996).

18. See GRAEME TURNER, BRITISH CULTURAL STUDIES: AN INTRODUCTION 15 (1990) (defining culture as "the site where meaning is generated and experienced").

19. Stuart Hall, *Introduction*, in REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 2 (Stuart Hall ed., 1997)

20. Mezey, *supra* note 13, at 42.

21. *Id.*

22. Joan W. Howarth, *Women Defenders on Television: Representing Suspects and the Racial Politics of Retribution*, 3 J. GENDER RACE & JUST. 475, 477 (2000).

Although culture is a struggle over meaning, this struggle has boundaries. No society could exist without some common understanding of values and the meanings of norms and social practices. These common understandings gain a certain inertia and resist changes that run contrary to the dominant values and meanings within a given culture. As Michael Madow puts it:

[T]here are significant constraints on . . . popular meaning-making. Individuals and groups must do this work with centrally-produced and distributed commodities. They must make their culture out of these commodities, for there is no other material or discursive resources available to them. What is more, the instability or volatility of meaning must not be overstated. The products or “texts” of the culture industries (films, television programs, music, fashion, stars, etc.) do generally come with “preferred” meanings already structured into them, meanings that often serve or reflect the interests of dominant groups. Against-the-grain readings of such texts may be difficult to mount or sustain.²³

Widely shared cultural values are associated with power and authority in the same way that democratic processes are associated with the “tyranny of the majority.” The very fact of majority status suppresses the emergence of minority or alternative positions. Moreover, the political power of culture is well known to the dominant and powerful groups in society.²⁴ These groups consciously seek, with varying levels of success, to employ culture to accomplish their political ends.²⁵

I have adopted Hall’s concept of the consensus to refer to the values and meanings that have gained a dominant, taken-for-granted status

23. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 140 (1993) (citations omitted). Although Madow is speaking specifically about popular culture and certain cultural productions within that sphere (films, television programs, etc.), I think the constraints he has described are essentially the same when applied to the broader culture as I have defined it above.

24. As I have stated elsewhere:

Cultural studies holds that, through culture, the social order oppresses, extracts conformity, and requires obedience to its rules. . . . Cultural power, and indeed political power, includes the power to define, legitimize, and authorize.

Nunn, *supra* note 17, at 400.

25. “Although power seeks to impose its own definition on social practices — to declare that some conduct is valued or inappropriate — individuals and groups struggle to make and establish their own meanings.” *Id.* at 400.

through the operation of culture.²⁶ “The ‘consensus’ consists of the accepted parameters of social conduct and the established view of the purposes and functions of the institutions of society.”²⁷ The concept of the consensus captures the hegemonic (but not instrumental) power of the state. The consensus, then, cannot be equated with popular opinion or mass culture. Instead, as I have stated:

The consensus describes a relationship of power. That is to say, the prevailing ideology only *prevails* because it is compatible with the preexisting institutions of power and authority that exist in any given society. But the relationship is not one-sided. Consensus can only emerge through authority and power, *and* power can only operate through the consensus.²⁸

A final point of introduction is the process of “articulation.”²⁹ Articulation simply refers to the process of making meaning.³⁰ Making meaning requires that ideas be articulated through the use of concepts and ideas that already exist.³¹ “In order to be understood, even to be conceived of in the first instance, all new ideas must be built upon the ideas of the past.”³²

With this understanding of culture in mind, we can see that culture affects criminal law in at least two key ways. First, culture and crime symbiotically define each other. Second, culture helps explain which courtroom narratives will be successful, and which will not. I will address each of these intersections between culture and crime in turn.

Crime, in its popular understanding, and as it is expressed in the criminal law, helps to shape culture. This is true because crime has tremendous mobilizing force.³³ A community can become quickly galvanized to support an issue or politician as a result of a specific

26. See Kenneth B. Nunn, *The Trial As Text: Allegory, Myth and Symbol in the Adversarial Criminal Process — A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 761-64 (1995) (discussing the consensus).

27. *Id.* at 761.

28. Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks,”* 6 J. GENDER RACE & JUST. 381, 428-29 (2002) (emphasis added).

29. See generally Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 858-61 (2002) (discussing the concept of articulation).

30. Nunn, *supra* note 17, at 401.

31. *Id.*

32. *Id.*

33. Nunn, *supra* note 26, at 763.

criminal act or a generalized fear of crime.³⁴ This mobilization “makes it desirable for the state to seek out its services.”³⁵ The state, of course, can seek to define crime through the passage of legislation and through the use of its privileged access to the mass media.³⁶ Nonetheless, other individuals and groups can also influence the definition of crime, and may well seek to establish definitions of crime that contradict the official definitions promulgated by the state.³⁷ Thus, groups seeking to change the definition of crime compete to control the state apparatus that sets the official definition of crime.³⁸ It is not unusual to observe political challengers or activist groups riding to political power on the claim that the incumbents are “soft on crime.”³⁹

Once an act is defined as criminal, changes in behavior and attitudes are wrought in the overall society. At least superficially, these changes are a result of the desire to avoid punitive aspects of the new law.⁴⁰ The more lasting and pervasive effect, however, comes from the influence of the law on popular notions of morality and justice.⁴¹ The criminalization of a given form of conduct, for example, the dumping of toxic wastes in the environment, is both a signal of how accepted the prohibition has become within the culture, and a catalyst to further cultural change.⁴² The moral wrongness of environmental dumping is *signified* and communicated by the fact of its criminalization.⁴³

I have already alluded to the influence of culture on crime. Since the success of any criminal law is constrained by the degree to which the law reflects preexisting social norms and moral attitudes,⁴⁴ the influence of culture on crime can be seen. Culture influences crime as differing social groups compete over the definition of crime.⁴⁵ This competition reflects the contestation of different cultural forces. The competition over the definition of crime thus provides a “feedback mechanism,” so as crime influences culture, culture in turn influences crime.

One of the more well-known examples of the interaction of culture and crime involves the transformations that have occurred in the area of rape

34. Nunn, *supra* note 28, at 429-30.

35. *Id.* at 430.

36. *See* Nunn, *supra* note 26, at 765-66.

37. *Id.* at 766.

38. *Id.* at 765.

39. Nunn, *supra* note 28, at 390.

40. *See* Nunn, *supra* note 26, at 761-62.

41. *See id.* at 760, 762.

42. *See id.* at 760.

43. *See id.* at 760 n.84.

44. *See* Nunn, *supra* note 28, at 432.

45. *See* Nunn, *supra* note 26, at 765.

law since the advent of the feminist movement.⁴⁶ Traditionally, rape was defined in a way that privileged the rights of male suspects over the rights of female victims.⁴⁷ Rape laws required female victims to resist their attackers and marital rapes were exempted from prosecution.⁴⁸ The feminist movement intervened and succeeded to change cultural perceptions of rape.⁴⁹ The new cultural norms, combined with advocacy from feminist groups, forced lawmakers to redefine the crime of rape, reducing the force and resistance requirements, and eliminating the marital exemption.⁵⁰

The second way that culture affects crime is that culture helps determine which courtroom narratives will succeed, and which will not.⁵¹ Culture can accomplish this because culture defines the boundaries of our understanding of the world around us. If we wish to tell a story in a courtroom setting, or explain the behavior of a party in a case, we have to rely on the conventions for storytelling previously established within our culture.⁵² Otherwise, our stories and explanations are unintelligible.

A trial can be described as a “text,” subject to the same conventions of coding and decoding,⁵³ that would apply to the interpretation of any other text. As a text, a trial is socially constructed and a product of the consensus. Consequently:

The consensus on crime reaches its ultimate expression in the device of the trial. The trial is where society both assesses and responds to behavior it marks as deviant. The cultural mythologies that work to produce the verdict are forged in an environment that can best be described as a “metaphorical morality play.” As a morality play, the trial has its own stage or setting, players, and conventions as to how the script is to unfold.⁵⁴

46. See generally Patricia Wencelblat, *Boys Will Be Boys? An Analysis of Male-On-Male Heterosexual Sexual Violence*, COLUM. J.L. & SOC. PROBS. 37, 40-44 (2004) (reviewing development of rape laws). See also Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 394-95 (discussing relationship of patriarchy to definition of rape).

47. Wencelblat, *supra* note 46, at 40-42.

48. *Id.*

49. *Id.* at 43.

50. *Id.* at 43-44.

51. See Nunn, *supra* note 26, at 799.

52. *Id.* at 795-96 (describing how culture inscribes prosecution and defense narratives with unequal persuasive power); see also Taslitz, *supra* note 46, at 435, 439 (explaining how differences in narrative power in courtrooms affects outcome in rape cases).

53. See *infra* notes 96-100 and accompanying text (discussing “coding” and “decoding”).

54. Nunn, *supra* note 26, at 781-82.

The understanding of culture that I have set forth here can meaningfully contribute to the scholarship featured in this symposium. Chiu's claim that the rule of retreat, the defense of habitation, and the permissible use of deadly force to prevent rape are cultural constructs could be strengthened by using the definition of culture I have described to show how culture produced these particular outcomes through the working of the consensus. Chiu recognizes that the culture of the United States is not monolithic, yet she asserts that the doctrines she addresses are simplistically copied (or mirrored) from the culture of one dominant ethnic group.⁵⁵ An understanding of how the defenses she discusses are produced through the interplay of many ethnic and cultural groups in the consensus would provide a richer explanation of Chiu's thesis.

In her piece on multicultural feminism, Nelson takes issue with the way culture is essentialized and "legally pathologized" within the cultural defense.⁵⁶ My definition of culture allows for the recognition of culture's influence on the criminal law without leading to a reductionist view of a specific culture, or culture generally.

In her contribution to this symposium, Hoeffel makes a clear distinction between problems in cultural evidence cases that result from the law and legal procedures and those that result from cultural insensitivity. However, given the definition of culture I employ here, this distinction is not so cut and dried. I argue law is a product of the culture in which it operates. Consequently, cultural distinctions may be built into the law and not show up just as instances of cultural insensitivity.

In her essay on blameworthiness and intent, Kim criticizes the failure of mainstream legal theory to account for cultural differences in the definition of crimes. She argues that "[c]riminal law assumes that the judge and jury share the same cultural and experiential framework as the defendant; accordingly, crimes are defined with this assumption as an underlying premise."⁵⁷ Using the definition of culture that I have supplied would help Kim make her point that, absent the cultural defense, law is not culturally neutral.

Lee's argument that interest convergence theory accounts for the differential success of some uses of the cultural defense over others⁵⁸ could

55. See Elaine M. Chiu, *Culture in Our Midst*, 17 U. FLA. J.L. & PUB. POL'Y 231 (2006).

56. See Camille A. Nelson, *Multicultural Feminism: Assessing Systemic Fault in a Provocative Context*, 17 U. FLA. J.L. & PUB. POL'Y 263 (2006).

57. See Nancy S. Kim, *Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants*, 17 U. FLA. J.L. & PUB. POL'Y 199 (2006).

58. See LEE, *supra* note 7.

benefit from the view of culture I present here. As Levine points out, Lee's treatment of interest convergence theory does not explain how the theory works.⁵⁹ Consequently, her claim that interest convergence determines which cultural defenses succeed appears ambiguous and vague. A sophisticated understanding of culture could enhance her description of interest convergence's effects. The explanation of culture I have provided above teaches that culture's influence derives from the fact that it works through the consensus. That is, our understanding of what is or what ought to be, proper or improper, depends upon ideas that have come before. Consequently, in a courtroom, some narratives ring true and others fall flat. For example, the consensus gives certain advantages to the prosecution in a criminal trial:

The prosecution starts with much more legitimacy and credibility than does the defense. To the jury, every word the prosecution utters is suspended in a web of meaning that has been spun and re-spun every day of their lives. Every teacher's mention of "Officer Friendly," every parent's caution not to trust strangers, every book, every television show, every newspaper report of crime, collectively work to suggest a guilty defendant and an earnest prosecutor committed to justice.⁶⁰

Lee's claim that interest convergence determines the success of cultural defenses can be taken as a shorthand way of describing the working of the consensus. When a claim of the cultural defense rings true, it is because that use of the defense resonates with ideas about truth and justice that have been articulated and rearticulated by primary definers in the culture.⁶¹ When immigrants or people of color raise a cultural defense, they must do so "in terms pre-established by the primary definers and the privileged definitions, and have a better chance of securing a hearing and influencing the process precisely if they cast their case within the limits of that consensus."⁶² As Lee insists, cultural defenses are more likely to succeed when "they comport with the dominant social norms prevalent in American society."⁶³

59. Levine, *supra* note 8.

60. Nunn, *supra* note 26, at 790.

61. *See id.* at 764-68.

62. STUART HALLET AL., *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* 64 (1978).

63. LEE, *supra* note 7.

I have defined culture and discussed the relevance of this definition to the criminal law and the scholarly project of several of our symposium authors. In the next section, I will discuss some of the methodological questions that Levine raises in her essay.

III.

Levine provides a legitimate critique of Lee's interest convergence thesis on the grounds that the thesis lacks sufficient rigor to provide insight into what causes variation in cultural defense cases.⁶⁴ I have addressed this critique above and suggested that Lee's thesis could be strengthened by adopting a definition of culture which recognized the importance of the process of articulation.⁶⁵ Levine, however, also raises several points about the methodology that should be used to test claims regarding the impact of the cultural defense in the criminal justice system that are worthy of further examination.

In her discussion of the proper methodology to apply to the study of culture and crime, Levine begins with a critique of the case method. She argues that, standing alone, case analysis is of limited benefit, since appellate case decisions represent a small, anecdotal sample of reality.⁶⁶ Instead of the case method, Levine advocates engaging legal research through the "triangulation" technique. Using triangulation, allows one to "approach the question from multiple perspectives, using a variety of research methods and data sets, in order to create the fullest, most textured portrait of the relationship between culture and culpability."⁶⁷ Specifically, Levine suggests that the triangulation technique should include the following steps: (1) case analysis,⁶⁸ (2) coding and statistical analysis,⁶⁹ (3)

64. Levine, *supra* note 8.

65. LEE, *supra* note 12 and accompanying text.

66. Levine, *supra* note 8.

67. *Id.*

68. *Id.*

69. *Id.* Levine suggests that to test a cultural defense claim, at this stage:

[W]e could code . . . demographic data on defendants and victims . . . the timing and method of raising culture as a defense, the crime at issue, and the outcome of the claim. 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).

grass roots research in randomly selected areas,⁷⁰ and (4) qualitative methods.⁷¹

There are two problems with the research agenda that Levine sketches out. First, it imposes a rather severe burden of proof on proponents of the cultural defense. Is there anything about the claim that culture impacts the criminal justice system that requires such a rigorous examination? Carl Sagan once said, “[e]xtraordinary claims require extraordinary proof.”⁷² This, of course, means distinguishing between claims that are in fact *extraordinary* and those that are not, a decision that requires one to refer to a system of values. Levine’s proposed methodology would require Lee’s interest convergence claim to be subjected to extensive testing. Compare this to the degree of proof required for the Bush administration’s rather transparent claim that Saddam Hussein possessed weapons of mass destruction.⁷³ Although, hundreds of thousands of lives were at stake in the case of the Iraq war, the requisite burden of proof was quite low.

In other words, burdens of proof are fundamentally political in nature. They tend to be high when we are suspicious of the proposed theory or outcome, and low when we are not.⁷⁴ On closer examination, we can see the political character of Levine’s critique of Lee’s theory. Levine condemns Lee’s thesis as merely a convenient and soft description that 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.”⁷⁵

70. *Id.* At this stage Levine suggests the following: “we could 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 defense.” *Id.*

71. Levine, *supra* note 8, at (10).

72. Cited in Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 OHIO ST. J. ON DISP. RESOL. 683, 767 n.330 (2005).

73. See JOSEPH CIRINCIONE ET AL., WMD IN IRAQ: EVIDENCE AND IMPLICATIONS 52 (Carnegie Endowment for Int’l Peace 2004) (stating Bush administration officials “systematically misrepresented” the threat of Iraqi weapons in the absence of any hard evidence Iraq possessed WMD; see John Conyers, *Did Bush Deliberately Deceive America About Iraq?*, COUNTERPUNCH, June 6, 2005, available at <http://www.counterpunch.org/conyers06062005.html> (last visited Feb. 6, 2006).

74. See Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1537 (2000) (describing burdens of proof as “obstacles to changing the status quo where doing so would have significant costs”).

75. Levine, *supra* note 8.

Through this critique, Levine adopts what is known as the “perpetrator’s perspective.”⁷⁶ Clothing herself with a false neutrality, she uses it to accuse Lee of bias. In the context of the dominant culture in which we live, her claim that interest convergence may be attractive to outsider critics of the status quo is really two claims. On its face, it is a claim about who may gravitate to the theory. Levine also raises a *hidden* claim that Lee’s use of interest convergence is *irrational*, and that is attractive to outsider critics *and no one else*. I describe this as a position of false neutrality because Levine actively endorses one of two otherwise equally credible claims. It would be just as accurate for her to say that interest convergence is a theory that *supporters* of the criminal justice system, notwithstanding its imperialism, sexism, and racism, may find repulsive. Levine gives support of the criminal justice system by offering the position of normality, and pushes critics of the criminal justice system to an abnormal position where their claims must be subjected to heightened examination and proof.

The second problem with Levine’s research agenda involves her misunderstanding and consequent misuse of the qualitative method. Levine describes her proposed methodology as a multiple-approach technique that includes both quantitative and qualitative methods.⁷⁷ Her research agenda, however, is predominantly quantitative. After the data set is gathered from multiple sources and coded, a small subset of that data is subjected to a rather limited qualitative review to determine what factors influenced prosecutorial decision-making. Levine suggests reviewing police reports, prosecutor’s notes, and training materials to glean insight into prosecutorial responses to cultural defenses.⁷⁸ Most importantly, Levine would have researchers interview prosecutors “to learn their professional and personal interpretations of the relevance of culture.”⁷⁹

I would not describe these techniques as *qualitative* in nature. They are quantitative because they are primarily concerned with data collection and

76. See Leland Ware, *Race and Urban Space: Hypersegregated Housing Patterns and the Failure of School Desegregation*, 9 WIDENER L. SYMP. J. 55, 66 (2002) (defining perpetrator’s perspective as “viewing discriminatory conduct through the eyes of the dominant majority and failing to consider the injuries inflicted on victims”). The term was first used by Alan Freeman in a civil rights law context. See Alan D. Freeman, *Antidiscrimination Law: The View From 1989*, 64 TUL. L. REV. 1407, 1412 (1990).

77. Levine, *supra* note 8.

78. *Id.*

79. *Id.*

assuring the quality of the data collection process.⁸⁰ Qualitative methods are not concerned with the collection of data, but with its interpretation.⁸¹ In her discussion of research techniques, Levine fails to mention any form of content analysis, which is the hallmark of qualitative research. Properly conceptualized, qualitative methods can assist researchers who are interested in investigating the relevance of culture to crime. In the remaining part of this section, I will describe the quantitative method and give my own thoughts on a proper methodology for examining the impact of culture on criminal law and procedure.

Qualitative methods seek to interpret reality and expose underlying social relationships.⁸² Philosophically, they differ from quantitative methods in that qualitative methods reject the empiricism and positivism inherent in the quantitative approach.⁸³ To qualitative theorists, quantitative methods are based on an unquestioning view of objectivity that, while helpful for some purposes, is ineffective for interpretation and unable to access and describe the social construction of reality.⁸⁴ By contrast, qualitative methods seek a rich and textured description of individual or group action.⁸⁵ Employers of the qualitative approach are interested in *social* relationships, not merely mathematical relationships between differing variables.⁸⁶ This focus on context and interpretation aids in understanding the social construction of reality.⁸⁷

On the other hand, quantitative methods focus on numerical analysis and attempt to equate social science disciplines like sociology and law with the hard sciences.⁸⁸ Consequently, qualitative methods focus less on individuals and more on aggregates of individuals so that relationships between variables (not social relationships) can be discovered. The fact that these aggregates do not necessarily represent social groups must be emphasized. As one scholar explains:

[Quantitative] analysis deals in the notion . . . of populations to be described, for example, the population of those with a criminal

80. See RAYMOND A. MORROW WITH DAVID D. BROWN, CRITICAL THEORY AND METHODOLOGY 204-05 (1994) [hereinafter CRITICAL THEORY] (describing quantitative method).

81. See *id.* at 206.

82. See *id.* at 199.

83. See *id.* at 202.

84. *Id.*

85. CRITICAL THEORY, *supra* note 80, at 206.

86. *Id.* at 209.

87. *Id.* at 206.

88. See *id.* at 203, 204.

record in Canada. The members of such a population to a large extent do not interact with one another. In other words, such a set of individuals would constitute a legitimate aggregate for the purposes of most quantitative analysis in sociology, but it clearly would not constitute any level of social organization from a theoretical perspective.⁸⁹

As I have already stated, the methodology Levine describes is almost entirely quantitative. As a result of this orientation, Levine fails to see the contribution that interest convergence theory could make toward understanding the way culture influences crime. The problem is not that Levine's proposed methodology is ill conceived, but that Levine asks the wrong research question. The impact of culture on the criminal law is not simply a matter of the correlation of blatant and obvious behaviors with known and recognized rationales. Instead, culture's influence on the criminal law involves the transmission of *ideas*, and it is this kind of social reality that qualitative methods address best.

Cultural studies encompass a wide variety of methodological choices.⁹⁰ There is one core methodological approach that I believe is useful for the task at hand. This methodology was originally developed by Stuart Hall and his colleagues at the Centre for Contemporary Cultural Studies. The method, which they describe as a *culturist* one, requires the scholar to understand that culture is the culmination of a semiotic process of articulation, as I have described above. With this understanding in hand, the scholar's task is to trace the ideological history of a given social practice to uncover its relationship to other ideas and practices through the consensus, and to show how it is interpreted or read by different social groups.

Using Foucault's concept of "discourse," Professor Frank Rudy Cooper provides a clear and understandable explanation of this cultural studies methodology. According to Cooper, "[d]iscourses are the clusters of 'ideas, images and practices' that provide . . . 'ways of speaking about the world of social experience.'"⁹¹ In addition to providing a medium for

89. *Id.* at 205.

90. See Pedro Malavet, *Outsider Citizenship and Multidimensional Borders: The Power and Danger of Not Belonging*, 52 CLEV. ST. L. REV. 321, 326 n.28 (citing Carla Freccero for the proposition that cultural studies uses "a variety of methodologies, drawing on ethnography, anthropology, sociology, literature, feminism, Marxism, history, film criticism, psychoanalysis, and semiotics").

91. See Frank Cooper, *Understanding "Depolicing": Symbiosis Theory and Critical Cultural Theory*, 71 UMKC L. REV. 355, 371 (2002).

communication, discourses also limit the terms of communication. Because discourse “rules in” certain viewpoints and “rules out” others, a discourse, when adhered to, is also a way of doing. To understand practices like the cultural defense, one must understand the discourse, or argument, that gave rise to it and supports it.

A cultural studies methodology must do three things. First, it must understand how a particular discourse is constructed.⁹² Second, it must illuminate how discourses respond to and are influenced by each other.⁹³ Third, since “a discourse is a social group’s attempt to win a position in the struggle over cultural meaning,”⁹⁴ a cultural studies methodology must explain how the discourse is related to cultural power.⁹⁵ Each of these goals can be accomplished through the use of the “encoding” and “decoding” techniques familiar to students of mass communication studies.⁹⁶

The encoding of text is simply the construction of an argument, or the telling of a story.⁹⁷ Since stories may be told in a myriad of ways, a scholar must first “critique the text to see why it was constructed in a particular manner.”⁹⁸ “Decoding is essentially a process of ‘reading’ the proffered discourse.”⁹⁹ To decode, a scholar must “ask why the audience accepted, rejected, or modified the encoded meaning.”¹⁰⁰ Encoding and decoding helps us disclose the ideological genealogy of a given social practice, and situates it in that universe of social practices we call the consensus.

What, then, is the research agenda that cultural studies would recommend for examining and explaining the impact of crime on culture and culture on crime? Cooper profitably suggests a series of five questions that I think provide a road map for the cultural study of any social practice. These are:

1. What social practices does a specific doctrine encourage or discourage?

92. *Id.*

93. *See id.*

94. Cooper, *supra* note 29, at 860.

95. *See* Cooper, *supra* note 92, at 372.

96. This technique was first set out in Hall’s influential article “Encoding and Decoding in the TV Discourse.” *See* Stuart Hall, *Encoding and Decoding in the TV Discourse*, in *CULTURE, MEDIA, LANGUAGE* (Stuart Hall et al. eds., 1981).

97. *See* Cooper, *supra* note 29, at 858.

98. *Id.*

99. *Id.* at 862.

100. *Id.*

2. How has the doctrine been translated in practices in specific contexts?
3. Whom does the doctrine affect as practiced in specific cultural contexts?
4. What counter-discourses emerged from the practices?
5. How did the discourses about a doctrine and its effects relate to struggles for cultural power?¹⁰¹

These questions should be approached with an understanding of how all ideas interact in the consensus through a process of articulation and with the techniques of coding and encoding firmly in hand. All in all, this approach should contribute to a fuller understanding of the workings of culture and how culture, crime and the criminal law are intertwined.

CONCLUSION

I am very grateful for the contributions that each of the authors has made to this symposium. Through a multitude of approaches, this symposium has broadened our understanding of the cultural defense, and has gone a long way toward demonstrating the potential for future scholarship in this important area. There is much work that remains to be done at the intersection of culture and crime. In this brief Foreword, I have tried to provide some basic tools for future interdisciplinary legal scholarship on culture and crime. I have defined culture as a medium of exchange and a site for contestation over meaning, surveyed the theoretical groundings of this definition, and proposed a methodology for applying this definition in specific cases. It is my hope that these tools will help legal scholars as they seek to improve our system of criminal justice through their investigations of culture.

101. Cooper, *supra* note 92, at 374-75.