GOAL IX

TO PROMOTE FULL AND EQUAL PARTICIPATION IN THE LEGAL PROFESSION BY MINORITIES

Volume 9, Number 3, Summer 2003

Culture and Crime

Cynthia Lee

On January 20, 1998, Chanh Van Duong, a Vietnamese former military officer, was waiting outside a divorce courtroom when he saw his estranged wife, Huong "Rosie" Nguyen, with a man, Robert Jencks, whom Duong suspected was the reason his wife wanted a divorce. Duoung pulled out a handgun and fired at Jencks, hitting him in the wrist. He then fired at his wife, killing her.

Duong was charged with murder in the death of his wife and second-degree assault in the shooting of Jencks. At trial Duong argued he should be found not guilty of both charges because he was provoked to the heat of passion by the sight of his wife with the man he suspected was her lover. According to Duong, any reasonable Vietnamese man would have been similarly provoked because in Vietnam, divorce is a serious taboo that brings a stain upon the husband.

Provocation ordinarily does not serve as a defense to any crime other than murder; and even in murder cases, provocation serves only as a partial, not a complete, defense. Nonetheless, the jury acquitted Duong of assaulting Jencks, permitting his provocation defense to serve as a complete defense to the aggravated assault charge. The jury also returned a verdict of manslaughter, rather than murder, for Duong's shooting of his wife—even though his claim that he was suddenly provoked to passion was undermined by the fact that he had brought a loaded gun to the courthouse knowing he would see his wife. Some felt the fact that he introduced cultural evidence about divorce's taboo status in Vietnam helped the claim that he was "reasonably" provoked into the heat of passion.

Although use of the term "cultural defense" is common, there is no cultural defense per se.

Although use of the term "cultural defense" is common, there is no cultural defense per se. Typically, immigrant or minority defendants offer evidence regarding their cultural background to support traditional defenses such as insanity, provocation, or self-defense. Evidence of culture differences also may be offered as a mitigating factor during plea negotiations or sentencing.

No nationwide uniform rule exists regarding whether and when cultural evidence is admissible. Judges are free to decide whether they believe the introduction of culture norms as evidence is relevant. Many judges believe cultural evidence should be excluded on the ground that ignorance of the law is no excuse. Under this rationale, people with different culture backgrounds ought to conform their conduct to U.S. laws and should not be excused simply because they come from a country where action that is criminal here is treated differently there.

Perhaps as a result of such thinking, most attempts to use evidence of culture differences in the criminal courtroom are unsuccessful. In a few exceptional cases, the ones that tend to be featured by the media, evidence about culture norms appears to help the defendant receive either reduced charges or a lighter sentence. For example, other Asian immigrant men charged with murdering their Asian immigrant wives have successfully argued that, in light of their cultural background, they were reasonably provoked into the heat of passion by their wives' infidelities. Hmong men charged with rape have successfully argued that they honestly and reasonably believed their female victims were consenting to sexual intercourse in light of the Hmong cultural practice of *zij paj niam* ("marriage by capture"). Under this custom, a Hmong man will take a woman he wants to marry from her home, bring her to his family home, then have sexual inter-

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First Thing We Do— Let's Diversify the Profession*

Lawrence R. Baca
Commission Chair

*With apologies to William Shakespeare

I spoke recently on a panel discussion about minority judges—how racial and ethnic minority lawyers make the cut to be selected as judges, and what hurdles they may face as judges. I am not a judge, but as the characters in the movies always say, "I was frightened by one once."

As a young lawyer out of law school a minute and a half and a member of the bar for thirty seconds, I found myself lead counsel on a case in federal district court in South Dakota. An Indian man had filed a petition to run for the office of county commissioner and had been told that he could not run because he was an Indian living on an Indian reservation. The United States filed a petition for a temporary restraining order to prevent the election from going forward until the man had a chance to campaign and other Indians could file petitions to run and get their names on the ballot, too. As you might imagine, I was a little nervous—this was my first-ever court appearance, and I was representing the United States of America. I was in the library of the U.S. Attorney the afternoon before the hearing when an Assistant U.S. Attorney came running in. "The judge is coming," he said. "He just called to ask if you were here. He's on his way up and he isn't happy."

At that moment this enormous man appeared at the door; he was in full robes and his bulk blotted out the sun as he entered the room. In my nightmares I see his huge finger in my face: "Boy, are you Baca?" he asked. "I read those papers you filed, and I'm here to tell you that I won't hear about discrimination in my courtroom. Do you hear me, boy? We don't have any problems with our Indians until you people from Washington come out here and stir them up. You start talking about discrimination and someone will believe you. If you talk about discrimination in my courtroom, boy, I'm gonna chew you up and spit you out. Do you hear me, boy?"

The next day I felt pretty alone in that courtroom. Racially alone. The judge, the court reporter, the clerk of court, the state attorney general, the county attorney, and my supervisor were all white. The Indian man who had tried to run for office was there as my witness. But in the arena that is trial practice, I was one Indian in a sea of white justice. The victim/witness in my case did not know what the judge had said in the library. I had shared it with my supervisor, but the witness didn't know. But I've often wondered how he felt anyway. He, like me, would have seen a white justice system before him.

In twenty-seven years of federal practice, I've never tried a case in front of a judge who was black, Hispanic, Asian, or American Indian. But I don't believe that a judge who was a person of color would have addressed me that way—no matter how adverse to the merits of the case I was filing the judge might be. In fact, I can state without equivocation that none of my attorney friends has ever spoken to me about being verbally abused on a racial level by a minority judge.

It is curious that if you live in an area where, say, 35 percent of the jury pool is of your race and the court allows something to occur that excludes those 35 percent from the actual jury, you might have a right of action. You have a constitutional right to a jury of your peers, and it is unconstitutional to exclude jurors based on their race. University of Maryland School of Law Assistant Professor Sherrilyn Ifill has proposed that there ought to be a constitutional right to a judiciary of your peers. I think it sounds intriguing. It is, however, an untested legal theory.

Along with the simple appearance of fundamental fairness that an integrated judiciary produces, many additional things are lost when you fail to be inclusive of all races in your selection of judges. First, as Professor Ifill eloquently states, you lose the intellectual capability of all of the racial and ethnic minority lawyers who would otherwise bring their skills and thought processes to the development of the law. Second, as I and others have pointed out, you send a negative signal to those who are not included. If I am black and I see in the courtroom no one of my race, it does not matter whether I am the plaintiff in a civil suit, the victim of a crime, or the defendant to the charges—I will question whether I can get justice in this room. If I am Hispanic or Asian, I will ask whether it will be assumed that I am a foreigner; if I speak with an accent, will it be held against

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Defending Liberty
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A Network in Action:
Wolverine Bar Association Connects Employers with Students of Color

Tyra L. Wright

[T]he only networking that works is networking for the benefit of others.
—George C. Fraser
Success Runs in Our Race

Detroit's Wolverine Bar Association (WBA) has a legacy of coordinating the energy of African American lawyers, once excluded from local bar associations, that has endured since its establishment in the 1930s. The organization's Wolverine Summer Clerkship program is an example of its dedication to promoting diversity in the profession. In fact, both lawyers of color and the legal community benefit from the clerkship program, in ways that, for me, refreshed my view of the power of our network.

Established in the late 1980s, the program exposes first-year law students of color to the rigors and culture of Detroit-area law firms and legal departments. At the suggestion of a colleague, Kiana Woods, this year I joined the clerkship committee, a group of WBA members who voluntarily coordinate the program. Of the eight attorneys who serve on the committee, five are former Wolverine clerks, and most have served on the committee for several years. We seek applicants from Michigan's six law schools: Ave Maria, University of Detroit Mercy, Michigan State University, University of Michigan, Thomas M. Cooley, and Wayne State University—and from Michigan residents who attend out-of-state law schools. The committee evaluates students using a variety of criteria such as academic achievement, writing and research proficiency, community service, and two rounds of rigorous interviews.

The selected students are then matched with employers. Each year numerous employers, primarily law firms, agree to participate in hiring Wolverine clerks for the summer. This year the applicant pool was quite competitive. "Speaking from experience,"

Both lawyers of color and the legal community benefit from the clerkship program.

says committee chair James Gray, "I believe this is the first time we have been in a situation where we literally scrambled to secure additional placement opportunities to accommodate the increased number of top-quality candidates." Thirteen students were selected from the forty-six applicants. They began their employment in May, and with them, I began my journey toward a greater appreciation of our network.

Explain the Ropes

The committee continually strives to improve the program to benefit students and employers. For instance, this year the committee introduced a new feature, a one-day orientation conducted in April. "Every year as we planned the program, inevitably someone would say, 'I wish we could tell them this or explain how to handle that situation,'" says Kevin Smith, co-chair of the committee. Smith and Gray sought a volunteer to develop the new orientation. I was intrigued by the thought that this orientation would enhance the program and possibly be adopted by future committees. Woods and I worked together on the new orientation. Again, the network was in action.

We started by gathering concerns, issues, and anecdotes from committee members' collective years of experience with their firms' summer programs, with the Wolverine clerkship program, and, in some cases, from having been Wolverine clerks themselves. Next, we identified the information we thought would be most valuable to the students. Finally we looked to the network to find presenters who could communicate the information with candor and passion. "The old adage that you have to be twice as good still holds true today," says Woods, a former Wolverine clerk. "Having mentored and observed summer law clerks over the past few years, I have witnessed mistakes and social gaffes that could have been avoided had someone taken the time to explain the ropes. Explaining the ropes was the goal of the orientation."

Committee members conducted the orientation, and several WBA members were invited to address the students. Saul A. Green, a founder of the clerkship program, provided an inspirational keynote address followed by frank discussion on topics that ranged from handling multiple complex assignments to negotiating business social events. "It was a day of 'Here's what you don't learn in law school that you need to know to have a successful summer as well as career,'" says Smith, a former Wolverine clerk. "It was straightforward advice."

One student's question about networking elicited advice that I thought captured an intrinsic benefit of the program: "Look around, this is your network. Exchange your numbers and addresses and communicate with each other." At that moment, I realized our mission was much more meaningful than simply helping students gain legal work experience. We were introducing them to their network—our network. Their legal careers could be enriched for years to come because of our efforts.

Hooked Up to the Network

Many lawyers lament a lack of diversity in the profession, while others grapple with the challenges of recruiting and retaining minority candidates. An all-too-common refrain is

"Where *are* they?" Hooking majority law firms and corporations into the power of our network strengthens the whole profession.

"Most legal employers and firms are actively seeking to increase the diversity of their workforce. The summer clerkship program has become a tried and true way of achieving that goal," Gray says. "It is not unusual for participating employers to extend permanent offers of employment to their assigned clerk. Many program participants have gone on to become accomplished and successful members of the participating law firms."

Gary C. Ankers, a Michigan attorney, attended a May reception that recognized this summer's participants. He praised his firm's Wolverine clerk, Erika Pennil (one of his firm's six summer associates): "Erika is doing a great job. She has assimilated very well. Although she is a 1L and everyone else is a 2L, you wouldn't know the difference." Pennil, who attends the University of Michigan Law School, is doing some critiquing of her own. "I'm trying to get as much litigation experience as possible. I think I have the fortitude for it." Pennil believes she is getting an honest view of what life really will be like as a trial attorney because she and the other summer associates are invited to practice group and monthly staff meetings and "have even gotten to see everyone's billable hours," she adds.

High Expectations

Other Wolverine clerks express similar focus and enthusiasm. Malika Pryor, a Wayne State University law student, says she feels good about her summer placement. Pryor initially felt like "a fish out of water." The feeling didn't last long. About two hours before the end of her first day, an influential practice group leader asked whether she was busy, and she recalls thinking, "I am *never* going to be too busy if he has an assignment." With the satisfaction of completing her first memorandum still fresh on her mind, Pryor says, "I like to put out a great work product anyway, but he was so good to work with that I really wanted [the question] resolved successfully." This positive experience buoyed Pryor's expectation of interesting work for the rest of the summer.

The bar association gets satisfaction in finding students like Pennil and Pryor.

Look around, this is your network. Exchange your numbers and addresses and communicate with each other.

At the May reception, WBA President Linda D. Johnson praised the clerks and thanked the employers for embracing the program. Indeed, she is confident that the program thrives because of the attitude of everyone involved. "Appreciation and gratitude get us everything we need and keep us where we need to be."

Good to Know You're Here

Where lawyers of color need to be is in law firms, corporate legal departments, government agencies, and their own private practices. For proponents of diversity, that we are needed everywhere in the legal profession is axiomatic. Law students may wonder how knowing the attorneys of color who are working in the firm will impact them. To hear Maureen Onyeagbako tell it, this knowledge means everything. Onyeagbako is a student at the University of Michigan and is spending this summer at Gray's firm.

She was sitting at her desk during her first week at the firm, nerves frazzled by piles of legal resource material, when she received an e-mail note from Gray. "It was something like 'Have a nice day' or weekend. I thought 'Wow! I need to call him.'" Onyeagbako credits Gray with skillfully helping her see that she already knew the answer to her legal research question. "He was not patronizing. I just felt like I could talk to him. Now it is just great to know he is here."

Onyeagbako's words express my sentiment. It is satisfying to know students are taking advantage of our experiences and the opportunities before them. In hindsight, I see that I accepted my colleague's offer to join the committee out of a sincere but narrow belief that the clerkship program is a good cause. I soon saw it as so much more. My participation reminds me of what motivated the founders of the WBA. Helping to open the proverbial door of opportunity for others is more gratifying than opening it only for one's self. I look forward to next year and to greeting a new group of Wolverine summer clerks with a warm "Welcome to the clerkship program, welcome to our network!"

Tyra L. Wright (twrigh14@ford.com) practices in the litigation group of the General Counsel's Office at Ford Motor Company. She is a frequent speaker on topics of interest to lawyers and students.

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me? When the face of justice is multiracial, the message of justice is multilingual. It was Mr. Justice Thurgood Marshall who said that there can be no justice for all as long as all justices are white.

Third, minority justices alter the judicial discourse by their mere presence at the table. Think about *People v. Hall*, 4 Cal. 399 (S. Ct. Cal. 1854), a case in which a white man was convicted of murder based on the testimony of a Chinese witness. He appealed his conviction on the ground that Section 14 of the California Criminal Code provided, "No Black, or Mulatto person, or Indian shall be allowed to give evidence against a white man." The California Civil Code, in Section 394, provided, "No Indian or Negro shall be allowed to testify as a witness in any action in which a White person is a party." The California Supreme Court was compelled to decide whether a person of Chinese ancestry, not specifically addressed in the statute, could testify against a white man.

When the face of justice is multiracial, the message of justice is multilingual.

The court begins by noting that, in 1492, Columbus thought he had arrived in India when he landed on San Salvador, off the coast of what is now the Americas:

> Acting upon this hypothesis, and also perhaps from the similarity of features and physical conformation, he gave the Islanders the name of Indians, which appellation was universally adopted and extended to the aboriginals of the New World as well as of Asia. From that time, down to a very recent period, the American Indians and the Mongolian, or Asiatic, were regarded as the same type of human species.

Looking further into the language of the statute, the court observes:

> The word "Black" may include all Negroes, but the term "Negro" does not include all Black persons. . . . By use of this term in this connection, we understand it to mean the opposite of "White," and that should be taken as contradistinguished from all White persons. . . . We are of the opinion that the words "White," "Negro," "Mulatto," "Indian," and "Black person," wherever they occur in our Constitution and laws, must be taken in their generic sense, and that, even admitting the Indian of this Continent is not of the Mongolian type, that the words "Black person," in the 14th Section must be taken as contradistinguished from White, and necessarily excludes all races other than Caucasian.
>
> *We have carefully considered all the consequences resulting from a different rule of construction, and are satisfied that even in a doubtful case we would be impelled to this decision on grounds of public policy. The same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls.*
>
> This is not a speculation which exists in the excited and over-heated imagination of the patriot and statesman, but it is an actual and present danger.

What the court holds is that Chinese are not Indians, but that Indians and Chinese are both black. But it is his justification that is most intriguing. Can you imagine that the justice who wrote those words would have done so had there been judges of color on the California Supreme Court? Would he have circulated that language for a round table discussion to a multiracial Supreme Court?

Several justices of the U.S. Supreme Court have spoken of what Thurgood Marshall brought to the discourse at that court. It is sometimes described as "outsider discourse," or just plain life experience that the white justices didn't have. For the justice in *Hall*, the life experience of working with a judge of color could have been a life awakening.

Last term the importance of diversity on the bench was driven home in every major newspaper the morning after the Supreme Court argument in *Virginia v. Black*, Case No 01-1107, a cross-burning case testing the limits of free speech under the First Amendment. Many reporters who watched the arguments wrote that the justices seemed equivocal as to whether Virginia could ban cross burning and may have even favored the arguments of the plaintiff that a cross burning is just another form of speech and as such cannot be forbidden by the state because speech is protected by the U.S. Constitution.

Then the silent justice spoke. Mr. Justice Clarence Thomas, the lone African American justice on the Court and the one who draws more attention for his failure to engage the attorneys during oral argument than for the opinions he writes, engaged—he gave all present a short lesson on the history of cross burnings in America. He brought home to the eight white justices the true meaning of cross burnings. Yes, it is speech—hate speech. Burning a cross is a message that says "I want to harm you, I want to kill you, I want to eradicate your race." The news writers described the effect of his speech as having the other justices "enthralled." Some believed it was this singular moment that changed what will be the outcome of the case. No one else on the Court could have rendered the history lesson with the same gravitas. The terror of cross burnings could be explained by any member of the Court, but the ring would not be the same coming from a white person. To understand the sting of the hate that cross burning represents, the Court needed Mr. Justice Thomas's voice.

The Supreme Court now has ruled that our nation's law schools can take race into account in selecting a diverse law school class. "Diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter v. Bollinger*, slip op. at 13. We knew that. Law schools are a good start—but we cannot rest until we include the bench. Diversity among judges is a compelling national interest.

For the most complete and up-to-date information on diversity in the legal profession, visit www.abanet.org/minorities.

National Conference for the Minority Lawyer

The 5th Annual National Conference for the Minority Lawyer was held June 5-6 in Philadelphia. This conference brought together minority lawyers from all over the country and from all practice areas. It provided a unique networking opportunity while attending programs on both substantive topics of law as well as diversity-related issues. Highlights included: a discussion between some of the lawyers representing Barbara Grutter in *Grutter v. Bollinger* and advocates for the University of Michigan; an examination of whether minority lawyers have a duty to speak out on issues of diversity; a session on surviving, thriving, and growing during good or bad economic times; interactive workshops based on years of practice; and a keynote address by Robert Grey Jr.

ABA Minority Counsel Program Fall Meeting

SAVE THE DATE
October 2-3, 2003

The Sutton Place Hotel
Chicago, IL

Defending Liberty
Pursuing Justice

Confirmed Keynote Speakers:

William B. Lytton, Executive Vice President and General Counsel, Tyco International Ltd., Portsmouth, NH

Stacey J. Mobley Sr., Vice President and General Counsel and Chief Administrative Officer, E.I. DuPont De Nemours, Wilmington, DE

Gloria Santona, Senior Vice President and General Counsel, McDonalds Corporation, Oak Brook, IL

Solomon B. Watson IV, Senior Vice President and General Counsel, The New York Times Company, New York, NY

August 2-9, 2003	NBA Annual Meeting	Hilton Riverside New Orleans, LA
August 7, 2003 **8a.m.-12 noon**	Commission Business Meeting	San Francisco, CA
August 7-10, 2003	Commission's Annual Meeting	Park Hyatt San Francisco, CA
August 8, 2003 **2-5 p.m.**	Tort Trial and Insurance Practice Section Women and Minority Involvement Committee meeting. All are welcome.	San Francisco, CA
August 9, 2003 **2-5 p.m.**	Tort Trial and Insurance Practice Section Equal Access in the Legal Profession Program Keynote Speaker Dennis W. Archer	San Francisco, CA
August 9, 2003	NAPABA Quarterly Board Meeting	Minami, Lew & Tamaki LLP San Francisco, CA
August 22-23, 2003	Chicago Committee on Minorities in Large Law Firms Cook County Job Fair	Chicago, IL
September 3-6, 2003	HNBA Annual Convention	Fairmont Hotel San Jose, CA
October 2-3, 2003	MCP Fall Meeting	Chicago, IL For more information, contact Regina Smith at 312.988.5508.
October 9-12, 2003	ABA Section of Dispute Resolution Third Annual Indian Tribes, Natural Resources, and ADR Conference	Durango, CO For more information, contact Heather Sibbison at hsibbison@pattonboggs.com.
October 22-23, 2003	ABA Presidential Diversity Conference	Willard-Intercontinental Hotel Washington, DC For more information, contact Rachel Patrick at patrickr@staff.abanet.org.
November 8, 2003	Council on Legal Education Opportunity 35th Anniversary Celebration	San Francisco, CA
November 13-16, 2003	NAPABA Annual Convention	Honolulu, HI
January 16-20, 2004	NAPABA MLK Weekend Ski Vacation	Colorado
February 4-10, 2004	ABA Midyear Meeting	San Antonio, TX
March 25-26, 2004	Spring MCP Meeting	Philadelphia, PA
April 15-16, 2004	NNABA Annual Meeting	Albuquerque, NM
July 2004	NBA Annual Meeting	Charlotte, NC
August 5-11, 2004	ABA Annual Meeting	Atlanta, GA

ABA Commission on Racial and Ethnic Diversity in the Profession

Master Calendar of Meetings

Abbreviations

ABA	American Bar Association
NNABA	National Native American Bar Association
NAPABA	National Asian Pacific Bar Association
NBA	National Bar Association
MCP	Minority Counsel Program
HNBA	Hispanic National Bar Association

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course with her to consummate the marriage. Although the woman may scream, cry, and protest, both parties interpret this as consent.

One way of understanding these cases is to see them as examples of law professor Derrick Bell's interest convergence theory. Bell posits that African Americans can expect to receive tangible gains in the civil rights arena only when their interests converge with the interests of the dominant white majority. Similarly, interest convergence theory suggests that Asian immigrant male defendants' claims of provocation in female infidelity cases and Hmong male defendants' claims of honest and reasonable belief in consent to sexual intercourse in rape cases tend to succeed because they are congruent with the interests of the dominant majority culture. Asian immigrant men who are able to mitigate murder charges down to manslaughter by arguing they were reasonably provoked into a heat of passion because their wives were unfaithful are very like American men who kill their American wives and successfully mitigate murder charges to manslaughter by arguing they were reasonably provoked by spousal infidelity. Hmong men who are able to escape a rape conviction by arguing they honestly and reasonably believed their victim was consenting to sexual intercourse are very like American men accused of date rape who are able to plea bargain to a lesser charge because the prosecutor fears the jury will not convict.

Questions do arise concerning whether or not Bell's theory can also explain the successful use of deviance defenses such as "black rage" and "mob contagion," defenses that promote the idea that the defendant, as a racial minority, acted violently as a result of pent-up rage from years of racial discrimination and harassment. For example, the two black men charged with beating Reginald Denny (the white man pulled from a truck and severly beaten during the Los Angeles riots in 1992) argued that they were caught up in the mob mentality during the looting that followed the not guilty verdicts in the first trial of the four police officers caught on tape beating Rodney King. Both defendants in the *Denny* case were acquitted of attempted murder and convicted of lesser offenses. I believe interest convergence theory can explain the successful use of deviance defenses. Although white male defendants do not argue "white rage," deviance defenses like "black rage" and "mob contagion" serve the dominant majority's interest by reinforcing the dominant stereotype of black men as violent criminals.

Critics of cultural evidence in the courtroom often argue that allowing immigrant and racial minority defendants to offer evidence of culture norms in their defense acts as a form of reverse discrimination against white American defendants (i.e., majority culture defendants). These critics, however, overlook the fact that white American defendants already receive the benefit of culture norms—those of American culture. Every time they walk into the courtroom, white American defendants are presumed to reflect the ordinary or average person. White American defendants don't need to bring in expert witnesses to testify about how and why their beliefs and acts are reasonable in light of existing norms, because judges and virtually all jurors already are familiar with these norms. Dominant social norms bolster these defendants' claims of reasonableness without any special effort on their part.

Cynthia Lee is a professor of law at the George Washington University School of Law and the author of Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom, *recently published by NYU Press. This article is adapted from Chapter 4 of the book.*

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