

CULTURAL CONVERGENCE: INTEREST CONVERGENCE THEORY MEETS THE CULTURAL DEFENSE

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Defendants who successfully introduce cultural evidence in their defense have one thing in common—the cultural norms underlying their claims are either similar to or complement American cultural norms, including retrograde racist and sexist norms. This Article argues that cultural convergence is one way to understand these results. Cultural convergence is the idea that the cultural defense claims of minority and immigrant defendants are more likely to receive accommodation when there is convergence between their cultural norms and American cultural norms.

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INTRODUCTION

Much has been written about the so-called “cultural defense”—the proffering of cultural evidence by a criminal defendant seeking to mitigate a charge or sentence.¹ Many scholars support the admission of this kind of evidence, but urge its limitation to negate the *mens rea*.² Others take the position that the

1. The term is somewhat misleading as there is no official “cultural defense” per se. The term is used to refer to a criminal defendant’s use of cultural evidence to support a traditional criminal defense, to mitigate a charge or sentence, or to support a plea bargain.

2. See, e.g., Nancy S. Kim, *Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants*, 17 U. FLA. J.L. & PUB. POL’Y 199, 201 (2006) [hereinafter Kim, *Blameworthiness, Intent, and Cultural Dissonance*]; Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for*

admission of cultural evidence violates the principle of equal protection by favoring immigrant and minority defendants over non-immigrant, non-minority defendants, and therefore should be sharply circumscribed.³ Recently, a few legal scholars have issued calls for recognition of an official cultural defense.⁴

In this Article, I neither defend nor criticize the practice of using culture in the criminal courtroom.⁵ Rather, I seek to illuminate why some uses of it seem more successful than others. Generally speaking, immigrants and minority defendants who seek to proffer cultural evidence in their defense do not succeed. Either the judge deems such evidence irrelevant and denies its admission, or the jury is unpersuaded that the defendant's cultural background should be grounds for leniency. An extensive review of the literature⁶ suggests that immigrant and

Analysis, 27 N.M. L. REV. 101, 115 (1997) [hereinafter Kim, *The Cultural Defense and the Problem of Cultural Preemption*]; Kay L. Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 LAW & SOC. INQUIRY 39, 39 (2003).

3. See, e.g., Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1097 (1996); Valerie L. Sacks, *An Indefensible Defense: On the Misuse of Culture in Criminal Law*, 13 ARIZ. J. INT'L & COMP. L. 523, 524–25 (1996); Julia P. Sams, Note, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335, 351–52 (1986). But cf. Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1612–13 (1996) (responding to Coleman).

4. See, e.g., ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* (2004) (arguing for the establishment of an official cultural defense which would act as a partial excuse); Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317 (2006) (arguing for recognition of culture as a justification, rather than an excuse).

5. I am generally in favor of giving criminal defendants wide latitude to present relevant evidence in their defense, including cultural evidence. Because the presentation of such evidence carries the risk of reinforcing negative stereotypes about a given racial or ethnic group, I suggest that prosecutors be prepared to counter negative stereotypes with expert witnesses of their own. I am thus in agreement with Holly Maguigan, who argues the following:

[T]he goal of committing the criminal justice system to the effective prosecution of family violence offenses should be accomplished, not by limiting the rights of defendants to present cultural information to juries and judges, but by imposing on prosecutors the obligation to educate those juries and judges so that dispositions do not reflect acceptance of a stereotypical view of the cultural legitimacy of male dominance.

Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 43 (1995).

6. RENTELN, *supra* note 4; Lama Abu-Odeh, *Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West,"* 1997 UTAH L. REV. 287 (1997); Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994) [hereinafter Chiu, *The Cultural Defense*]; Chiu, *supra* note 4; Elaine M. Chiu, *Culture in Our Midst*, 17 U. FLA. J. L. & PUB. POL'Y 231 (2006) [hereinafter Chiu, *Culture in Our Midst*]; Carolyn Choi, *Application of a Cultural Defense in Criminal Proceedings*, 8 UCLA PAC. BASIN L.J. 80 (1990); Doriane Lambelet Coleman, *Culture, Cloaked in Mens Rea*, 100 S. ATL. Q. 981 (2001) [hereinafter Coleman, *Culture, Cloaked in Mens Rea*]; Coleman, *supra* note 3; Rashmi Goel, *Can I Call Kimura*

minority defendants who successfully introduce cultural evidence in their defense have one thing in common: the cultural norms underlying their defense are either similar to or coalesce with those of the dominant majority. Borrowing from Derrick Bell's interest convergence theory,⁷ I argue that *cultural convergence* is one way to explain these results. Cultural convergence is the idea that the interests of minority and immigrant criminal defendants in obtaining leniency seem most likely to receive accommodation when there is convergence between dominant majority cultural norms and the cultural norms relied upon by the immigrant or minority defendant.

Crazy? Ethical Tensions in the Cultural Defense, 3 SEATTLE J. FOR SOC. JUST. 443 (2004); Kristen L. Holmquist, *Cultural Defense or False Stereotype? What Happens When Latina Defendants Collide With the Federal Sentencing Guidelines*, 12 BERKELEY WOMEN'S L.J. 45 (1997); Kim, *Blameworthiness, Intent, and Cultural Dissonance*, *supra* note 2; Kim, *The Cultural Defense and the Problem of Cultural Preemption*, *supra* note 2; Anh T. Lam, *Culture as a Defense: Preventing Judicial Bias Against Asians and Pacific Islanders*, 1 ASIAN AM. PAC. ISLANDS L.J. 49 (1993); Levine, *supra* note 2; Choua Ly, *The Conflict Between Law and Culture: The Case of the Hmong in America*, 2 WIS. L. REV. 471 (2001); Maguigan, *supra* note 5; Alison Matsumoto, *A Place for Consideration of Culture in the American Criminal Justice System: Japanese Law and the Kimura Case*, 4 J. INT'L L. & PRAC. 507 (1995); Deirdre Evans-Pritchard & Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage By Capture" Case in Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1 (1995); Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437 (1993) [hereinafter Renteln, *A Justification of the Cultural Defense as Partial Excuse*]; Alison Dundes Renteln, *Raising Cultural Defenses*, in CULTURAL ISSUES IN CRIMINAL DEFENSE (2001); Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991); Sacks, *supra* note 3; Malek-Mithra Sheybani, *Cultural Defense: One Person's Culture is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L. REV. 751 (1987); James J. Sing, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845 (1999); Melissa Spatz, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 COLUM. J.L. & SOC. PROBS. 597 (1991); Deborah Boulette Taylor, *Paying Attention to the Little Man Behind the Curtain: Destroying the Myth of the Liberal's Dilemma*, 50 ME. L. REV. 445 (1998); Catherine Trevison, *Changing Sexual Assault Law and the Hmong*, 27 IND. L. REV. 393 (1993); Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89 (Winter 2000) [hereinafter Volpp, *Blaming Culture for Bad Behavior*]; Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57 (1994) [hereinafter Volpp, *(Mis)Identifying Culture*]; Volpp, *supra* note 3; Nancy A. Wanderer & Catherine A. Connors, *Kargar and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829 (1999); Deborah Woo, *The People v. Fumiko Kimura: But Which People?*, 17 INT'L J. SOCIO. L. 403 (1989); Alice J. Gallin, Note, *The Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 B.C. L. REV. 723 (1994); Nicole A. King, Comment, *The Role Of Culture In Psychology: A Look at Mental Illness and the "Cultural Defense,"* 7 TULSA J. COMP. & INT'L L. 199, 223-24 (1999); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986); Sams, *supra* note 3; Spencer Sherman, *When Cultures Collide*, CAL. LAW., Jan. 1986, at 33.

7. Interest convergence, according to NYU law professor Derrick Bell, is the idea that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites." Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

This Article proceeds in three parts. In Part I, I present an overview of the major legal issues surrounding the use of cultural evidence in the criminal courtroom. Part II provides a comprehensive taxonomy of the ways Bell's interest convergence theory has found application in scholarship on a variety of subjects from reparations to pension reform. In Part III, I illustrate how cultural convergence can help explain the successful use of culture in the criminal courts. Three types of cases in which cultural defense arguments seem to be the most successful support my thesis: (1) Asian immigrant men who kill their unfaithful Asian immigrant wives and claim that they acted reasonably within the dictates of their culture; (2) Asian immigrant women who kill their children and claim they were attempting to commit parent-child suicide upon learning of their husband's infidelity; and (3) Hmong men charged with rape who claim they were engaging in the Hmong custom of marriage by capture. Cultural convergence is also evident in the rare case in which a Black man successfully asserts a deviance defense like "Black Rage" or "mob contagion."

I. THE "CULTURAL DEFENSE"

Although the term "cultural defense" is frequently used in academic circles and by the bench and bar, no official body has recognized such a defense. Rather, the term "cultural defense" refers to the introduction of cultural evidence by immigrant and/or racial minority defendants seeking to refute or mitigate criminal charges. Defendants may offer cultural evidence to show that they lacked the mental state required for commission of the charged offense⁸ or to bolster a traditional criminal law defense, such as self-defense,⁹ insanity¹⁰ or provocation.¹¹

8. In *State v. Haque*, 726 A.2d 205, 207 (Me. 1999), for example, the defendant unsuccessfully attempted to proffer evidence that his traditional Muslim Indian upbringing strongly influenced his perception of his relationship with the victim and how he reacted when she terminated the relationship, thus showing that he lacked the requisite *mens rea* for murder.

9. In *State v. Wanrow*, 538 P.2d 849, 853 (Wash. Ct. App. 1975), defense attorneys representing an Indian woman charged with second-degree murder unsuccessfully attempted to introduce expert testimony relating to the defendant's Indian culture to demonstrate that "an Indian, confronted by an older person attempting to perform an unnatural sex act on a young child, would undergo a more traumatic emotional experience than a member of the Anglo-Saxon culture because of the highly respected position an older person possesses in the Indian culture." In *Ha v. State*, 892 P.2d 184, 195 (Alaska Ct. App. 1995), a Vietnamese male defendant argued that when he fatally shot the victim (another Vietnamese man) in the back, he was acting in self-defense because Vietnamese culture teaches that police are corrupt and people have to take the law into their own hands. See also Renteln, *A Justification of the Cultural Defense as Partial Excuse*, *supra* note 6, at 454-56 (discussing the Patrick "Hooty" Croy case, where defense attorney Tony Serra successfully argued that given his Native American background, Croy acted reasonably in self-defense when he fatally shot a white police officer).

10. In *People v. Metallides*, Case No. 73-5270 (Fla. Cir. Ct. 1974), the defense attorney successfully used a temporary insanity argument based on the defendant's Greek culture, arguing that under the law of the old country, one does not wait for the police if one's daughter has been raped. See also Renteln, *A Justification of the Cultural Defense as Partial Excuse*, *supra* note 6, at 464.

They may also offer cultural evidence in support of a plea bargain¹² or lenient sentence.¹³

The term “culture” has been defined in many ways.¹⁴ A standard definition of culture is that it consists of “[a] set of rules or standards shared by members of a society which, when acted upon by the members, produce behavior that falls within a range of variance the members consider proper and acceptable.”¹⁵ This standard definition fails to recognize that “culture is experienced differently by different people within a particular community, for example, along lines of age, gender, class, race, or sexual orientation.”¹⁶ Moreover, as Leti Volpp has often pointed out, “[c]ulture is not some monolithic, fixed, and static essence.”¹⁷ It varies over time and depends on context.

No official rule specifically governs the admissibility of cultural evidence in the criminal courtroom. Sometimes judges admit cultural evidence; sometimes they exclude it. This lack of consistency and predictability is unsettling to defendants and makes it difficult for defense attorneys to advise their clients or develop appropriate strategies. As Alison Dundes Renteln and Deirdre Evans-

11. For example, in *Trujillo-Garcia v. Rowland*, No. 93-15096, 1993 WL 460961, at *1-2 (9th Cir. 1993), the defendant asked the trial court to instruct the jury to apply a reasonable Mexican person standard to his claim of provocation.

12. In *People v. Kimura*, No. A-091133 (L.A. Super. Ct. Nov. 21, 1985), the prosecutor allowed the defendant, a Japanese woman who killed her two young children and then attempted to commit suicide, to plead guilty to manslaughter. See also Kim, *The Cultural Defense and the Problem of Cultural Preemption*, *supra* note 2, at 121. In *United States v. Whaley*, 37 F. 145, 145-46 (C.C.S.D. Cal. 1888), the district attorney decided to dismiss the murder charge and permit the defendant to plead guilty to manslaughter in light of Indian customs and superstitions. See also Maguigan, *supra* note 5, at 63-67 (discussing the use of cultural background information in plea bargaining and sentencing proceedings).

13. See *United States v. Carbonell*, 737 F. Supp. 186, 187 (E.D.N.Y. 1990) (where sentencing court departed downward from the applicable federal sentencing guidelines in part because defendant’s “sole motivation in agreeing to [commit the crime] was to help out a fellow Colombian from the same hometown who was down on his luck,” after hearing that an obligation to help others from one’s country is a “common sentiment in the Hispanic community”); *State v. Rodriguez*, 204 A.2d 37, 38 (Conn. Super. Ct. 1964) (reducing sentence based in part on defendant’s Puerto Rican heritage); see also Damian W. Sikora, Note, *Differing Cultures, Differing Culpabilities?: A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L.J. 1695, 1698 (2001) (arguing for cultural evidence to be used as a mitigating factor at sentencing). But see *Gutierrez v. State*, 920 P.2d 987, 990-91 (Nev. 1996) (affirming death sentence despite evidence regarding defendant’s upbringing in Mexico and the local cultural belief in witches).

14. A.L. KROEBER & CLYDE KLUCKHOHN, *CULTURE: A CRITICAL REVIEW OF CONCEPTS AND DEFINITIONS* 41-72 (1952) (collecting over 150 different definitions of “culture”).

15. Michaël Fischer, Note, *The Human Rights Implications of a “Cultural Defense,”* 6 S. CAL. INTERDISC. L.J. 663, 669 (1998) (quoting WILLIAM A. HAVILAND, *ANTHROPOLOGY* 278 (5th ed. 1989)).

16. Volpp, *supra* note 3, at 1592.

17. *Id.* at 1589.

Pritchard have remarked, “whether a defendant can invoke a cultural defense depends almost entirely on the luck of the draw, that is, on who the judge is.”¹⁸

Whether immigrant and minority defendants *should* be allowed to introduce cultural evidence in their defense is a hotly contested issue, with multiculturalists and feminists often taking opposite positions.¹⁹ Defenders of cultural evidence argue that the United States is a multicultural and pluralistic society which should permit immigrants and minorities to show how their cultural backgrounds may have contributed to their actions.²⁰ Some feminist scholars have opposed the admission of cultural evidence on the ground that it can further harm the victim of cultural violence who is often a woman or a child.²¹ Because cultural evidence often finds use by male defendants who have killed or harmed female victims, the admission of cultural evidence appears to condone such violence.²²

18. Evans-Pritchard & Renteln, *supra* note 6, at 36.

19. Chiu, *The Cultural Defense*, *supra* note 6, at 1120–25 (describing the debate between feminists and multiculturalists over the admissibility of cultural evidence); Maguigan, *supra* note 5, at 97; *see also* SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN? 9–24 (1999) [hereinafter OKIN, IS MULTICULTURALISM BAD FOR WOMEN?] (arguing that there is a considerable likelihood of tension between feminism and multiculturalism, especially when cultural groups seek to use culture as a defense in criminal cases); Susan Moller Okin, *Feminism and Multiculturalism: Some Tensions*, 108 ETHICS 661, 664 (1998) (arguing that liberal progressives often fail to take into account tensions between feminism and multiculturalism).

20. *See, e.g.*, Sing, *supra* note 6, at 1847 (noting that advocates of cultural evidence “claim that recognition of a cultural defense will advance two desirable ends consistent with the broader goals of liberal society and the criminal law: (1) the achievement of individualized justice for the defendant; and (2) a commitment to cultural pluralism”); Sikora, *supra* note 13, at 1707–08 (arguing that “forced assimilation goes against the American ideal that cultural pluralism should be encouraged and that America is a place where people from all over the world can come, and their differences will be accepted and embraced”).

21. Coleman, *supra* note 3, at 1095; Rimonte, *supra* note 6; Gallin, *supra* note 6; Naomi Mendelsohn, Note, *At the Crossroads: The Case for and Against a Cultural Defense to Female Genital Mutilation*, 56 RUTGERS L. REV. 1011, 1033 (2004) (arguing that enabling a cultural defense to female genital mutilation sends a message that culture is more valuable than the bodily integrity of women and children); Michele Wen Chen Wu, Comment, *Culture Is No Defense for Infanticide*, 11 AM. U. J. GENDER SOC. POL’Y & L. 975, 977 (2003) (“[A] child’s right to live . . . makes one’s culture an inadequate defense.”). *But see* Janet C. Hoefel, *Deconstructing the Cultural Evidence Debate*, 17 U. FLA. J. L. & PUB. POL’Y 303, 320–21 (2006) (noting that a review of fifty cultural evidence cases showed that twenty-two of the cases did not involve violence against women or children, and, of the eighteen that did, the use of cultural evidence to excuse or justify a male defendant’s violence against a woman was effective in drastically reducing the charge or sentence in only three cases).

22. Coleman, *supra* note 3, at 1095 (“What happens to the victims—almost always minority women and children—when multiculturalism and individualized justice are advanced by dispositive cultural evidence?”). Coleman notes that the question of whether cultural evidence should be admitted puts liberals in a quandary, which she calls the “Liberals’ Dilemma.” *Id.* at 1096. Coleman argues that liberals, who tend to respect both cultural difference and the rights of women, have to choose one over the other when deciding whether cultural evidence should be admitted. *But see* Taylor, *supra* note 6, at 447,

Opponents of cultural evidence also argue that admitting it violates the principle of equal protection by favoring immigrants and racial minorities over other Americans.²³ Doriane Coleman, for example, argues:

Tolerance of the use of immigrant cultural evidence in criminal proceedings fundamentally conflicts with the principle that ‘the protections given by the laws of the United States shall be equal in respect to life and liberty . . . [for] all persons.’ Indeed, permitting cultural evidence to be dispositive in criminal cases violates both the fundamental principle that society has a right to government protection against crime, and the equal protection doctrine that holds that whatever protections are provided by government must be provided to all equally, without regard to race, gender, or national origin.²⁴

This argument that recognition of cultural evidence gives immigrants and racial minorities special treatment over Americans overlooks the fact that Americans already have an advantage in the American criminal courtroom. As Leti Volpp has observed, talking about a “cultural” defense for immigrants erroneously presumes that America is without a culture.²⁵ Numerous criminal law doctrines, including the “no duty to retreat” rule in self-defense law, the broad version of the defense of habitation, and the “reasonable belief in consent” defense against forcible rape, reflect the American culture in which we live.²⁶ Moreover, when an American asserts a defense that includes a reasonableness requirement, such as self-defense, provocation, duress or necessity, he or she can rely on American cultural norms to bolster his or her claims of reasonableness.²⁷

Recently, a few scholars have renewed calls for recognition of a separate cultural defense. In her recent book, *The Cultural Defense*,²⁸ Alison Dundes Renteln argues that courts should take culture into account when adjudicating criminal cases. Renteln proposes an official cultural defense, enabling defendants to introduce evidence concerning their culture and its relevance to their case.²⁹ She

465–70 (arguing that the “‘liberal’s dilemma’ arises from an overly narrow definition of culture that is Eurocentric, racist, and sexist”); Volpp, *supra* note 3, at 1575 (challenging Coleman’s thesis as “a regressive vision of immigrant communities, of multiculturalism, and of scholarship on these issues”).

23. See Coleman, *supra* note 3.

24. *Id.* at 1135–36.

25. Volpp, *(Mis)Identifying Culture*, *supra* note 6, at 62 (“Creating a ‘cultural defense’ for immigrants in the United States thus rests on the implication that U.S. law is without a culture.”).

26. See Chiu, *Culture In Our Midst*, *supra* note 6; see also Volpp, *Blaming Culture for Bad Behavior*, *supra* note 6, at 115; Volpp, *(Mis)Identifying Culture*, *supra* note 6, at 62, 68; Volpp, *supra* note 3.

27. See CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (2003) (arguing that traditional criminal law defenses that include a reasonableness requirement, such as the defense of provocation and the defense of self-defense, are in essence cultural defenses that favor American defendants); Sing, *supra* note 6, at 1869 (calling the defense of provocation a “dominant cultural defense”).

28. RENTELN, *supra* note 4.

29. *Id.* at 187.

reasons that “[a] defendant whose criminal act is culturally motivated is less blameworthy” than one whose acts are not culturally motivated, and therefore deserves less punishment.³⁰ Renteln’s proposed cultural defense would operate as a partial excuse.³¹ That is, a defendant’s culture would not exonerate the defendant completely, but could mitigate the charged offense.

Similarly, Elaine Chiu argues that the criminal law should recognize culture as a defense. In contrast to Renteln, Chiu argues that culture should operate as a complete justification, not merely as a partial excuse.³² Chiu reasons when cultural claims are treated as partial excuses, the criminal law suggests that the defendant is mentally or emotionally deficient.³³ Often, however, nothing is wrong with the defendant. He or she has simply acted in conformity with his or her culture.

It is unlikely that state legislators will enact legislation recognizing an official cultural defense anytime soon. After the September 11, 2001 terror attacks on the World Trade Center and the Pentagon, there was little public sympathy for people with different cultural or religious backgrounds who commit crimes of violence purportedly because of these backgrounds. In light of rising anti-immigrant sentiment today,³⁴ publicly elected officials might worry about the political consequences of supporting legislation that would make it easier for defendants who commit culturally motivated crimes to win acquittals or lighter sentences.

It is difficult to determine the extent to which cultural defenses are successful.³⁵ No nationwide database tracks the outcomes in cultural defense cases.

30. *Id.* at 189.

31. *Id.* at 191.

32. Chiu, *supra* note 4.

33. *Id.*

34. For example, under mounting pressure from constituents opposed to illegal immigration, in October 2006 Congress passed legislation authorizing the construction of 700 miles of fencing along the U.S. and Mexican border. Michael A. Fletcher & Jonathan Weisman, *Bush Signs Bill Authorizing 700-Mile Fence for Border*, WASH. POST, Oct. 27, 2006, at A4. Also in 2006, anti-immigration forces launched a “Send-A-Brick” campaign, encouraging citizens to send bricks to members of Congress, asking them to stop the flood of illegal immigration. Carl Hulse, *A Build-a-Protest Approach to Immigration*, N.Y. TIMES, May 31, 2006, at A15. In 2007, President George W. Bush’s attempts to enact immigration reform legislation met with fierce opposition from his Republican base because of provisions that would allow illegal immigrants to become lawful permanent residents if they fulfilled certain requirements. See Michael Abramowitz, *Immigrant Legislation Splits GOP; Right Lashes Out at Bush and Senate Over Compromise*, WASH. POST, May 19, 2007, at A1. In April 2007, Republican Representative Dan Lungren joined fellow Republican Representatives Nathan Deal (GA) and Brian Bilbray (CA) in introducing legislation that would end birthright citizenship. David Whitney, *Citizenship Bill Faces Long Odds in Democratic Congress*, THE PROVIDENCE SUNDAY J., Sept. 16, 2007, at A16 (noting that “each year, an estimated 400,000 babies are born in the United States to mothers who are illegal immigrants” and currently “each of these babies automatically becomes a U.S. citizen when it takes its first breath”).

35. Nonetheless, Susan Moller Okin notes that the three types of cases in which cultural defenses have been used most successfully in the United States are: (1) cases in

Moreover, in this country, most traditional legal research relies on the published appellate decision. Whenever any defense strategy is successful, the defendant rarely files an appeal. Without an appeal, the chances of a published written record about the case are extremely low. This makes research about the effectiveness of particular defense strategies extremely difficult.³⁶

Nonetheless, commentators seem to agree that most attempts to use cultural evidence to exonerate a defendant or mitigate charges fail.³⁷ One reason may be a “when in Rome, do as the Romans do” way of thinking about the law.³⁸ Judges and jurors often feel immigrants and racial minorities who live in America should abide by American laws and customs. If they break the law, they should not hide behind a curtain of cultural tradition different from America’s dominant culture.

This “when in Rome” argument enjoys great appeal, drawing, as it does, on our strong tradition of not allowing people to argue ignorance of the law. If I fail to file my income taxes, I cannot escape liability by claiming I did not know I had to do so. Ignorance of the law is no excuse.

The problem with this argument is that it does not seem to apply to most cultural defense cases. While some immigrant defendants may seek to use cultural evidence to excuse their ignorance of the law, most do not. Rather, most seem to introduce evidence about their cultural background to rebut an element of the charged offense, such as the *mens rea*, or to bolster a traditional criminal law defense, such as insanity, provocation, or self-defense.³⁹ Given that immigrant and minority defendants seek to use cultural evidence to bolster traditional criminal law defenses, it is odd that most such attempts are unsuccessful. This makes the relatively rare successful uses of cultural evidence all the more interesting.

Another reason cultural claims often fail may be a result of what Dan Kahan and Donald Braman call “cultural cognition.”⁴⁰ According to Braman and Kahan, jurors and judges, like ordinary people, evaluate the credibility of people, arguments, and evidence through the prism of their own cultural norms.⁴¹ If these

which Hmong men kidnap and rape Hmong women, then claim their actions were part of their cultural practice of marriage by capture; (2) cases in which male immigrants from Asian and Middle Eastern countries murder wives who “have committed adultery or treated their husbands in a servile way”; and (3) cases in which Japanese or Chinese mothers killed their children and attempted to kill themselves in response to spousal infidelity. OKIN, IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 19, at 18. As discussed in Part III, cultural norm convergence is reflected in all three of these categories.

36. Another problem is that research in this area must rely heavily on newspaper and media coverage which is sporadic and tends to focus on the exceptional cases.

37. See, e.g., RENTELN, *supra* note 4, at 5; Maguigan, *supra* note 5; Sacks, *supra* note 3, at 523. Janet Hoeffel describes a number of cases in which defense attempts to use cultural evidence were not successful. See Hoeffel, *supra* note 21, at 321–27.

38. RENTELN, *supra* note 4, at 5, 193.

39. See *supra* notes 8–11; see also Taylor, *supra* note 6, at 448.

40. See Donald Braman & Dan M. Kahan, *Legal Realism as Psychological and Cultural (Not Political) Realism*, in HOW LAW KNOWS 93, 94 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2007).

41. *Id.* at 102.

norms are widely shared, as they often will be when the defendant, the attorneys, the witnesses, the judge, and the jurors are all white and American, jurors will tend to agree with one another on whether a witness is credible, whether an argument makes sense, and whether particular evidence is relevant. In contrast, "in cases where there is competition between cultural groups over which values should be privileged in the law, there will be serious disagreement."⁴² Often this disagreement will manifest itself in differences in interpretations of the law and even the facts.⁴³ Jurors and judges may downplay the relevance of evidence that fails to conform to preexisting scripts.⁴⁴ Thus, when an immigrant or minority defendant claims that his culture encouraged him to act in a way that violated American law, American judges and jurors may not understand the relevance of the defendant's cultural evidence because it fails to conform to their cultural norms. When the immigrant or minority defendant's claim conforms to American cultural norms, the claim may be more readily accepted.

A variety of factors contribute to the effectiveness of any particular criminal defense strategy, including the makeup of the jury, the background of the judge, the cultural sensitivities of the attorneys, and the attitude of the victim (or victim's family) toward the defendant.⁴⁵ In "cultural defense" cases, another factor comes into play. Whether there is convergence between the cultural norms relied upon by the immigrant or minority defendant and the cultural norms of American society may also influence the ultimate verdict. Cultural convergence theory finds roots in Derrick Bell's interest convergence theory, to which I will now turn.

II. INTEREST CONVERGENCE THEORY

The term "interest convergence" was first coined by Derrick Bell in a *Harvard Law Review* article published in 1980.⁴⁶ In that article, Bell responded to criticisms leveled by Herbert Wechsler against the U.S. Supreme Court's decision in *Brown v. Board of Education*.⁴⁷ In his famous 1959 article, *Toward Neutral Principles of Constitutional Law*,⁴⁸ Wechsler accused the Court of deciding *Brown* without a neutral and principled basis. In response, Bell pointed out that at least on a normative level, racial equality was "the neutral principle which underlay the *Brown* opinion."⁴⁹ However, because racial equality was not viewed by most Americans in the 1950s as a desirable goal, Bell posited that the real driving force behind *Brown* was interest convergence. Interest convergence, explained Bell, is the idea that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."⁵⁰

42. *Id.* at 114.

43. *Id.* at 102.

44. *Id.*

45. I thank Sara Sun Beale for this observation about the importance of the attitude of the victim or victim's family toward the defendant.

46. Bell, *supra* note 7.

47. 347 U.S. 483 (1954).

48. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

49. Bell, *supra* note 7, at 522.

50. *Id.* at 523.

Bell explained how the *Brown* decision to end racial segregation in the public schools reflected a convergence between the interests of blacks in achieving racial equality and the interests of whites. *Brown* helped the United States in its Cold War foreign relations by providing the U.S. with instant credibility regarding its well-advertised commitment to racial equality. Segregation had hurt America's reputation as a nation committed to freedom, equality, and democracy for all, and had undermined America's efforts to persuade Third World countries to convert to democracy. By ordering the public schools to desegregate, the Court demonstrated America's commitment to equality to the world.⁵¹

Bell also posited that the *Brown* decision helped America in its efforts to persuade African Americans that they were a welcome part of the United States. Bell pointed out that Blacks who had fought for this country in World War II were returning home to widespread racial discrimination. Elite whites worried that in the event of another war, African Americans might be reluctant to fight again. The *Brown* decision was thus important domestically as a symbol of America's commitment to equality.⁵²

In later work, Bell elaborated upon his theory, explaining:

[Only] when whites perceive that it will be profitable or at least cost-free to serve, hire, admit, or otherwise deal with blacks on a nondiscriminatory basis, they do so. When they fear—accurately or not—that there may be a loss, inconvenience, or upset to themselves or other whites, discriminatory conduct usually follows.⁵³

According to Bell, “racism is a permanent feature of American society, necessary for its stability and for the well-being of the majority of its citizens.”⁵⁴ Interest convergence explains how Blacks “are able to achieve political gains despite the essentially racist nature of American society.”⁵⁵ Commenting on Bell's theory, Charles Ogletree notes that interest convergence works as a safety valve, permitting “short-term gains for African Americans when doing so furthers the short- or long-term goals of the white elite. . . . This is an important check on widespread disaffection that may end in revolution.”⁵⁶

Although Bell's hypothesis about the underlying motivations behind the *Brown* decision initially evoked much skepticism and even outrage,⁵⁷ ultimately his hypothesis was vindicated. In 2000, Mary Dudziak, a professor of law and

51. *Id.* at 524.

52. *Id.* at 524–25.

53. DERRICK A. BELL, JR., *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 7 (1992).

54. Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivor's Story*, 24 B.C. THIRD WORLD L.J. 13, 20 (2004) (citing BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 53, at 3–10).

55. *Id.*

56. *Id.* at 21.

57. Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. Rev. 369, 373 (2002) (reviewing MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000)).

history at the University of Southern California, published *Cold War Civil Rights: Race and the Image of American Democracy*.⁵⁸ In her book, Dudziak provided proof in the form of U.S. State Department files, other archival records, and international media coverage that “*Brown v. Board of Education* and the softening of racial attitudes that it ushered in were largely prompted by Cold War considerations.”⁵⁹ Dudziak explains that even though *Brown* was decided in 1954 when Dwight D. Eisenhower was President, it was the Truman administration’s Department of Justice “that initiated the government’s participation in the legal battle to overcome Jim Crow.”⁶⁰ The Truman administration submitted amicus curiae briefs in numerous civil rights cases preceding *Brown*, emphasizing “the international implications of race discrimination . . . [and] the negative impact on U.S. foreign relations that a pro-segregation decision might have.”⁶¹ In one brief, the Truman administration “hammered home the point that racial segregation hampered the U.S. government’s fight against world communism.”⁶² The Brief of the United States as amicus curiae in *Brown* reflects the foreign-policy concerns behind the administration’s involvement in civil rights cases:

[T]he existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.⁶³

Several legal scholars were quick to recognize that Dudziak’s work essentially confirmed the theory that Bell had put forth twenty years earlier.⁶⁴ In a review of Dudziak’s book, Robert Chang and Peter Kwan note that “Mary Dudziak’s work provides a wonderful complement to Derrick Bell’s.”⁶⁵ Richard Delgado notes that Dudziak’s book and an article she published in the *Stanford Law Review* “build on an impressive insight by Derrick Bell that gains for blacks coincide with white self-interest and materialize at times when elite groups need a breakthrough for African Americans, usually for the sake of world appearances or the imperatives of international competition.”⁶⁶ Similarly, Neil Gotanda writes:

Mary Dudziak has written a study of the foreign policy influences upon *Brown*. Dudziak used as her framework of analysis, an influential suggestion of Professor Derrick Bell that civil rights

58. DUDZIAK, *supra* note 57.

59. Delgado, *supra* note 57, at 373.

60. DUDZIAK, *supra* note 57, at 90.

61. *Id.*

62. *Id.* at 93.

63. *Id.* at 100.

64. Dudziak cites to Bell at least once in her book, *id.* at 258 n.26, and in an earlier piece she more explicitly acknowledged the link between her work and Bell’s interest convergence theory. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 66 (1988) (noting that her article “demonstrates Derrick Bell’s interest-convergence thesis”).

65. See Robert S. Chang & Peter Kwan, *When Interests Diverge*, 100 MICH. L. REV. 1532, 1537 (2002) (reviewing DUDZIAK, *supra* note 57).

66. Delgado, *supra* note 57, at 371.

progress occurs when there is an interest convergence between white Americans and Black Americans, and that progress ends when their interests diverge. She concludes that the Bell interest convergence hypothesis is supported by the history of *Brown*.⁶⁷

Other legal scholars have endorsed Bell's theory more explicitly, applying it in a number of different ways.⁶⁸ First, legal scholars have used interest convergence theory to explain Supreme Court cases, legislative enactments, and state court decisions.⁶⁹ Second, legal scholars have used interest convergence theory as an affirmative tool of strategy or prediction regarding mostly legislative

67. Neil Gotanda, *Towards Repeal of Asian Exclusion: The Magnuson Act of 1943, the Act of July 2, 1946, The Presidential Proclamation of July 4, 1946, The Act of August 9, 1946, and The Act of August 1, 1950*, in *ASIAN AMERICANS AND CONGRESS: A DOCUMENTARY HISTORY* 309, 313 (Hyung-Chan Kim ed., 1996).

68. A few legal scholars have focused on Bell's theory of racial sacrifice which cautions minority groups against being too quick to join with majority causes because when minority and majority interests diverge, minority interests are likely to be sacrificed to preserve the majority's position:

The flip side to Bell's interest-convergence theory is his theory of racial sacrifice. Just as the interests of blacks are advanced when they converge with the interests of whites, he argues that the interests of blacks and even hard-won racial remedies will be sacrificed or abrogated when such remedies threaten the interests of "superior societal status of whites."

Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253, 272 (2005) (citing DERRICK A. BELL, JR., *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPE FOR RACIAL REFORM* 69 (2004)). Scholars who focus on Bell's theory of racial sacrifice include Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly*, 82 CAL. L. REV. 851, 865 (1994) ("[I]nterest convergence is not a particularly promising avenue for blacks and others interested in promoting the cause of hate-speech regulation."); Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994) (warning minorities to cautiously seek interest convergence because any gains may be short-lived while the losses will be long lasting); Richard Delgado & Helen Leskovic, *The Politics of Workplace Reforms: Recent Works on Parental Leave and a Father-Daughter Dialogue*, 40 RUTGERS L. REV. 1031 (1988) (warning that some of the recent workplace reforms, such as parental leave, may not be beneficial to women in the long run); Maurice R. Dyson, *Playing Games With Equality: A Game Theoretic Critique of Educational Sanctions, Remedies, and Strategic Noncompliance*, 77 TEMP. L. REV. 577, 604-09 (2004) (explaining the interest convergence dilemma which "arises when minority and majority coalitions find a common basis to cooperate but where cooperation ultimately leads to a marginal, if not harmful, result for minorities"); Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls for Brown?*, 103 MICH. L. REV. 1507 (2005) (reviewing BELL, *supra*). Bell's racial sacrifice theory is viewed by some as a strand of Bell's interest convergence theory. I treat Bell's theory of racial sacrifice as a separate theory.

69. See *infra* Part II.A; see also Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 715 (2005) (arguing that the U.S. Supreme Court's refusal to extend disparate impact theory to equal protection jurisprudence in *Washington v. Davis* was consistent with Bell's interest convergence theory).

reform.⁷⁰ To a certain extent, interest convergence in the legislative context is not surprising given that politicians are accustomed to horse-trading to achieve their goals. What is interesting is that interest convergence, while normal and expected in the legislative context, appears to be operating vigorously in the judicial context, where some might say it should have no force.

A. Interest Convergence as Explanation

Interest convergence theory is often deployed to explain a particular case or a line of judicial decisions or legislative enactments. Just as Derrick Bell used the theory to explain the latent forces behind the *Brown* decision, other legal scholars have used interest convergence to explain a host of U.S. Supreme Court decisions, legislative enactments, and lower state court cases.

1. Supreme Court Cases

a. Hernandez v. Texas

Richard Delgado uses interest convergence theory to explain the U.S. Supreme Court's decision in *Hernandez v. Texas*.⁷¹ Hernandez was indicted for the murder of a man named Joe Espinosa by a grand jury in Jackson County, Texas.⁷² He was convicted and sentenced to life imprisonment.⁷³ Prior to trial, Hernandez's lawyer moved to quash the indictment, arguing that persons of Mexican descent had suffered systematic exclusion from service as jury commissioners, grand jurors, and petit jurors, and that this exclusion deprived his client of equal protection.⁷⁴ The trial judge denied the motion.⁷⁵

The Court of Criminal Appeals of Texas affirmed on the ground that Mexican people are white people of Spanish descent.⁷⁶ Since the grand jury that indicted Hernandez and the petit jury that tried him were "composed of members of his race, it cannot be said, in the absence of proof of actual discrimination, that [Hernandez] has been discriminated against . . . and thereby denied equal protection of the laws."⁷⁷

70. See *infra* Part II.B. Because Bell's theory has enjoyed widespread application, this review of the legal scholarship applying interest convergence summarizes only a small, but representative, sample of such scholarship. Some scholars have used interest convergence neither to explain judicial or legislative action nor to advocate for social or political reform. See, e.g., Michael Dehaven Newsom, *Some Kind of Religious Freedom: National Prohibition and the Volstead Act's Exemption for the Religious Use of Wine*, 70 BROOKLYN L. REV. 739 (2005) (positing that interest convergence is responsible for the benefits to minority religious groups of the Volstead Act's exemption for the religious use of wine); Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92 (2004).

71. 347 U.S. 475 (1954).

72. *Id.* at 476.

73. *Id.*

74. *Id.* at 476–77.

75. *Id.* at 477.

76. *Hernandez v. State*, 251 S.W.2d 531, 535 (Tex. App. 1952).

77. *Id.* at 536.

The U.S. Supreme Court reversed, holding that the systematic exclusion of persons of Mexican descent from service as jurors in Jackson County deprived Hernandez of the equal protection of the laws.⁷⁸ Noting a history of pervasive discrimination against Mexicans in southern Texas, evidenced by whites-only bathrooms and a sign in at least one local restaurant barring Mexicans,⁷⁹ the Court ruled that:

Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period. But it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years. The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner. The judgment of conviction must be reversed.⁸⁰

While *Hernandez* has been hailed as a major civil rights victory for Mexican Americans, Delgado notes that fear of Latin American communism and domestic unrest may have prompted the Supreme Court decision more than a concern for the rights of Mexican-Americans.⁸¹ At the time *Hernandez* was making its way up to the Supreme Court, the United States “was in the early stages of the Cold War, in which it was competing with the Soviet Union for the loyalties of the Third World.”⁸² The U.S. Communist Party was starting to agitate for the rights of Mexican farm and mine workers,⁸³ and several government commissions had examined the threat of Latin American communism.⁸⁴ In 1950, Assistant Secretary of State Edward Miller warned of the dangers of communist political aggression in Latin America.⁸⁵ Three years later, then Secretary of State John Foster Dulles predicted:

[T]he conditions in Latin America are somewhat comparable to . . . China in the mid-thirties when the Communist movement was getting started . . . if we don't look out, we will wake up some morning and read in the newspapers that there happened in South America the same kind of thing that happened in China in 1949.⁸⁶

Apparently, several of the Justices on the Supreme Court were aware of these Cold War concerns. Justice William Douglas, for example, wrote about how racial discrimination in America hurt America's standing abroad.⁸⁷ On one trip to Panama, he wrote to a friend in the United States about how that country was ripe

78. *Hernandez*, 347 U.S. at 477–82.

79. *Id.* at 479–80.

80. *Id.* at 482.

81. Richard Delgado, *Rodrigo's Roundtable*, *Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 Harv. C.R.-C.L. L. Rev. 23, 43 (2006).

82. *Id.* at 40.

83. *Id.* at 43.

84. *Id.* at 45.

85. *Id.* at 49–50.

86. *Id.* at 50.

87. *Id.* at 52 (citing DUDZIAK, *supra* note 57, at 104).

for communism.⁸⁸ On a second trip to Latin America, Justice Douglas tried to dissuade some university students from joining the local communist party. Justice Hugo Black worried that America's treatment of its racial minorities might deprive the U.S. of political capital in the fight against world communism.⁸⁹ Justice Earl Warren spoke about how the world looked to the United States as a model of justice and expressed his belief that adhering to the Constitution and the Bill of Rights would make us more secure than a stockpile of hydrogen bombs.⁹⁰ In short, the convergence of interests—the American foreign policy interest in curbing the spread of communism in Latin America and the threat of communism at home coupled with the interest of Mexican Americans in not suffering systematic exclusion from jury pools—may have been an influential factor contributing to the result in *Hernandez*.

b. *Plyler v. Doe*

Similarly, Maria Pabon Lopez uses interest convergence to explain *Plyler v. Doe*.⁹¹ In *Plyler*, the U.S. Supreme Court held that a Texas statute withholding funds from local school districts for the education of undocumented children and authorizing such districts to deny enrollment to such children violated the Equal Protection Clause of the Fourteenth Amendment. The Court first explained that undocumented children are “persons” entitled to the protections of the Fourteenth Amendment.⁹² The Court then considered the possible state interests that might support the Texas legislature's decision to deny the children of undocumented immigrants a public education and found none of these interests substantial enough to justify the denial.⁹³ The Court seemed particularly concerned that denying a public education to the children of undocumented immigrants would impose “a lifetime of hardship on a discrete class of children not accountable for their disabling status.”⁹⁴

While *Plyler v. Doe* appears on the surface to be an all-out victory for the children of undocumented immigrants and immigrant rights advocates, Lopez sees *Plyler* in a less positive light, arguing that “*Plyler* acts as a form of preserving the undocumented as a separate class, ensuring a primary and secondary education for their children but nothing more in society.”⁹⁵ Lopez explains:

That *Plyler* can be viewed as an interest convergence case is further evinced by the fact that it was decided at a time when the hiring of undocumented workers had not yet been outlawed by the Immigration Reform and Control Act (IRCA), and thus, it still was

88. *Id.* (citing Letter from William O. Douglas to John Cooper Wiley, Apr. 24, 1953, in THE DOUGLAS LETTERS 294 (Melvin I. Urofsky ed., 1987)).

89. *Id.* at 52–53 (citing DUDZIAK, *supra* note 57, at 106–07).

90. *Id.* at 53–54 (citing DUDZIAK, *supra* note 57, at 106).

91. 457 U.S. 202 (1982); see also Maria Pabon Lopez, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1405 (2005).

92. *Plyler*, 457 U.S. at 210–15.

93. *Id.* at 228–30.

94. *Id.* at 223.

95. Lopez, *supra* note 91, at 1398.

considered to serve the nation's interest to have undocumented workers and their families in the country.⁹⁶

Lopez points out that higher education remains mostly inaccessible for undocumented students, largely because they lack legal immigration status.⁹⁷ Therefore, while *Plyler* guarantees the children of undocumented immigrants the right to an elementary and high school education, most are unable to go on to college and work legally in the United States. The only way they are able to stay in this country is by providing inexpensive, under-the-table labor.

Lopez notes that despite numerous legislative efforts, both at the state and federal levels, to overrule or bypass the decision, *Plyler* remains good law.⁹⁸ She concludes that “[b]ecause the nation’s interest in maintaining a cheap and expendable labor force has converged with the expectation of an education for undocumented children, *Plyler* survives to this day.”⁹⁹

c. *Grutter v. Bollinger*

Derrick Bell uses interest convergence theory to explain *Grutter v. Bollinger*,¹⁰⁰ a 2003 Supreme Court decision upholding the University of Michigan Law School’s use of race in its admission program against an equal protection challenge by a white applicant.¹⁰¹ Justice Sandra Day O’Connor, writing for the Court, found that Michigan Law School “has a compelling governmental interest in attaining a diverse student body.”¹⁰² Accepting the position urged by the Fortune 500 corporations and military officials who filed amici briefs in the case, O’Connor wrote that diversity “better prepares [white] students for an increasingly diverse workforce and society, and better prepares them as professionals.”¹⁰³ Bell notes that the interests of Fortune 500 companies and the military in having prospective employees and prospective military recruits exposed to minorities as classmates during law school converged with the interests of minority students seeking admission to elite law schools.¹⁰⁴

96. *Id.* at 1405.

97. *Id.* at 1400.

98. *Id.* at 1395–96.

99. *Id.* at 1405.

100. 539 U.S. 306 (2003).

101. Derrick A. Bell, Jr., *Diversity’s Distractions*, 103 COLUM. L. REV. 1622 (2003) [hereinafter Bell, *Diversity’s Distractions*]; Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y. L. SCH. L. REV. 1053 (2005); see also Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 678 (2004) (weakly suggesting that *Grutter* may be “just another example of what Derrick Bell has called ‘interest convergence’—that civil rights progress occurs only in moments when it benefits white elites, whether for economic profit or national security”).

102. *Grutter*, 539 U.S. at 328.

103. *Id.* at 330.

104. Bell, *Diversity’s Distractions*, *supra* note 101, at 1623. *But see* Victor C. Romero, *Racial Profiling: “Driving While Mexican” and Affirmative Action*, 6 MICH. J. RACE & L. 195 (2000) (using interest convergence to explain why whites generally do not support affirmative action—because it burdens whites).

Michael Crusto comes to a similar conclusion. According to Crusto, the real reason behind the Supreme Court's *Grutter* decision was that a diverse student body "enhance[s] the learning environment of the affluent white majority."¹⁰⁵ According to Crusto, *Grutter* "treats aspiring African-American students applying to America's elite public universities and professional schools as a 'diversity commodity': there merely to serve the white majority's needs."¹⁰⁶ In short, Michigan Law School's admissions policy was upheld because the interests of black and other minority students in attending elite universities converged with the interests of whites in a diverse learning environment.

Not everyone sees *Grutter* as an example of interest convergence. Arthur Wolfson takes issue with the view that *Grutter* reflects a convergence between the interests of big business and those of racial minorities.¹⁰⁷ Even though the amicus briefs filed by leading American businesses in support of the University of Michigan Law School's admissions policy suggest a convergence, Wolfson points out that in the same year the Supreme Court decided *Grutter*, social scientists Marianne Bertrand and Sendhil Mullainathan exposed "a marked pattern of race-based discrimination in the hiring process[es] of a cross-section of American business."¹⁰⁸

Bertrand and Mullainathan compared employer responses to resumes submitted by fictional job applicants with "very white sounding names" with the responses to resumes submitted by fictional job applicants with "very African American sounding names."¹⁰⁹ After dividing resumes into two groups (higher quality applicants vs. lower quality applicants), Bertrand and Mullainathan sent a set of four resumes to employers in response to help-wanted ads in Boston and Chicago. Each employer received a resume from a higher quality applicant with a white sounding name, one from a lower quality applicant with a white sounding name, one from a higher quality applicant with an African American sounding name, and one from a lower quality applicant with an African American sounding name. They found that resumes with white sounding names had a 10.08% chance of producing a callback whereas resumes with African American sounding names had a 6.7% chance.¹¹⁰ In other words, "a job applicant with a white sounding name can expect one callback for every ten resumes submitted while a similar applicant with an African American sounding name can expect one callback for every fifteen resumes submitted."¹¹¹

105. Michael F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. L. C.R. & C.L. 51, 58–59 (2005).

106. *Id.* at 52.

107. Arthur M. Wolfson, *Business Support of Affirmative Action and Discriminatory Hiring Practices: Contradictory or Compatible?*, 27 W. NEW ENG. L. REV. 197 (2005).

108. *Id.* at 197–98.

109. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003).

110. Wolfson, *supra* note 107, at 205.

111. *Id.* To test whether employers were using race as a proxy for socio-economic disadvantage, the researchers assigned random addresses to the resumes of each fictional

Wolfson acknowledges that at first glance the amicus briefs submitted in support of Michigan's affirmative action policy by leading American businesses in *Grutter* and the results of the Bertrand and Mullainathan study appear to be "wildly contradictory."¹¹² By supporting affirmative action, big business seemed to be expressing "recognition of the value of increasing minority employment."¹¹³ Yet the Bertrand and Mullainathan study suggests that businesses do not in fact value diversity, a fact reflected in their actual hiring practices.

Wolfson explains that the support of big business for Michigan's affirmative action policy was based primarily on the benefit to potential white employees of *exposure* to nonwhite minorities while attending law school rather than an altruistic desire to help minority students get into law school.¹¹⁴ As the Brief for Amici Curiae 65 Leading American Businesses stated, "[i]t is essential that [students] be educated in an environment in which they are exposed to diverse people, ideas, perspectives and interactions."¹¹⁵ Similarly, the brief submitted by General Motors placed heavy emphasis on the need for "cross-cultural competence" which is gained by potential employees through exposure to students of diverse racial groups.¹¹⁶ Wolfson concludes, "[b]ecause the support of big business for the Michigan programs reflects less of a concern for hiring minorities than for hiring [white] employees who were exposed to minorities as students, that support and the findings of Bertrand and Mullainathan are not contradictory."¹¹⁷ According to Wolfson, the interests of minority students and the interests of big business did not converge,¹¹⁸ rather, they diverged.

Wolfson's analysis is based on a narrow interpretation of the meaning of interest convergence. To Wolfson, interests converge only if the parties have the exact same goals and purposes in mind. This, however, is not how Bell understood

applicant. While all applicants seemed to benefit from an affluent address, the resumes of those with African American sounding names did not benefit at a rate higher than that of applicants with white sounding names. The researchers concluded that the discrimination revealed was not based on socio-economic disadvantage, but on race. *Id.* at 206–07.

112. *Id.* at 198.

113. *Id.*

114. *Id.* at 210.

115. *Id.* at 212 (alteration in original) (quoting Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents at 2, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-241) and *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-516), 2003 WL 399056).

116. *Id.* at 212–13 (citing Brief of General Motors Corp. as Amicus Curiae in Support of Respondents at 4, *Gratz*, 539 U.S. 244 (2003) (No. 02-241) and *Grutter*, 539 U.S. 306 (2003) (No. 02-156), 2003 WL 399096).

117. *Id.* at 210.

118. On the other hand, Wolfson acknowledges that there was interest convergence between high ranking officers of the U.S. military and the minority students. *Id.* at 214–15 ("An amicus brief filed by former high ranking officers of the United States military in support of the Michigan programs represents a rationale based on the convergence of interests."). This is because the military saw benefits from an officer corps with minority representation. According to Wolfson, the military's interest in an effective military drawn from a diverse population and minority interest in officer placement converged. *Id.* at 215.

it. For Bell, black schoolchildren won the right to attend desegregated schools not because those in power wanted to integrate the schools, but because desegregating the public schools helped American foreign policy interests. In Wolfson's understanding of interest convergence, however, *Brown* would not be a case of interest convergence because those in power were not motivated by a desire to help black parents and their children. Interest convergence, however, does not require the parties to have the same exact interests. Different, perhaps overlapping, interests that produce the same result are sufficient.

2. *Legislative Enactments and State Court Trends*

Some scholars have used interest convergence not merely to explain a Supreme Court opinion, but to give reasons for legislative enactments or trends in state courts. For example, John Hayakawa Torok uses interest convergence to explain changes to immigration laws affecting Asians.¹¹⁹ Torok examines Congress's decision to repeal the Chinese Exclusion Acts and laws prohibiting Chinese and other Asians from becoming naturalized U.S. citizens beginning in 1943.¹²⁰ During this time, the United States was at war with Germany and Japan, while China was an American ally.¹²¹ Torok notes that "Japanese wartime propaganda in China emphasized the racism in American law as shown by the Chinese exclusion acts."¹²² Japan suggested the United States was no different from European colonial powers and that it "intended to colonize China for its own imperial purposes."¹²³

Then President Franklin Roosevelt recognized that repeal of the Chinese Exclusion Acts would help preserve America's good relationship with China. In a message to Congress supporting repeal, Roosevelt stated:

There is now pending before the Congress legislation to permit the immigration of Chinese people into this country and to allow Chinese residents here to become American citizens. I regard this legislation as important in the cause of winning the war and establishing a secure peace.

China is our ally. For many long years she stood alone in the fight against aggression. Today we fight at her side. . . .

But China's resistance does not depend alone on guns and planes and on attacks on land, on the sea, and from the air. It is based as much on the spirit of her people and the faith of her allies. We owe it to the Chinese to strengthen that faith. One step in this

119. John Hayakawa Torok, *"Interest Convergence" and the Liberalization of Discriminatory Immigration and Naturalization Laws Affecting Asians, 1943-1965*, 9 CHINESE AM.: HIST. & PERSP. 1 (1995); see also Gotanda, *supra* note 67, at 309-16 (explaining how American foreign policy interests influenced the repeal of the Chinese Exclusion Acts).

120. Torok, *supra* note 119, at 8.

121. *Id.*

122. *Id.*

123. *Id.*

direction is to wipe from the statute books [the immigration and naturalization preclusions]. . . .

By the repeal of the Chinese exclusion laws, we can correct a historic mistake and silence the distorted Japanese propaganda¹²⁴

Additionally, Kevin Washburn uses interest convergence theory to explain why state courts sometimes recognize tribal criminal convictions while refusing to recognize tribal civil judgments.¹²⁵ In *A Different Kind of Symmetry*, Washburn examines cross-border enforcement of civil and criminal tribal court judgments in state courts.¹²⁶ Washburn begins by observing that a number of state courts have begun to respect tribal judgments of conviction (*i.e.* tribal judgments in criminal cases) while refusing to recognize them in civil cases. He notes that since tribal courts possess criminal jurisdiction only over Native American Indians, recognition of tribal criminal convictions “will always place Indians in greater jeopardy than they would face absent such a rule.”¹²⁷ In contrast, because tribal courts sometimes possess civil jurisdiction over non-Indians, “denial of recognition of a tribal civil judgment will sometimes have the effect of denying an Indian the ability to satisfy a judgment against a non-Indian in state court.”¹²⁸

Washburn points out that “no state has yet adopted a fully symmetrical approach to tribal civil and criminal judgments,”¹²⁹ leading to asymmetry in those states that recognize tribal criminal judgments but refuse to recognize or have presumptions against the recognition of tribal civil judgments. Washburn explains this asymmetry in interest convergence terms:

Viewing tribal courts as the relevant minority group under [interest convergence] theory, the notion is that certain states are willing to credit tribal court convictions because it serves the public safety interests of the non-Indian majority. In contrast, the recognition of tribal civil judgments serves no such interest and, thus, under Professor Bell’s theory, the non-Indian majority is less willing to respect such judgments.¹³⁰

In another setting, Michael Crusto uses interest convergence theory to explain why antebellum law in the South allowed black mistresses of white men to own property.¹³¹ Crusto notes that while black women were deemed inferior to all others in most respects, the law granted property rights to free black mistresses of

124. *Id.* at 8–9.

125. Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. REV. 263 (2004).

126. *Id.* at 264–65.

127. *Id.* at 286. Tribal criminal jurisdiction is limited to misdemeanors committed by Native American Indians. *Id.* at 271.

128. *Id.* at 286.

129. *Id.* at 279.

130. *Id.* at 286–87.

131. Crusto, *supra* note 105.

white men because this advanced “the sexual desires and needs of the white men they served.”¹³²

B. Interest Convergence as a Tool of Strategy or Prediction

A number of scholars have used interest convergence theory to advocate in favor of desired reform.¹³³ Legal scholarship using interest convergence as a strategy or as a means of predicting the success of that strategy can be divided into four categories: (1) workplace reform, (2) educational reform, (3) political reform, and (4) other reforms.

1. Workplace Reform

Interest convergence theory has been used to promote racial justice or equality in the workplace. Legal scholar Michael Green argues that because the current political climate provides little hope for improvement under Title VII, the best way for employees of color to protect against racial discrimination in the workplace is to use alternative dispute resolution (“ADR”) methods while appealing to the employer’s interest in the diversity rationale expressed in *Grutter*.¹³⁴ Assuming employers have an interest in fostering diversity in the workplace, they should understand the importance of having workplace dispute resolution systems in place that are fair to employees of color. Green concludes that “the only realistic mechanism for change must focus on the convergence of any racial justice interests with the diversity interests of corporate America.”¹³⁵

Joseph Feldman uses interest convergence to argue for racial reform in the workplace through Title VII litigation brought by white employees against employers engaged in racial discrimination in hiring and firing.¹³⁶ Feldman recognizes that white employees will bring such suits only if there are personal benefits to doing so, and suggests there are associational benefits from a diverse work environment including increased social and economic opportunities.¹³⁷ He concludes that “[i]f the rights of minorities are more likely to be furthered when white and minority interests converge, then it is worthwhile to frame convincing arguments that those groups’ interests do in fact converge.”¹³⁸

Dorothy Brown uses interest convergence theory to encourage workers to increase their participation in pension plans and maximize the investment of those

132. *Id.* at 98, 119–22.

133. Sheryll Cashin notes that “Bell seems to be suggesting that the interest-convergence model has predictive value; and it shows what can be achieved or maintained when the self-interests of whites are transparent and do happen to converge with those of blacks.” Cashin, *supra* note 68, at 273 (citing BELL, *supra* note 68, at 201).

134. Michael Z. Green, Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence, 48 *How. L.J.* 937, 959 (2005).

135. *Id.* at 961.

136. Joseph C. Feldman, *Standing and Delivering on Title VII’s Promises: White Employees’ Ability to Sue Employers for Discrimination Against Nonwhites*, 25 *N.Y.U. REV. L. & SOC. CHANGE* 569 (1999).

137. *Id.* at 600–01.

138. *Id.* at 601.

funds.¹³⁹ Brown notes that because the majority of private sector employees do not participate in their employer-sponsored pension plans, white workers and workers of color have a mutual interest in increasing their participation in pension plans and in effectuating pension reform.¹⁴⁰ Brown explains that “because employer sponsored pension plans exclude a majority of Whites and people of color, according to Professor Derrick Bell’s interest-convergence thesis, this may be a unique opportunity to effectuate pension reform.”¹⁴¹

Steven Ramirez uses a similar approach to push for greater diversity on corporate boards.¹⁴² Ramirez notes that “the bastions of corporate governance remain the nearly exclusive province of white males, with no realistic end in sight.”¹⁴³ Ramirez maintains that this racial hegemony survives not because of intentional racial discrimination, but because board members are chosen based on “cultural proximity to CEOs.”¹⁴⁴ Since “upper class white males are frequently most culturally proximate to upper class white males,”¹⁴⁵ this state of affairs will end only when those in power “see it in their interest to end it.”¹⁴⁶ Ramirez argues that the best way to achieve greater diversity on corporate boards of directors is to find political and economic interests that can benefit from diversity and improved corporate governance.¹⁴⁷ He explains:

All of this suggests an intriguing interest convergence. With all the power that CEOs hold in our managerial corporate state, they are not monarchs that may hold themselves above the law—yet. Very broad constituencies have large economic stakes in the performance of the macroeconomy. To the extent that the full costs of our continued apartheid hangover are fully comprehended, these constituents are a source of potential political and economic power in favor of reform. Corporate capitalists, while clearly on the wane in terms of power over the past several decades, are nevertheless powerful and fundamentally in favor of reducing the power of CEOs. Politicians intuitively fear anti big-business and populist cries for reining in the power of business elites. Combined with advocates for racial reform, whether Latino, African-American, Native-American, white, or Asian-American, these forces would be a formidable political and economic power. Add to this mix the interest of feminists in board diversity, and a convincing convergence of interests in favor of reform emerges.¹⁴⁸

139. Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501 (2004).

140. *Id.* at 1539.

141. *Id.* at 1505 (citation omitted).

142. Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America’s Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583 (2004).

143. *Id.* at 1583–84.

144. *Id.* at 1584.

145. *Id.*

146. *Id.*

147. *Id.* at 1600.

148. *Id.*

2. *Educational Reform*

Derrick Bell notes that *Grutter* is an example of interest convergence as a strategy for affirmative action in higher education.¹⁴⁹ The interests of minority students in attending elite universities converged with the interests of the military and big business in having their recruits and employees exposed to a diverse student body, and this convergence helped convince the Supreme Court to uphold the University of Michigan Law School's affirmative action program.¹⁵⁰

Interest convergence theory can also be used to reform public education.¹⁵¹ In *Caught in the Trap: Pricing Racial Housing Preferences*, Mechele Dickerson argues that if policymakers can convince middle-class parents who are fleeing urban school systems that it is in their interest to improve their schools, then both middle class parents and inner city school children will benefit.¹⁵² She proposes a public school choice and auction system to encourage middle-class parents to live in integrated neighborhoods.¹⁵³ Under her proposal, parents could rank their choices of public schools.¹⁵⁴ If they did not get into their first choice, they could buy a slot from a parent whose child did get into that school.¹⁵⁵ This would merge the interests of middle-income parents in giving their children a good education with those of minority children in going to good public schools.¹⁵⁶

Bryan Adamson uses interest convergence to advocate for school finance reform in Ohio.¹⁵⁷ Adamson argues any school finance reform that benefits African Americans without comparable benefits for wealthy suburban whites will be rejected or resisted.¹⁵⁸ He explains how school integration efforts in the 1960s and 1970s led to white flight into the suburbs.¹⁵⁹ "Ohio's largest cities, with one exception, have suffered net population losses, are poorer, and are now significantly or predominantly African-American."¹⁶⁰ Adamson notes that African Americans and whites have a "markedly different view of the role of courts on the

149. Bell, *Diversity's Distractions*, *supra* note 101, at 1624.

150. See *supra* notes 100–106 and accompanying text; see also Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future*, 47 HOW. L.J. 795 (2004) (arguing that integration was affirmed in *Grutter* not because it enhanced the lives of minorities, but because it "enhance[ed] the lives of Americans more generally").

151. A. Mechele Dickerson, *Caught in the Trap: Pricing Racial Housing Preferences*, 103 MICH. L. REV. 1273 (2005) (reviewing ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS & FATHERS ARE GOING BROKE (WITH SURPRISING SOLUTIONS THAT WILL CHANGE OUR CHILDREN'S FUTURES)* (2004)).

152. *Id.* at 1287.

153. *Id.* at 1290–94.

154. *Id.* at 1289.

155. *Id.* at 1291.

156. *Id.* at 1287.

157. Bryan L. Adamson, *The H'Aint in the (School) House: The Interest Convergence Paradigm in State Legislatures and School Finance Reform*, 43 CAL. W. L. REV. 173 (2006).

158. *Id.* at 174–75.

159. *Id.* at 176–77.

160. *Id.* at 181.

subject of school finance reform."¹⁶¹ He concludes that in order to be successful, school finance reform solutions "must represent some form of interest convergence."¹⁶²

3. *Political Reform*

Another area where legal scholars have used interest convergence as a tool of strategy or prediction is in pushing for progressive political reform. Sheryll Cashin, for example, argues that progressives need to focus on multi-racial coalition building to achieve political reform.¹⁶³ Cashin notes that "[t]he most significant debate in the political science literature about multiracial coalitions is whether interest or ideology is the more effective motivating force behind coalitions."¹⁶⁴ Cashin explains that "ideology" means the "pre-existing opinions and attitudes of a particular racial group toward another group."¹⁶⁵ "Interest," according to Cashin, is "the recognized tactical or strategic advantages that one racial group can gain by forming a coalition with another group."¹⁶⁶ Cashin notes that powerful conservative whites have used racial *ideology* to co-opt poor and working class whites whose interests, she argues, should be aligned with poor and working class minorities. Poor and working class whites align themselves with other whites because this makes them feel racially superior to non-whites. Cashin argues that rather than focusing on ideology, progressives should focus on similarity or *convergence of interests*.¹⁶⁷

Cashin points to one example of a multiracial, multi-class coalition that rose up in support of the Texas "10 percent plan," which guarantees admission to the public universities of that state to the top ten percent of every graduating high school class in Texas.¹⁶⁸ Developed by a group of Latino and Black activists, legislators, and academics, this legislation passed only because conservative Republican rural legislators whose constituents were not being admitted to the University of Texas decided to support it.¹⁶⁹

Another example of interest convergence as a tool of strategy for political reform is reflected in the legal scholarship on reparations for African-American descendants of slaves. Kevin Hopkins argues that in order for a reparations bill to become law, it would need to provide a significant benefit to White America.¹⁷⁰ Similarly, Charles Ogletree notes that reparations litigation has the power to create interest convergence between blacks and whites if, for example, "legislation for

161. *Id.* at 197.

162. *Id.* at 201.

163. Cashin, *supra* note 68.

164. *Id.* at 278.

165. *Id.*

166. *Id.*

167. *Id.* at 281, 289–91.

168. *Id.* at 288.

169. *Id.*

170. Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2540–41 (2001).

reparations could be generalized to erase societal disadvantages suffered by whites as well as blacks."¹⁷¹

Eric Yamamoto and his co-authors go one step further, explaining how granting reparations to African Americans can help America secure the moral high ground in the ongoing war on terror.¹⁷² They argue that "the United States may lack the unfettered moral authority and international standing to sustain a preemptive worldwide war on terror unless it fully and fairly redresses the continuing harms of its own long-term government-sponsored terrorizing of a significant segment of its populace."¹⁷³ Yamamoto notes that "President Bush implicitly acknowledged this 'interest-convergence' in his pre-9/11 anniversary news conference statement that 'in order for us to reject what was done to America on September 11th, we must reject bigotry in all forms.'"¹⁷⁴ Just as the United States of the early 1950s "needed to portray democracy as the morally superior, 'most civilized' form of government,"¹⁷⁵ the country today needs to promote its image as a benevolent democracy abroad.¹⁷⁶ It cannot do so if its treatment of African Americans is not just.

In another example of interest convergence as a tool of strategy, Richard Delgado suggests ways that interest convergence theory can support progressive

171. Ogletree, *supra* note 54, at 16–17.

172. Eric K. Yamamoto, Susan K. Serrano & Michelle Natividad Rodriguez, *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1331 (2003); *see also* DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* (2002) (arguing that the war on terror offers opportunities for interest convergence); Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121 (2003) (reviewing FRANCISCO VALDES ET AL., *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (2002)); Stephanie M. Weinstein, *A Needed Image Makeover: Interest Convergence and the United States' War on Terror*, 11 ROGER WILLIAMS U. L. REV. 403 (2006) (predicting that the need for foreign support in the war on terror will lead the U.S. government to grant concessions to domestic minorities).

173. Yamamoto et al., *supra* note 172, at 1294; *see also* Van B. Luong, Note, *Political Interest Convergence: African American Reparations and the Image of American Democracy*, 25 U. HAW. L. REV. 253, 274 (2002) (arguing that proponents of reparations should argue that reparations will enhance the United States' moral authority to persecute terrorists).

174. Yamamoto et al., *supra* note 172, at 1294 (citing News Release, White House Office of the Press Sec'y, President Bush Holds Roundtable with Muslim-American Leaders (Sept. 10, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/09/20020910-7.html>).

175. *Id.* at 1330.

176. Just as the United States, in the 1940s and 1950s, tried to silence blacks critical of American domestic policy by making it difficult for them to travel abroad while promoting blacks willing to say good things about the U.S., *see* DUDZIAK, *supra* note 57, the U.S. State Department today has created a new award that will honor groups that promote the image of the U.S. abroad, *see* Glenn Kessler, *U.S. Overseas Image Gets New Focus: State Dept. to Honor Groups that Promote Understanding*, WASH. POST, Jan. 10, 2007, at A4 (reporting the creation of a new annual award by the U.S. State Department to honor a "company, academic institution or other nongovernmental entity that does the most to promote the U.S. image abroad through intercultural understanding").

immigration reform and racial justice reform.¹⁷⁷ With the number of baby boomers now retiring, there will be an increasing need for caretakers for the elderly. Delgado notes that immigrants are more likely to empty bed pans and do work that is considered dirty, but this source of labor will not be available if Congress passes restrictive immigration legislation.¹⁷⁸ Additionally, in trying to convince Islamic countries that the United States represents a better, more egalitarian way of life, the U.S. appears hypocritical when it engages in racial profiling of Black and Brown motorists and imprisons mostly persons of color.¹⁷⁹

4. *Other Reform*

The ways in which interest convergence is used as a tool of strategy or prediction are not limited to workplace, educational, and political reform. Joseph Lubinski advocates for conscious application of interest convergence theory by animal rights activists seeking legislative reform to protect animals.¹⁸⁰ Lubinski suggests that in order to succeed, animal rights activists need to show how animal rights reform benefits humans and not just animals.¹⁸¹ For example, those supporting legislation punishing animal abusers might point out that people who abuse animals often go on to abuse human beings.¹⁸² To improve the lives of farm animals, animal rights activists might point out the potential health risks to humans from practices such as injecting farm animals with high doses of antibiotics that remain in the slaughtered animals' tissues only to be later ingested by consumers.¹⁸³ People who oppose the slaughter of animals for human consumption can point to the health benefits of a vegetarian diet, including cancer prevention and control.¹⁸⁴

In the domestic violence arena, Adele Morrison uses interest convergence theory to support a shift from a white-centered battered women discourse to a multicultural version with battered women of color at the center.¹⁸⁵ In *Deconstructing the Image Repertoire of Women of Color*, Morrison explores the ways in which whiteness permeates legal discussion of domestic violence to the detriment of all victims of intimate abuse, but particularly victims of color.¹⁸⁶ She calls for a multicultural approach, arguing that battered white women's interests

177. Richard Delgado, *Si Se Puede, But Who Gets the Gravy?*, 11 MICH. J. RACE & L. 9 (2005).

178. *Id.* at 17–18.

179. *Id.* at 18.

180. Joseph Lubinski, *Screw the Whales, Save Me! The Endangered Species Act, Animal Protection, and Civil Rights*, 4 J.L. SOC'Y 377 (2003).

181. *Id.* at 407–11.

182. *Id.* at 409.

183. *Id.* at 410–11.

184. *Id.*

185. Adele M. Morrison, *Deconstructing the Image Repertoire of Women of Color: Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1114–15 (2006).

186. *Id.*

converge with those of battered women of color in having a responsive legal system.¹⁸⁷

III. CULTURAL CONVERGENCE THEORY

Just as interest convergence theory helps us understand the forces that may have motivated certain Supreme Court decisions beneficial to minorities such as *Brown* and *Hernandez*, *cultural convergence* theory can help us understand why certain cultural defense arguments seem to be more successful than others. *Cultural convergence* is the idea that a “cultural defense” is more likely to succeed when the cultural norms underlying an immigrant or minority defendant’s cultural defense claim converge with the cultural norms of American society.¹⁸⁸ Like interest convergence theory, cultural convergence theory can be used to explain the underlying forces behind a particular decision or series of decisions. It might also be used as an affirmative tool of strategy or prediction.¹⁸⁹ Cultural convergence, however, focuses on the presence or absence of overlapping cultural *norms* as opposed to converging *interests*.

Three generally successful cultural defenses illustrate cultural convergence. A fourth type of cultural defense, which is rarely successful, reflects cultural norm convergence in its successful application. These successful cultural defenses often reinforce racial or ethnic stereotypes.

First, Asian immigrant men who have killed their unfaithful Asian immigrant wives have successfully claimed that in light of their cultural background, they were reasonably provoked into a heat of passion and should not be convicted of murder. Such claims, however, are not culturally unique. In this country, we have a long history of excusing American men who kill their unfaithful wives.¹⁹⁰ In other words, the reason behind the success of the Asian immigrant man’s provocation claim may not be not so much because of his immigrant status, but rather because his underlying claim is familiar and resonates with the judge and jury. Moreover, while acceptance of such claims is often viewed as a positive sign that Americans are willing to accept immigrants and their

187. *Id.* at 1115.

188. Not all successful “cultural defense” cases can be explained as the result of cultural norm convergence. *See, e.g.*, *State v. Kargar*, 679 A.2d 81 (Me. 1996) (vacating conviction on two counts of gross sexual assault arising from Afghan father’s kissing of his 18-month-old son’s penis after considering testimony on the Afghani practice and custom of kissing a young son’s penis to show love for the child); *see also* Wanderer & Connors, *supra* note 6. However, given that most attempts to use culture as a defense tactic are unsuccessful, the apparent convergence of cultural norms in many of the cases where cultural evidence is successfully employed is all the more striking.

189. In this Article, I use cultural convergence to explain the successful use of cultural evidence in four types of cultural defense cases. While cultural convergence might also be useful as an affirmative tool of strategy or prediction, my focus in this Article is on cultural convergence as explanation. I leave for another day (or for other legal scholars) the discussion of cultural convergence as an affirmative tool of strategy or prediction as well as other possible applications of cultural convergence theory to explain trends in cases outside the cultural defense arena.

190. *See* LEE, *supra* note 27, ch. 1.

different cultures, such acceptance also reflects and reinforces negative stereotypes about Asian men as barbaric foreigners who do not value human life as much as Americans do.

Second, Asian immigrant women who attempt to commit parent-child suicide in response to spousal infidelity, but succeed only in killing the children, are often found guilty of manslaughter rather than murder. While at first glance it appears that the cultural background of the immigrant female defendant plays a key role in mitigating murder charges down to manslaughter, it turns out that many American women who kill their children under similar circumstances are also convicted of manslaughter rather than murder. Gender role stereotyping, depicting the woman as emotionally weak and dependent upon her husband for her happiness, as opposed to cultural difference, may explain the mitigation in these kinds of cases.

Third, when a Hmong man charged with rape claims he thought the sex was consensual given the Hmong cultural practice of marriage by capture and the prosecutor allows him to plead guilty to a lesser offense, it may appear at first glance that the prosecutor is giving undue weight to the defendant's cultural claim. However, plea bargaining is not uncommon in America. In some jurisdictions, as many as ninety-six percent of all criminal cases end in a plea agreement prior to trial.¹⁹¹ In date rape cases in particular, it is fairly common for the prosecutor to accede to a plea bargain because of the uncertainties involved in trying a "he said/she said" case. In other words, the Hmong defendant succeeds in having his rape charge mitigated not necessarily because the prosecutor places a high value on cultural difference, but because the underlying claim reflects a familiar American cultural norm. A defendant who reasonably believes a woman has consented to sexual intercourse is not guilty of forcible rape. Accepting the Hmong defendant's claim not only comports with this tradition, it also reinforces negative stereotypes about Asian males as misogynistic foreigners who mistreat women.

Finally, when an African-American man charged with a crime of violence against a white man claims "Black Rage" or some other race-based deviance defense and wins an acquittal of the most serious charges leveled against him, cultural convergence is difficult to see because no comparable "White Rage" defense would be available for a Caucasian charged similarly. Nonetheless, cultural convergence can also help explain these cases. A Black Rage defense reinforces stereotypes about Black men as dangerous, violent criminals—stereotypes that prevail in our society today.¹⁹²

191. U.S. SENTENCING COMM'N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig. c (2006); Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 *FORDHAM L. REV.* 2711, 2764 (2005). Tina Olson reports that after passage of California's Three Strikes law, "plea agreements [in California] totaled ninety-one percent of the felony convictions." Tina M. Olson, *Strike One, Ready for More? The Consequences of Plea Bargaining "First Strike" Offenders Under California's "Three Strikes" Law*, 36 *CAL. W. L. REV.* 545, 561 (2000).

192. See LEE, *supra* note 27, at 120–21; see also SHERENE H. RAZACK, *LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTROOMS AND*

The successful cultural defense both resonates with dominant cultural norms and is cabined or particularized through the cultural link so the legal decision-maker does not feel a favorable decision will open the floodgates to leniency. Judges, jurors, and prosecutors attempting to be culturally sensitive often end up reinforcing negative stereotypes about the racial or ethnic group of the defendant.

A. Asian Immigrant Men Who Kill Their Unfaithful Asian Immigrant Wives

When an Asian immigrant man kills his wife after discovering she has been unfaithful, he may claim that his behavior was culturally motivated and that therefore he should not be punished as a murderer. One of the most notorious of these cases is *People v. Chen*.¹⁹³ Dong Lu Chen, an immigrant from China, was charged with second-degree murder for killing his wife by striking her eight times over the head with a claw hammer after she confessed to adultery and refused to have sex with him.¹⁹⁴ At a bench trial, Chen's attorney called Burton Pasternak, a cultural anthropologist who had done fieldwork in China, to testify that Chen's violent reaction to his wife's confession was not at all unusual given his Chinese cultural background. Pasternak testified that "one could expect a Chinese to react in a much more volatile, violent way to those circumstances" than an American man¹⁹⁵ because a wife's adultery was considered a stain on the husband, who would be viewed as unable to maintain control of his wife.¹⁹⁶ In other words, it was reasonable for Chen, a Chinese man, to become provoked by his wife's infidelity.¹⁹⁷

Pasternak further testified that "in traditional Chinese culture, due to societal beliefs concerning infidelity, a Chinese man might threaten to kill his wife

CLASSROOMS 60 (1998) (discussing the "culturalization of racism" wherein "Black inferiority is attributed to 'cultural deficiency, social inadequacy, and technological underdevelopment'").

193. For a detailed account of the Chen case, see Volpp, *(Mis)Identifying Culture*, *supra* note 6, at 64–77. For descriptions of other cases involving Asian immigrant men who killed their Asian immigrant wives and made a cultural claim that they were provoked by their wife's infidelity, see Lee, *supra* note 27, at 113–17.

194. See Chiu, *The Cultural Defense*, *supra* note 6, at 1053 (noting that prosecutors initially charged Chen with second-degree murder, and that Chen was convicted of second-degree manslaughter).

195. Volpp, *(Mis)Identifying Culture*, *supra* note 6, at 66.

196. *Id.* at 69.

197. While some accounts of the Chen case report that the defense asserted was insanity, Chen's attorney, Stewart Orden, asserts that the thrust of the defense was that at the moment of the attack, Chen was unable to form a specific intent to kill or seriously injure. Email from Stewart Orden, attorney for Dong Lu Chen, to author (Mar. 15, 2007) (on file with author). Orden also argued that Chen acted under the influence of an extreme emotional disturbance (the Model Penal Code's version of the provocation defense). See Coleman, *Culture, Cloaked in Mens Rea*, *supra* note 6, at 985; Telephone Interview by Philip Cardinale with Stewart Orden, attorney for Dong Lu Chen (Aug. 29, 2005) ("[The] defense was that it was extreme emotional distress but it was so extreme as to render any intentionality on [Chen's] part to be nonexistent at the time he was striking her with the hammer. He had formed no intent to cause her injury.").

if she commits adultery. However, the Chinese community usually stops him from following through with his threats.¹⁹⁸ Because Chen was in America when he discovered his wife's adultery, he did not have the usual community safeguards in place to stop him from killing his wife.¹⁹⁹

Persuaded by these arguments, the judge presiding over Chen's bench trial acquitted Chen of second-degree murder and found him guilty of manslaughter.²⁰⁰ He then sentenced Chen to five years of probation.²⁰¹ Brooklyn Supreme Court Justice Edward Pincus explained:

Were this crime committed by the defendant as someone who was born and raised in America, or born elsewhere but primarily raised in America, even in the Chinese American community, the Court would have been constrained to find the defendant guilty of manslaughter in the first degree. But, this Court cannot ignore . . . the very cogent forceful testimony of Doctor Pasternak, who is, perhaps, the greatest expert in America on China and interfamilial relationships.²⁰²

The judge concluded that Chen "was the product of his culture. . . . The culture was never an excuse, but it is something that made him crack more easily. That was the factor, the cracking factor."²⁰³

Although Chen's case seems like an example of culture winning out over all other considerations, cultural convergence may have contributed to the outcome. Rather than being culturally unique, Chen's claim of having acted reasonably in response to his wife's confession of adultery echoes claims of legally adequate provocation made by countless American men who have killed their

198. Nicole A. King, *The Role of Culture in Psychology: A Look at Mental Illness and the "Cultural Defense,"* 7 TULSA J. COMP. & INT'L L. 199, 221 (1999) (citing Gallin, *supra* note 6, at 730).

199. See Volpp, *(Mis)Identifying Culture*, *supra* note 6, at 73. Volpp points out that Pasternak's "bizarre portrayal of divorce and adultery in China in fact had little basis in reality." *Id.* at 70. When the prosecutor cross-examined Pasternak, he "admitted he could not recall a *single instance* in which a man in China killed his wife [for being unfaithful] or having ever heard about such an event, yet he suggested this was accepted in China." *Id.* (emphasis in original).

200. There is some confusion over whether Justice Pincus reduced the charge from murder to manslaughter, or merely reduced the charge from first-degree manslaughter to second-degree manslaughter. Compare Chiu, *The Cultural Defense*, *supra* note 6, at 1053 (noting that prosecutors initially charged Chen with second-degree murder, but that Chen was convicted of second-degree manslaughter), with Hoeffel, *supra* note 21, at 316 (stating that Justice Pincus reduced the charge from first-degree manslaughter to second-degree manslaughter). According to Stewart Orden, Chen's attorney, Justice Pincus acquitted Chen of second-degree murder and found him guilty of the lesser included offense of manslaughter. Email from Stewart Orden to author, *supra* note 197. The judge found Chen guilty of second-degree manslaughter. Volpp, *(Mis)Identifying Culture*, *supra* note 6, at 64.

201. Volpp, *(Mis)Identifying Culture*, *supra* note 6, at 64.

202. *Id.* at 73 (quoting Transcript of Record at 301-02, *People v. Chen*, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988)).

203. Chiu, *The Cultural Defense*, *supra* note 6, at 1053.

unfaithful wives.²⁰⁴ At early common law, a husband who killed his wife after catching her *in flagrante delicto* (i.e. in the act of adultery) fell into one of the few categories of legally adequate provocation that automatically mitigated a murder charge down to voluntary manslaughter. In some jurisdictions, a man who killed under such circumstances was guilty of no crime at all.²⁰⁵ In recent times, American men who have killed their female partners (or former partners) in response to acts as innocuous as dancing with another man have succeeded in mitigating their murder charges down to manslaughter by arguing they were acting under an extreme emotional disturbance, the Model Penal Code's version of the provocation defense.²⁰⁶ Given this history, it is not surprising that in many cases in which an Asian immigrant man has killed his wife in response to her infidelity, the defendant benefits from the provocation mitigation.²⁰⁷ He benefits precisely because his claim is familiar.²⁰⁸

Justice Pincus would likely deny that he granted the provocation mitigation because of any sympathy for men who kill in response to wifely infidelity. Indeed, he was careful to explain that he would have decided the case differently had Chen been an American, or even had Chen been a Chinese

204. See LEE, *supra* note 27, at 114 ("American men who kill their wives, like Chen, often base their claim of reasonableness on the threat to masculine honor and identity posed by a wife's sexual infidelity.").

205. *Id.* at 20 (noting that Georgia, Texas, Utah, and New Mexico deemed the husband's killing of his wife or her lover after catching them in the act of adultery a justifiable homicide).

206. Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1405 (1997); see MODEL PENAL CODE § 210.3(1)(b).

207. For example, Chanh Van Duong, a Vietnamese immigrant, shot and killed his estranged wife outside a courtroom because she wanted a divorce. Duong was charged with murder. He argued he was provoked into a sudden heat of passion when he saw his wife with her new boyfriend and was convicted of manslaughter. *Briefing*, COLO. SPRINGS GAZETTE TELEGRAPH, Aug. 12, 1998, at B7. Similarly, May Aphaylath, a Laotian man, killed his wife after finding her on the phone with her former boyfriend. At his trial for murder, Aphaylath's attorneys tried to introduce expert witnesses who could testify that in Laos, a husband whose wife receives calls from a single man can be expected to lose his self-control. The trial judge refused to allow such testimony and Aphaylath was convicted of murder. Aphaylath's conviction was reversed on the ground that the expert testimony should have been admitted. Aphaylath then pled guilty to manslaughter. Associated Press, *Refugee to Get New Murder Trial*, N.Y. TIMES, Nov. 16, 1986, at 54; Robert Bellafiore, *Court Overturns Laotian Refugee's Murder Conviction*, UPI, Nov. 13, 1986; *New Trial in Killing*, NEWSDAY, Nov. 14, 1986.

208. Coleman argues that in finding Chen guilty of second-degree manslaughter, reckless homicide without intent, Justice Pincus gave Chen more of a break than a similarly situated non-Chinese American would have received. Coleman, *Culture, Cloaked in Mens Rea*, *supra* note 6, at 987. While it is true that one who is provoked into a heat of passion normally will have his (or her) murder charge reduced to voluntary manslaughter as this is what the law permits, a judge or jury has the power to be more lenient than otherwise required by the law. Chen is not the only man in the United States who has killed his wife in response to her infidelity and received more leniency than what the law would require. See LEE, *supra* note 27, ch. 1.

American.²⁰⁹ Ostensibly, Chen's Asian immigrant culture was the deciding factor for the judge. Social science research on cognition, however, suggests that expressed attitudes often mask true attitudes as the subject may feel the need to conform to socially accepted norms.²¹⁰

Given the contested meaning of spousal infidelity killings in American society today, the judge may have relied on "culture" as reflected in anthropologist Burton Pasternak's rendition of Chinese culture to justify a decision that may have otherwise appeared gender biased. In so doing, his decision to grant leniency to Chen reinforced the long-standing American cultural norm that empathizes with a husband who kills after discovering his wife has committed adultery.²¹¹

Sarah Song notes that patriarchal mainstream norms often shape the frameworks within which minority claims are evaluated.²¹² According to Song, "there is a striking congruence in the norms of majority and minority cultures regarding the realm of intimate relations between the sexes," a congruence that helps us understand why cultural defense claims tend to be successful when they involve intimate sexual relations and stories of betrayal.²¹³ This phenomenon is not unique to American courts. Anne Phillips observes that cultural arguments raised

209. See Volpp, *(Mis)Identifying Culture*, *supra* note 6, at 73 (quoting Transcript of Record at 301–02, *People v. Chen*, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988)).

210. See Robert S. Chang & Rose Cuison Villazor, "Testing the 'Model Minority Myth': A Case of Weak Empiricism," 2007 NW. U. L. REV. COLLOQUY 101, 106 (2007) (discussing the gap between attitudes as expressed and people's "true" attitudes). One empirical study, for example, tested bias against the disabled. Vanessa Lynn Ewing et al., *Student Prejudice Against Gay Male and Lesbian Lecturers*, 143 J. SOC. PSYCH. 569 (2003) (discussing M.L. Snyder et al., *Avoidance of the Handicapped: An Attributional Ambiguity Analysis*, 37 J. PERSONALITY & SOC. PSYCH. 2297 (1979)). Participants in that study were asked to choose one of two rooms in which to watch a movie. The researchers found that when the same movie was playing in both rooms, and a disabled person sat in one room while the other room was empty, most participants chose to sit in the room with the person in the wheelchair, and sat down next to the disabled person. When researchers offered two different movies, one in an empty room, and one playing in a room with a disabled person, most participants chose to watch the movie in the empty room, regardless of the movie that was playing there. Robert Chang and Rose Cuison Villazor explain these results:

The results from the first situation accord with social norms about how one should act towards those with different abilities. Though participants might prefer not to sit next to the person in the wheelchair, the fear of appearing prejudiced led them to overcome that preference. The results from the second situation, though, show that the force of the social norms is insufficient to overcome the participants' preferences when they can justify or rationalize their behavior as being based on movie choice and not prejudice. Thus, . . . conclusions drawn from the expressed attitudes [in the General Social Survey context] are likely to tell us little about real world discrimination.

Chang & Villazor, *supra*, at 6.

211. See LEE, *supra* note 27, ch. 1.

212. Sarah Song, *Majority Norms, Multiculturalism, and Gender Equality*, 99 AM. POL. SCI. REV. 473, 480 (2005) (calling the support offered by mainstream gender norms to gender hierarchies in minority cultural communities the "congruence effect").

213. *Id.*

by minority defendants in English cases are most effective when they resonate with mainstream patriarchal English conventions.²¹⁴

An additional dynamic may underlie the appeal of culture in cases involving Asian men who kill their unfaithful wives: the reinforcement of negative stereotypes about Asians and Asian Americans. While less empirical research has been conducted on stereotypes about Asians than about other minority groups, those in the Asian American community are well aware of the many stereotypes about Asians that others consciously or unconsciously embrace.²¹⁵

214. Anne Phillips, *When Culture Means Gender: Issues of Cultural Defence in the English Courts*, 4 MOD. L. REV. 510 (2003).

215. Several Asian American scholars have written about these stereotypes. See, e.g., ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE 48 (1999) [hereinafter CHANG, DISORIENTED]; LEE, *supra* note 27, at 159–74 (discussing three stereotypes about Asian Americans, including the Asian-as-Foreigner stereotype, the Asian-as-Model Minority stereotype, and the Asian-as-Martial Artist stereotype); FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (2002); ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001) [hereinafter YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATION*]; Keith Aoki, “Foreignness” and Asian American Identities: *Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1, 1 (1996) (“From the beginning of judicial review of first Chinese Americans and then Japanese Americans in the nineteenth century, there has been a persistent view that the racial identity of Asians within the United States, even those born here and culturally assimilated, [was] distinctly ‘foreign.’” (citation omitted)); Chang & Villazor, *supra* note 210 (discussing the model minority myth); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1243 (1993) [hereinafter Chang, *Toward an Asian American Legal Scholarship*]; Pat K. Chew, *Asian Americans: The “Reticent” Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 14 (1994) (discussing the Asian-as-Foreigner stereotype and noting that historically, Americans have viewed Japanese immigrants as militaristic and aggressive); Gabriel J. Chin et al., *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice: A Policy Analysis of Affirmative Action*, 4 UCLA ASIAN PAC. AM. L.J. 129 (1996); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 186 (1997) (examining the ways in which the model minority stereotype converges with “stock portrayal[s] of obedient and servile Asian Pacific American women in popular culture”); Neil Gotanda, *Asian American Rights and the “Miss Saigon Syndrome,”* in ASIAN AMERICANS AND THE SUPREME COURT 1087 (Hyung-Chan Kim ed., 1994) [hereinafter Gotanda, *Asian American Rights and the “Miss Saigon Syndrome”*]; Cynthia Kwei Yung Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 HASTINGS WOMEN’S L.J. 165 (1995) (discussing racial stereotypes about the Asian Americans involved in the O.J. Simpson trial); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 71 (1997) (“By characterizing those of Asian descent as ‘foreigners,’ dominant society is able to slip freely from the model minority to the yellow peril label.”); Leti Volpp, *On Culture, Difference, and Domestic Violence*, 11 AM. U. J. GENDER SOC. POL’Y & L. 393, 397 (2003) (noting that many writers have “assert[ed] that there is something more misogynistic about Asian immigrant communities than ‘our own’”); Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995) [hereinafter Wu, *Neither Black Nor White*] (providing both a historical account of the model minority myth

One common stereotype about Asian Americans is the “Asian-as-Model Minority” stereotype which “depicts Asian Americans as achieving success through cultural values and hard work.”²¹⁶ The “Asian-as-Model Minority” stereotype works as both a blessing and a curse: it supports the view that Asian Americans are smart and hard-working, but it can foster hostility against persons of Asian descent who are seen as a monolithic group taking valuable jobs and educational opportunities away from “real” Americans.²¹⁷

For example, Asian Americans are often resented for taking up space at elite schools. At the University of California at Los Angeles (“UCLA”), a common joke for a while was that UCLA stood for United Caucasians Lost Among Asians.²¹⁸ Sometimes this resentment against Asians can lead to adverse changes in admissions policies. In 1984, for example, the University of California at Berkeley (“U.C. Berkeley”), regarded as the flagship of the University of California system, implemented a policy raising the requisite verbal score for

and an explanation of the modern model minority myth); Eric K. Yamamoto, *Friend, or Foe or Something Else: Social Meanings of Redress and Reparations*, 20 DENV. J. INT’L L. & POL’Y 223, 236 (1992) (noting that the unspoken message conveyed through Japan bashing is that “unscrupulous Asians [are] stealing United States business opportunities”); Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 ASIAN L.J. 1 (2000) (discussing the Asian-as-Model Minority and Asian-as-Yellow Peril stereotypes); Neil Gotanda, “Other Non-whites” in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1191 (1985) (book review) (discussing the “notion of ‘foreignness’” as one of the critical features of legal treatment of Japanese Americans and Chinese Americans); Jerry Kang, Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1935 (1993) (noting that during times of economic strife, racial hostility towards all Asian Americans increases because of “the misperception that Asian Americans ‘steal’ valuable” job opportunities from more deserving Americans).

216. Chang & Villazor, *supra* note 210, at 101. Rhoda Yen notes that “the post-1965 Asian immigrants were largely drawn from the wealthiest and most educated groups in their native countries” and that “[a]s exposure to this minority group increased, white Americans may have formed their ideas of Asian Americans from the limited number of wealthy, educated Asians who lived and worked among them.” Yen, *supra* note 215, at 2–3. For additional discussion of the model minority stereotype, see YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION, *supra* note 215, at 267–69; Chew, *supra* note 215; Chin et al., *supra* note 215; Saito, *supra* note 215; Wu, *Neither Black Nor White*, *supra* note 215.

217. In *Testing the “Model Minority Myth,”* Miranda Oshige McGowan and James Lindgren argue that empirical data do not support the belief that white Americans hold negative stereotypes associated with viewing Asian Americans as a “model minority.” Miranda Oshige McGowan & James Lindgren, *Testing the “Model Minority Myth,”* 100 NW. U. L. REV. 331 (2006). In response, Robert Chang and Rose Cuison Villazor show that McGowan and Lindgren’s argument is flawed because it relies heavily on data produced by asking white respondents about their racial attitudes in face-to-face interviews. Chang and Villazor assert that this methodology is unlikely to yield true data about racial attitudes as it is infected with problems of response falsification and cannot ferret out subtler forms of racial bias. Chang & Villazor, *supra* note 210, at 103.

218. John Schwartz et al., *The “Eastern Capital” of Asia*, NEWSWEEK, Feb. 22, 1988, at 56 (“At UCLA, where Asians make up upwards of 18 percent of the student body, Anglo students joke that the school’s initials really stand for ‘United Caucasians Lost Among Asians.’”).

immigrants on the SAT to 400 and automatically redirecting applications of Asian American students eligible for the Educational Opportunity Program to other U.C. campuses.²¹⁹ This policy had the effect of substantially limiting the number of Asians admitted to U.C. Berkeley.²²⁰ Initially, university officials denied that the minimum SAT score for immigrants policy had been implemented, claiming that the policy was discussed orally, but never adopted in written form.²²¹ However, “[f]ollowing two years of heated, public exchanges over the reasons behind the unexpected drop in [Asian American admissions] in 1984 and mounting public skepticism over the university’s handling of the Asian American concerns, the California Auditor General, acting on a request by the State Legislature, conducted an extensive, independent audit of Berkeley’s admissions records for the period 1981 to 1987.”²²² Following this audit, the SAT policy memo surfaced²²³ and with it an apology from Berkeley Chancellor Ira Michael Heyman to the Asian community on the University’s lack of sensitivity in handling the charges of bias in Asian admissions.²²⁴

Another common trope is the “Asian-as-Foreigner” stereotype. Neil Gotanda notes that “[f]rom the beginning of judicial review of first Chinese Americans and then Japanese Americans in the nineteenth century, there has been a persistent view that the racial identity of Asians within the United States, even those born here, and culturally assimilated, [is] distinctly ‘foreign.’”²²⁵ This perception that persons of Asian descent are foreign-born persists today. Well-meaning Americans will often remark that they are impressed at how well an Asian American speaks English. The unstated assumption is that this Asian person came from a country in Asia and had to learn English as a second language. Sometimes the assumption of foreignness becomes very clear as when someone asks an Asian American where he or she comes from. When the Asian American replies, “Oakland, California,” the questioner persists, often asking, “No, I mean where do you *really* come from?”²²⁶

219. Dana Y. Takagi, *From Discrimination to Affirmative Action: Facts in the Asian American Admissions Controversy*, 37 SOC. PROBS. 578, 580 (1990).

220. The number of Asian American freshmen at U.C. Berkeley dropped from 1,239 in 1983 to 1,008 in 1984. L. Ling-Chi Wang, *Meritocracy and Diversity in Higher Education: Discrimination Against Asian Americans in the Post-Bakke Era*, 4 INST. FOR SOC. SCI. RES. 1, 5 (1988). Wang notes that “with the exception of [Filipino] Americans, who were protected by an affirmative action program, every Asian American sub-group registered a decline” in admissions. *Id.* “The sharpest reduction occurred among Chinese American freshmen, dropping from 609 in 1983 to 418 in 1984 or by 30% in one year. By comparison, White freshmen admissions declined by only 4%, from 2,425 to 2,327.” *Id.*; see also Grace W. Tsuang, Note, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L.J. 659, 674 (1989).

221. Takagi, *supra* note 219, at 580 n.2.

222. Wang, *supra* note 220, at 6.

223. Takagi, *supra* note 219, at 580 n.2.

224. *Id.* at 587.

225. Gotanda, *Asian American Rights and the “Miss Saigon Syndrome,” supra* note 215, at 1095.

226. Professor Pat Chew recounts the following:

While the “Asian-as-Foreigner” stereotype seems innocuous on the surface, it can contribute to acts of violence against Asians. Jerry Kang notes that Asian Americans are often targets of robbery because of the misperception that all Asians distrust banks and carry a lot of cash.²²⁷ In another example of violence against Asian Americans arising from perceptions of foreignness, Vincent Chin, a Chinese American man, was beaten to death with a baseball bat in Detroit, Michigan by two men who thought Chin was Japanese and somehow responsible for declining American automobile sales.²²⁸ Chin had gone to a strip bar to celebrate his upcoming marriage. Ronald Ebens and Michael Nitz, two white men, were sitting directly across from Chin and his group of friends. They started calling Chin a “Nip” (a derogatory term for a person of Japanese descent, derived from the word “Nippon” which is the Japanese word for Japan) and one yelled, “It’s because of you little mother fuckers that we’re out of work.” Chin got up and went over to Ebens and threw a punch. A scuffle ensued and Chin, Ebens and Nitz were asked to leave the bar. Ebens retrieved a baseball bat from Nitz’s car and began chasing Chin. When the two men caught up with him, Ebens struck Chin repeatedly in the head with the baseball bat. Chin died four days later. As Robert Chang explains:

People like Chin were making people like Ebens and Nitz lose their jobs. Even though Ebens was still employed as a foreman in an automobile plant, he clearly identified with laid-off autoworkers. But there was more. Chin was displacing them as (the rightful) consumers of sexual attention. Here we have economics, race, gender, and sexuality coming together in interesting ways. Loss of jobs entails a loss of masculinity. The loss of masculinity was caused by a racial and foreign Other, an Asian man who in many ways was just like them. The bonding that might normally take

When people first meet me, it is not unusual for them to comment, “You speak so well, you don’t have an accent,” intending their observation to be a compliment. “Where are you from?” they continue, expecting my response to be a more foreign and exotic place than Texas or Pennsylvania.

A tall red-haired, casually dressed gentleman that I didn’t know recently knocked on my office door. “Yes?” I greeted. “Sorry to interrupt you,” he stammered, “I was visiting the law school and I saw the name on your door, and old family friends are named ‘Chew,’ and I thought you might be related, but” he paused, “I can see I’m wrong. *They’re American.*”

Chew, *supra* note 215, at 33 (emphasis added); see also LEE, *supra* note 27, at 165–70 (discussing the Asian-as-Foreigner stereotype).

227. Kang, *supra* note 215.

228. United States v. Ebens, 800 F.2d 1422, 1427 (6th Cir. 1986), *abrogated on other grounds* by Huddleston v. United States, 485 U.S. 681 (1988); Chang, *Toward an Asian American Legal Scholarship*, *supra* note 215, at 1252–53; Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verite and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347 (1996); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Construction of Reasonableness*, 81 MINN. L. REV. 367 (1996); WHO KILLED VINCENT CHIN? (Film News Now Foundation & WTVS-Detroit Public Television 1988).

place between men in a strip club is disrupted by Chin's Asianness. Further, the Asian man may be improperly consuming the sexual attention of a white woman, which, in part, he is able to do because he is doing well, economically, by displacing people like Ebens and Nitz from their jobs. We have, then, a double displacement along with a threat to racial purity, a threat to the very whiteness that provides their sense of place and entitlement in America.²²⁹

The "Asian-as-Foreigner" stereotype spawns other deeply entrenched perceptions about Asians and Asian Americans. Asian culture, in contrast to Western culture, is considered uniquely misogynistic and patriarchal.²³⁰ Asians are thought not to value human life to the same extent as Americans. For example, Keith Aoki writes about "the enduring popularity in the United States of the hari-kiri/kamikaze stereotype, which began circulating during World War II as supposed evidence of the lack of value placed on individual human life by the Japanese."²³¹ Darrell Hamamoto notes that a similar image of the Vietnamese as ruthless individuals who placed little or no value on human life surfaced during the Vietnam War.²³² The confluence of these images contributes to an "Asian-as-Yellow Peril" stereotype, which reflects the view that persons of Asian descent are not just foreigners, but foreigners with inferior cultural practices and behaviors.²³³ In Dong Lu Chen's case, the lenient sentence ostensibly based on Chen's cultural background reinforced the popular perception that Chinese men are more patriarchal and misogynistic than American men.

In explaining his verdict and sentence in cultural terms, Justice Pincus was giving Western culture "an implicit . . . pat on the back for [its] progressiveness and fairness."²³⁴ At the same time, under the guise of cultural sensitivity, the judge's ruling strengthened the image of a patriarchal Chinese culture where men brutally beat their unfaithful wives to death.²³⁵ American mainstream culture "was the implicit backdrop"²³⁶—a place where this kind of

229. CHANG, DISORIENTED, *supra* note 215, at 24–25.

230. Cho, *supra* note 215, at 184 (noting that in the 19th century, "[s]ensational newspaper headlines reflected the widespread characterization[s] of [Asian Pacific American] women as the abused chattel of brutal Chinese proprietors"); Yen Ling Shek, *Asian American Masculinity: A Review of the Literature*, 14 J. MEN'S STUD. 379, 381 (2006) (noting that the popular American movie *The Joy Luck Club* portrayed Asian American men "as misogynistic and cheap"); Volpp, *supra* note 215, at 393 (noting that legal scholars often depict Asian immigrant communities as more misogynistic than Western communities).

231. Aoki, *supra* note 215, at 38.

232. DARRELL Y. HAMAMOTO, MONITORED PERIL: ASIAN AMERICANS AND THE POLITICS OF TV REPRESENTATION 156 (1994) ("[T]he dehumanized Asians—'dinks,' 'gooks,' and 'slopes'—place a low premium on life itself.").

233. Yen, *supra* note 215, at 6; *see also* Saito, *supra* note 215, at 90–93 (identifying harms to Asian Americans arising from the ascription of foreignness).

234. Sonia N. Lawrence, *Cultural (In)Sensitivity: The Dangers of a Simplified Approach to Culture in the Courtroom*, 13 CAN. J. WOMEN & L. 107, 117 (2001).

235. *See id.* at 113 (discussing the bail hearing for a Sri Lankan man charged with beating and burning two female cousins for talking to boys at school).

236. *Id.*

behavior is unacceptable.²³⁷ Like many judges and jurors deciding guilt or punishment in cultural defense cases, Justice Pincus was unable to discern the similarities between Chinese cultural practices and Western practices.²³⁸

What happens in courtrooms where cultural claims are asserted, according to Sonia Lawrence, “can be seen as a modern project of racialization, namely a more ‘sophisticated’ version of the blunt attribution of inferior traits to non-Whites that thereby attaches the inferiority label not to the individuals but rather to their culture.”²³⁹ For example, in cases involving dowry murders, “an aspect of the phenomenon dissimilar to the experience in Western cultures, the use of fire as a murder weapon, becomes the central focus of the ‘Othering’ project.”²⁴⁰ Any similarity to Western cultural practices such as domestic violence is “systematically effaced and obscured through a selective gaze and presentation.”²⁴¹ Thus, when an American burns his wife or girlfriend,²⁴² the defendant’s actions are rarely seen as a reflection of American culture. Leti Volpp explains:

We identify sexual violence in immigrant[s] of color and Third World communities as cultural, while failing to recognize the cultural aspects of sexual violence affecting white mainstream women. This is related to the general failure to look at the behavior of white persons as cultural, while always ascribing the label of culture to the behavior of minority groups.²⁴³

One problem with the reliance on culture to justify a lenient sentence or verdict is that an essentialized view of the defendant’s culture tends to emerge.²⁴⁴

237. See *id.* at 117.

238. See *id.* (“A crucial aspect of the courts’ approach to culture is the seeming inability of the judge’s gaze to discern similarity between ‘Third World’ cultural practices and those ‘Western’ ones with which the judge is deeply familiar and adjudicates every day.”); Muneer I. Ahmad, *A Rage Shared by Law: Post September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1308 (2004) (“Honor crimes in the Muslim world have become a topic of great interest in the West in recent years, but far less attention has been paid to how violence in defense of honor operates in the United States.”).

239. Lawrence, *supra* note 234, at 112.

240. *Id.* at 116.

241. *Id.*

242. See Ruben Castaneda, “*He Said He Wanted to Fry Me like Crisco Grease,*” WASH. POST, Apr. 26, 2006, at B1 (On October 10, 2006, Roger Hargrave walked into a T-Mobile store in Clinton, Maryland where his wife Yvette Cade was working, poured gasoline onto her head and shoulders and set her on fire.); *Developments in Los Angeles County: Man Sets Wife, Mother Afire, Then Surrenders*, L.A. TIMES, Feb. 18, 2000, at B4 (A man walked into a police station in Southern California and told police that he had doused his wife and her mother with gasoline and set them afire.); Allison Klein & Philip Rucker, *Woman Set Afire in Landover*, WASH. POST, July 30, 2006, at C1 (A “landscaper doused his girlfriend with gasoline and set her on fire” in Prince George’s County, Maryland on July 29, 2006.); Kris Mayes, *Woman Set Afire Was Abused*, ST. PETERSBURG TIMES, July 29, 1998, at 1B; Eve Sullivan, *Man Set Fiancée on Fire*, ADVOCATE, Jan. 13, 2004, at A1 (A Stamford, Connecticut man was charged with attempted murder after dousing his 26 year-old fiancée with gasoline and setting her on fire in his van).

243. Leti Volpp, *Feminism and Multiculturalism*, 101 COLUM. L. REV. 1181, 1189 (2001).

244. Lawrence, *supra* note 234.

Culture is seen through the defendant's eyes, and the end result is a submerging of other views of that culture and an obscuring of the fact that cultural norms change over time.²⁴⁵ In the Chen case, Burton Pasternak suggested that Chinese culture is uniquely patriarchal, a place where Chinese men feel entitled to fly out of control and react with violence if they find out their wife has been unfaithful. While this image of China might have been an accurate reflection of Chinese culture in years long past, it is questionable whether it accurately reflects culture in today's China, a China that has been communist since 1949 and that at least on paper sees men and women as equal comrades in the proletarian struggle.

B. Asian Immigrant Women Who Kill Their Children in Response to Spousal Infidelity

Another type of case in which cultural evidence seems to be successfully deployed involves Asian immigrant women who kill their young children, then claim they were so distraught over the discovery that their husbands were seeing other women that they attempted to commit parent-child suicide. In Japan, this practice even has a name: *oya-ko shinju*.²⁴⁶ The Japanese mother who decides to commit suicide feels obligated to kill her children as well so they are not left in this world without a mother to raise them.²⁴⁷

In *People v. Kimura*, for example, a Japanese immigrant woman who discovered that her husband had been having an affair walked into the Pacific Ocean with her two young children in an attempt to kill herself and her children. Kimura was rescued, but Kazutaka, her four-year-old son, and Yuri, her six-month-old daughter, drowned.²⁴⁸ When Kimura was charged with two counts of first-degree murder and felony child endangerment, the Japanese-American community rallied behind her and gathered more than 25,000 signatures asking for leniency.²⁴⁹ Subsequently, the prosecutor allowed Kimura to plead guilty to manslaughter, and the judge imposed a sentence of five years of probation and one year in jail.²⁵⁰ Since Kimura had already been in jail for more than a year, she received credit for time served and was released immediately.²⁵¹ The prosecutor's decision to plea bargain and the judge's decision to impose a lenient sentence

245. *Id.*; Volpp, *supra* note 3, at 1589–93 (noting that culture is relational and fluid and that it is contested within communities).

246. Matsumoto, *supra* note 6, at 510–16.

247. Chiu, *supra* note 4, at 1353. Chiu writes as follows:

If Fumiko Kimura had been successful in taking not just her children's lives but also her own life, her act of *oya-ko shinju* would have constituted one final act of good parenting. In other words, "it is more merciful to kill children than to leave them in the cruel world without parental protection."

Id. (quoting MAMORU IGA, *THE THORN IN THE CHRYSANTHEMUM: SUICIDE AND ECONOMIC SUCCESS IN JAPAN* 18 (1986)).

248. Goel, *supra* note 6, at 443; Woo, *supra* note 6, at 403.

249. Woo, *supra* note 6, at 404.

250. Goel, *supra* note 6, at 443–44.

251. Matsumoto, *supra* note 6, at 524.

appeared to be influenced by the consideration that had Kimura been in her native country, Japan, she would have been looked upon with extreme sympathy.²⁵²

Critics of the cultural defense have compared Kimura to Susan Smith, the American woman who drowned her two young children by strapping them into their car seats, then pushing her car into a lake.²⁵³ Smith was convicted of first-degree murder and sentenced to life in prison with the possibility of parole.²⁵⁴ Even though both cases concerned mothers who killed their children, the *Smith* case is only superficially analogous to *Kimura*.²⁵⁵ First, unlike Kimura, Smith never attempted to kill herself.²⁵⁶ Smith strapped her kids into their car seats and pushed her car into the lake, not directly endangering her own life. Second, at least according to the government's theory, the reason Smith killed her children was not to protect them from living in this world without a mother to care for them, but to please a former boyfriend who had made it clear that he was not interested in continuing a relationship with a single mother burdened with two young children.²⁵⁷

The manslaughter conviction Kimura received is actually consistent with the manslaughter convictions received by the majority of American women who kill their young children.²⁵⁸ It was Susan Smith's murder conviction and life sentence that were not in keeping with the norm. As Daina Chiu observes:

Kimura's sentence of probation and counseling highlights how the mainstream recognizes similarity (or assumes similarity) when different cultural values or precepts are perceived to be congruent. The favorable legal treatment of Fumiko Kimura derives from the Anglo-American cultural view that women who kill their children are "victims in need of sympathy, support, and psychiatric treatment." Women are "assumed to be inherently passive, gentle, and tolerant; and mothers are assumed to be nurturing, caring and altruistic. It is an easy step, therefore, to assume that a 'normal'

252. *Id.* at 512 n.29 (noting that in one study, fourteen percent of well-adjusted Japanese women responded that they would have done the same thing as the mother who attempts parent-child suicide upon learning of her husband's infidelity).

253. *See, e.g.,* Coleman, *supra* note 3, at 1142 (opining that "the facts of the *Smith* case were, in all relevant aspects other than culture, the same as those in *Kimura*").

254. Gary Henderson & Clay Murphy, *Smith Verdict Met with Mixed Reaction in Union*, *HERALD-J.*, July 29, 1995, at A1.

255. *See* Volpp, *supra* note 6, at 1583-85 (discussing the misleading analogy between parent-suicide cases and the Susan Smith case).

256. *Id.* at 1583.

257. *See* Rick Bragg, *Smith Jury Hears of 2 Little Bodies, and a Letter, in the Lake*, *N.Y. TIMES*, July 20, 1995, at A16 (reporting that Tom Findlay, Susan Smith's former lover, wrote a letter telling Smith that he did not want a relationship that included children).

258. *See* Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 34 *AM. CRIM. L. REV.* 1, 7 (1996) (noting that most countries, including the United States, "articulate lesser penalties for homicides committed by mothers against children"); Jason Wolfe, *Maine's Laws Show Leniency for Child Killers*, *PORTLAND PRESS HERALD*, July 12, 1998, at 1A (noting "[t]he vast majority of the time, parents and caregivers who kill are charged with manslaughter, not murder"); *see also* LEE, *supra* note 27, at 123 n.125.

woman could surely not have acted in such a way. She must have been 'mad' to kill her own child."²⁵⁹

Kimura apparently benefited from these underlying Anglo-American cultural norms. Even though the Kimura case is often presented as an example of a successful use of cultural evidence, her cultural claim may not have succeeded had it not resonated with Anglo-American norms.

Another case involving an Asian mother who killed her child and then tried but failed to kill herself is *People v. Wu*.²⁶⁰ Helen Wu was initially convicted of second-degree murder and sentenced to a term of fifteen years to life.²⁶¹ She appealed, claiming the trial court erred in refusing to give a requested jury instruction on how her cultural background might have affected her state of mind at the time she killed her son.²⁶² The court of appeals agreed with Wu, reversed her murder conviction, and remanded the case, ordering the trial court to instruct jurors on retrial that they could consider Wu's cultural background in deciding whether she possessed the mental state necessary for a murder conviction.²⁶³ On retrial, Wu was convicted of voluntary manslaughter.²⁶⁴

Wu's claim that her cultural background influenced her behavior does not seem as compelling as Kimura's claim. Wu killed her nine-year-old son whom she had not seen or taken care of in years.²⁶⁵ Wu left her son when he was just a newborn because she was afraid of damage to her personal reputation. She had already abandoned Sidney once. Wu's claim that she killed Sidney so she would not abandon him again seems disingenuous given her absence from Sidney's life for much of his nine years.

Nonetheless, Wu was successful in mitigating her murder conviction to manslaughter, and cultural convergence appears to have played a role in this

259. Chiu, *The Cultural Defense*, *supra* note 6, at 1117 (citation omitted).

260. 286 Cal. Rptr. 868 (Ct. App. 1991). Helen was born and raised in China. She came to the United States and conceived a child with Gary Wu in 1979. When Gary did not propose marriage, Helen went back to Macau and left her newborn son, Sidney, with his father because she did not want people in Macau to know that she had borne a baby out of wedlock. Helen already had a daughter from a previous marriage. In 1989, at Gary's urging, Helen came back to the United States and married him in Las Vegas. Eight days after the wedding, nine-year-old Sidney told his mother that the house where they were staying belonged to Gary's girlfriend, Rosemary. Helen told Sidney that she wanted to die and asked him if he would go with her. When Sidney cried and hugged his mother, she cut the cord off a window blind and strangled him. Helen then slashed her wrist and lay on the bed next to her son. Gary returned several hours later and rushed Helen to the hospital where she was revived. Volpp, *(Mis)Identifying Culture*, *supra* note 6, at 85-86.

261. Volpp, *(Mis)Identifying Culture*, *supra* note 6, at 84.

262. *Id.* at 84-85.

263. *Id.* at 86. Interestingly, the California Supreme Court denied the government's petition for review, but then directed the Reporter of Decisions not to publish the appellate court opinion in the Official Appellate Reports. *People v. Wu*, No. S024083, 1992 Cal. LEXIS 310, at *1 (Cal. Jan. 23, 1992).

264. Levine, *supra* note 2, at 65. Wu was sentenced to eleven years in prison. *Id.*; see also Renteln, *A Justification of the Cultural Defense Partial Excuse*, *supra* note 6, at 474.

265. Volpp, *(Mis)Identifying Culture*, *supra* note 6, at 85-86.

success. Professor Juris C. Draguns, a clinical psychologist and expert in cross-cultural psychology, testified at Wu's trial about parent-child suicide by American mothers living in Chicago in the 1920s.²⁶⁶ Draguns testified that these mothers did not regard their infant children as separate children, but saw them as part of themselves.²⁶⁷ Professor Leti Volpp notes that Draguns' testimony "helped to collapse cultural differences between 'American' and 'Chinese' culture."²⁶⁸

Even though Wu's plea for sympathy was not particularly persuasive, she may have succeeded in reducing her murder conviction to manslaughter in part because of gendered stereotypes about women as nurturing, caring, and altruistic mothers.

C. Hmong Men Claiming "Marriage by Capture"

Another type of case involving a "cultural defense" involves Hmong men charged with forcible rape who claim that because of the Hmong custom of *zij paj niam* ("marriage by capture"), they thought the sex was consensual.²⁶⁹ Many such cases start with an arrest and the filing of criminal charges, but "in the majority of [these] cases, the prosecutor will reduce or drop charges in exchange for a plea."²⁷⁰ For example, in 1985, a twenty-three-year-old Hmong man from Laos named Kong Moua took a nineteen-year-old Hmong woman named Seng Xiong, also from Laos, from her dormitory room at Fresno City College in Central California to a close relative's home, and there had sexual intercourse with her several times. Xiong did not report the incident to the police right away, and later, when she did, told them that she had not been sexually molested. Only much later did Xiong report to the police that she had been raped.²⁷¹

Charged with rape and kidnapping, Moua defended his actions as dictated by the Hmong cultural practice of "marriage by capture." Under this practice, a

266. *Id.* at 90.

267. *Id.*

268. *Id.*

269. RENTELN, *supra* note 4, at 127-28; Ly, *supra* note 6; George M. Scott, Jr., *To Catch or Not To Catch a Thief: A Case of Bride Theft Among the Lao Hmong Refugees in Southern California*, 7 ETHNIC GROUPS 137 (1988) (describing a case involving a Hmong man from Orange County who abducted a Laotian girl from her home in San Diego, took her to the apartment of one of his cousins in Orange County, and repeatedly forced her to engage in sexual relations with him, all for the purpose of marrying the sixteen-year-old girl).

270. See Ly, *supra* note 6, at 480. Not all cases involving Hmong men charged with rape result in a plea bargain and lowered charges because of cultural evidence. See, e.g., *State v. Lee*, 494 N.W.2d 476 (Minn. 1993) (Hmong man found guilty of raping two Hmong women despite testimony by the leader of a Hmong group suggesting that the victims did not behave as if they had been raped); *State v. Her*, 510 N.W.2d 218 (Minn. Ct. App. 1994) (despite defendant's testimony that rape as it is understood in American culture does not exist in Hmong culture, defendant was convicted of rape).

271. For a complete account of this case, see Evans-Pritchard & Renteln, *supra* note 6.

Hmong man will take his bride-to-be from her home, bring her to his family home, then force her to have sexual intercourse with him to consummate the marriage.²⁷²

Moua argued that given his cultural background, he honestly and reasonably believed Xiong had consented to the intercourse.²⁷³ In most American jurisdictions, an honest and reasonable belief in consent is an affirmative defense to a charge of forcible rape.²⁷⁴ In light of Xiong's failure to immediately report the rape, prosecutors allowed Moua to plead guilty to false imprisonment for which he was ordered to pay \$1,000 in restitution and received three months in jail.²⁷⁵

The Moua case is often used as an example of a successful cultural defense strategy. Instead of being convicted of two felonies (rape and kidnapping), Moua was convicted of false imprisonment, a misdemeanor. Moua's cultural claim clearly contributed to his mitigated charge by making his claim of honest and reasonable belief in consent more believable. However, plea bargains are not that unusual in acquaintance rape cases in which the defendant claims he honestly and reasonably believed his female friend consented. Particularly when there is little evidence of force and the case boils down to a "he said" versus "she said" war of credibility, the prosecution may believe that a plea bargain is the best way to secure a conviction. In this country, we have a long history of giving male rape defendants the benefit of the doubt when the victim is a friend or an intimate.²⁷⁶ Accordingly, the decision to allow a plea bargain in Kong Moua's case may have been more a function of contested views on the social harm of date rape and weak evidence than cultural difference. Even though numerous studies suggest that American women often say "no" when they mean "yes,"²⁷⁷ to openly acknowledge this would contradict socially accepted norms held by a good segment of today's society. Moua's "no" means "yes" argument was able to prevail perhaps because it was dressed up as an exotic "cultural" claim.

Additionally, the Moua case is often presented as a case involving sensitivity to cultural difference when it arguably perpetuated cultural racism.²⁷⁸ Hmong culture was depicted as barbaric, an imagined place where men kidnap the women they want to marry, force them to have sexual intercourse against their

272. Ly, *supra* note 6, at 478–80 (describing three Hmong marriage practices, including marriage by capture).

273. *Id.* at 484–86.

274. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 33.05, at 637–38 (4th ed. 2006).

275. Spencer Sherman, *When Cultures Collide*, 6 CAL. LAW. 32, 60 (Jan. 1986).

276. Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. (forthcoming 2007).

277. STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 259–60 (1998).

278. Lawrence, *supra* note 234, at 112 (noting that "cultural racism" involves inferiorizing cultures, instead of race, *i.e.*, making certain cultures appear inferior, deviant, and inherently unassimilable); see also RAZACK, *supra* note 192, at 60 (explaining how culturalized racism—attributing Black inferiority to cultural deficiency—allows society to deny responsibility for racism); Volpp, *supra* note 3, at 1601 (explaining that under cultural racism, "the culture of certain communities is posited as either inferior or incompatible with the values of the dominant community").

will, and then the community endorses their marriage.²⁷⁹ The case reinforced negative stereotypes about Asian men in general and Hmong men in particular as foreigners with misogynistic patriarchal customs.²⁸⁰ The implicit assumption was that in America, this type of behavior would not be tolerated, when in fact we tolerate non-stranger rape—euphemistically called “date rape”—to a greater extent than is often acknowledged. Cultural convergence provides a better explanation than cultural sensitivity for the result in this and similar cases.

D. Black Men Who Successfully Argue “Black Rage”

A final example of cultural convergence involves African-American defendants who successfully assert a “Black Rage” defense, a type of defense that Anthony Alfieri calls a deviance defense because it relies on a racialized narrative that reinforces assumptions about Blacks as deviant criminals.²⁸¹ In *Black Rage Confronts the Law*, Paul Harris explains the difference between “black rage” and the “black rage defense”:

Black rage and the black rage defense are not synonymous. Black rage, in its positive and negative aspects, is examined insightfully by psychiatrists Price Cobbs and William Grier in their widely discussed 1968 book *Black Rage*. The frustration and anger of African Americans and their consequences for this country are also articulated in James Badwin’s *The Fire Next Time*. Black rage is eloquently expressed in the works of Alice Walker, Gloria Naylor, and Walter Mosley. It is found in the poems of Gwendolyn Bennett, in the music of KRS-One, in the essays of bell hooks, in the speeches of Malcolm X, in the “Ten-Point Program” of the Black Panther Party, and in the very history of African Americans.

The black rage defense is a *legal strategy* used in criminal cases. It is not a simplistic environmental defense. The overwhelming majority of African Americans who never commit crimes and who lead productive lives against overwhelming odds prove that poverty and racial oppression do not necessarily cause an individual to resort to theft, drugs, and violence. But is cannot be denied that there is a causal connection between environment and crime. A black rage defense explores that connection in the context of an individual defendant on trial.²⁸²

279. See Volpp, *supra* note 3, at 1589–91 (“‘American’ is equated with progress: the world of work, the college campus, while ‘Hmong’ is associated with barbarity and tradition, in this case, rape.”).

280. See Volpp, *supra* note 215, at 393 (critiquing the stereotypical view of Asian immigrant communities as more misogynistic than Western communities).

281. Anthony Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995) (arguing that using racialized narratives to defend young Black males charged with crimes involving interracial violence harms the larger African-American community by reinforcing negative stereotypes about young Black males as deviant, violent criminals).

282. PAUL HARRIS, *BLACK RAGE CONFRONTS THE LAW* 2 (1997).

While the Black Rage defense is not often asserted and rarely successful,²⁸³ it has on occasion worked to the benefit of individual black defendants. Consider the beating of truck driver Reginald Denny in South Central Los Angeles after acquittal verdicts were announced in the first (state) trial of the four officers charged with beating Rodney King. Denny, a Caucasian, was driving his truck in South Central Los Angeles when the verdicts were announced and pandemonium broke loose. The beating of Rodney King had been captured on home video and many expected that the four white police officers responsible for the beating would be convicted of assault. When the officers were instead acquitted by a mostly white Simi Valley jury, Blacks and Latinos in South Central Los Angeles reacted with anger and violence, setting fire to cars and businesses and looting stores.²⁸⁴ When Denny drove his truck into an intersection where a small angry crowd had gathered, he was pulled from his truck, kicked, and beaten almost to death.²⁸⁵

Damian Monroe Williams and Henry Keith Watson, both African-American, were charged with attempted murder, aggravated mayhem, torture, and second-degree robbery arising from their attack on Reginald Denny. Their attorneys did not deny that the beating took place, but argued that Williams and Watson lacked the specific intent to kill Denny because they were acting as a result of Black Rage and mob contagion.²⁸⁶ Apparently, the jury found this argument persuasive. Williams was acquitted of the charged offenses and convicted of simple mayhem and four misdemeanor assaults.²⁸⁷ Watson was acquitted of attempted murder and convicted of misdemeanor assault. The jury deadlocked on the other charges against Watson, leading to a mistrial on those counts.²⁸⁸

How does cultural convergence help explain the verdicts in the Reginald Denny case?²⁸⁹ Because the criminal law does not recognize a "White Rage" defense or any other race-based deviance defense, it is difficult to see any convergence between minority and majority norms, let alone understand how such a convergence of norms could explain the verdicts.

Although perhaps less obvious than in the cases involving Asian immigrant men charged with murdering their wives and Hmong men charged with rape, cultural convergence nonetheless may have played a role in the Reginald

283. See, e.g., Kimberly M. Copp, *Black Rage: The Illegitimacy of a Criminal Defense*, 29 J. MARSHALL L. REV. 205, 207 n.14 (1995) (discussing Colin Ferguson, the Long Island railway shooter).

284. See Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581 (1993).

285. Laurie Becklund & Stephanie Chavez, *Beaten Driver a Searing Image of Mob Cruelty*, L.A. TIMES, May 1, 1992, at A1.

286. Dawn Weber, *Videotape Evidence Key to Prosecution, Defense*, L.A. DAILY NEWS, July 26, 1993, at N14.

287. Edward J. Boyer & John L. Mitchell, *Attempted Murder Acquittal, Deadlock Wind Up Denny Trial*, L.A. TIMES, Oct. 21, 1993, at A1.

288. *Id.*

289. Although it would be more proper to refer to the case as the Williams and/or Watson case, it has become popularly known as the Reginald Denny beating case.

Denny case. The defense of “Black Rage” rests on the argument that after years of racial discrimination and unequal treatment, a Black person who explodes in a fit of anger should not be held responsible for his conduct because the environment in which he lived contributed to his criminal acts.²⁹⁰ The defense of “mob contagion” suggests that the defendant got caught up in the actions of the group and acted out almost as if on auto-pilot. Both of these defenses, as used to explain and excuse the actions of the young African American men on trial for the beating of Reginald Denny, reinforced negative stereotypes about Blacks, in particular young Black males, as dangerous, violent, criminals. Extensive social science literature supports the association most people in the country make between Blackness and criminality.²⁹¹ The “Black-as-Criminal” stereotype is so deeply ingrained in our subconscious that most of us must make a conscious effort to counter it or it will control our initial gut feelings. The verdicts in the Reginald Denny beating case, which essentially embraced the defense claims of “Black Rage” and “mob contagion,” reflected and reinforced the “Black-as-Criminal” image. Williams and Watson were partially excused for their actions because the jury believed these two young Black men could not help acting in the deviant way they did.²⁹²

CONCLUSION

The cases I have examined are troubling on a number of fronts. First, in each case, the defendant or defendants committed a crime of violence against an innocent victim. Dong Lu Chen bludgeoned his wife to death; Fumiko Kimura and Helen Wu killed their innocent children; Kong Moua had sexual intercourse with an unwilling partner; and Damian Williams and Henry Keith Watson kicked and beat Reginald Denny until he was almost dead.

Second, the cultural narratives told by each of these defendants seem to have been persuasive to a large extent because they were either familiar refrains or tapped into existing sexist or racist social norms. Dong Lu Chen’s outrage at

290. HARRIS, *supra* note 282.

291. See, e.g., Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limit of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590 (1976); H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children’s Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590 (1980).

292. In a 1995 law review article, Anthony Alfieri critiqued the defense strategy used in *Williams and Watson*, arguing that criminal defense attorneys should not, as a matter of ethics, use deviance defenses because of the harm such use causes the greater African American community by reinforcing community beliefs that Blacks are violent, dangerous criminals. Alfieri, *supra* note 281; see also Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER SOC. POL’Y & L. 117 (2003) (urging lawyers to think carefully about the broader consequences before employing racist, sexist, and anti-gay narratives to benefit the client). Abbe Smith and others have countered that criminal defense attorneys owe an ethical duty to their clients to zealously represent their interests and their interests alone. Abbe Smith, *Burdening the Least of Us: “Race-Conscious” Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1595 (1999). Smith explains that a criminal defense attorney would violate the rules of professional responsibility if he or she were to put the greater African American community’s interests ahead of his or her own client’s interest in being found not guilty of the charged offense. *Id.*

discovering his wife's infidelity may have made sense to Judge Pincus not only because American men have been similarly outraged, but because of stereotypes about patriarchal Chinese men and their familial relations. Fumiko Kimura's story of despair and hopelessness was persuasive perhaps because it reinforced the image of the emotionally weak woman completely dependent on her husband for her happiness. Kong Moua's claim that he honestly and reasonably believed Seng Xiong was consenting to sexual intercourse may have persuaded the prosecutor to drop the rape and kidnapping charges against him not only because of the he said/she said nature of his story, but also because doing so reinforced stereotypes about Asian men as barbaric misogynists. Damian Williams and Henry Keith Watson's claim that they were caught up in the mob mentality of the moment and could not help beating Reginald Denny made sense to the jury because it reinforced deeply-ingrained stereotypes about young Black males as violent, deviant criminals. That *these* cultural narratives were successful when the vast majority of cultural narratives are rejected in courtrooms across the country suggests that the persuasiveness of a defendant's cultural claims may turn on the extent to which the claims converge with dominant subtexts of racism and sexism.

In cultural defense cases, it is important for attorneys to be aware of and to counter negative and possibly incorrect stereotypes. The prosecutor in the Dong Lu Chen case could have called an expert witness to counter Burton Pasternak's testimony. Instead he did nothing on the assumption that the judge would not believe Pasternak's assertions. The Assistant District Attorney who tried the Chen case explained, "[i]n our wildest imaginations, we couldn't conjure up a scenario where the judge would believe that anthropological hocus-pocus."²⁹³ The prosecutor in the Kong Moua case could have presented evidence that the Hmong practice of marriage by capture is no longer widely accepted by the Hmong community in America. The Hmong District of the Christian and Missionary Alliance, for example, has officially denounced marriage by capture.²⁹⁴ The prosecutor in *Williams* and *Watson* could have called expert witnesses to testify about the prevalence of the "Black-as-Criminal" stereotype and asked the judge to instruct the jurors that it is inappropriate to rely on racial stereotypes when deciding whether to acquit or convict.²⁹⁵ By not countering the cultural evidence presented, these prosecutors unwittingly assisted the other side.

When minority and majority cultural norms converge, the minority offender may secure an acquittal or light treatment while reinforcing negative stereotypes about his entire community. By enabling us to understand these double-edged dynamics as well as the selective receptivity of the law towards certain cultural defenses, cultural convergence theory offers a starting point for scholars and policymakers concerned with the rule of law in an increasingly diverse society.

293. Dick Polman, *When is Cultural Difference a Legal Defense? Immigrants' Native Traditions Clash With U.S. Law*, SEATTLE TIMES, July 12, 1989, at A1.

294. See Ly, *supra* note 6, at 492.

295. For an example of such a limiting instruction, see Lee, *supra* note 228, at 481-82.
