Cultural Considerations in the Criminal Law: The Sentencing Process

James K. Boehnlein, MD, Michele N. Schaefer, MD, and Joseph D. Bloom, MD

In forensic psychiatry, there is increasing recognition of the importance of culture and ethnicity in the criminal justice process as the population becomes more culturally diverse. However, there has been little consideration of the role of cultural factors in the trial process for criminal defendants, particularly in the sentencing phase of trial. Using a capital murder case study, this article explores the role of cultural forensic psychiatric consultation, focusing on the sentencing phase of trial as the place where the full scope and power of a cultural evaluation can be brought most effectively to the attention of the court. Cultural psychiatric perspectives can enrich a core forensic evaluation and be maximally helpful to the court, by exploring family dynamics and psychological health influenced by cultural history, immigrant and refugee experiences, and sociocultural environment. Specific recommendations and cautions for effective cultural consultation in forensic psychiatry are discussed.

J Am Acad Psychiatry Law 33:335–41, 2005

Cultural factors are increasingly recognized as important variables in medical and psychiatric care. This is especially true as our population becomes more diverse. In forensic psychiatry, cultural factors are also being recognized to be important, as the number of criminal defendants and civil litigants of diverse cultural backgrounds increase. This leads to more requests for consultation with attorneys as psychiatrists with special expertise in cultural psychiatry are called on to consider how culture and ethnicity influence the cognition and behavior of defendants or plaintiffs.

In this article, we explore the role of cultural factors in the trial process for criminal defendants, with particular attention to the sentencing process. As a background, the role of cultural concepts in general psychiatry will be described, followed by a discussion of where cross-cultural psychiatric testimony may be valuable in the trial process. We will then focus on sentencing and its importance in the trial process and present a case from one of the authors in which cultural factors were helpful to a defendant at sentencing. We will conclude with a discussion of recommendations and pitfalls in forensic cultural psychiatric consultation.

Dr. Boehnlein is Professor, Dr. Schaefer was Chief Resident, and Dr. Bloom is Emeritus Professor, Department of Psychiatry, Oregon Health and Science University. Dr. Boehnlein also is Associate Director, VA Northwest Network Mental Illness Research, Education, and Clinical Center (MIRECC). Address correspondence to: James K. Boehnlein, MD, Department of Psychiatry (UHN80), Oregon Health and Science University, 3181 SW Sam Jackson Park Road, Portland, OR 97239. E-mail: boehnlei@ohsu.edu

The Role of Culture in General Psychiatry

Culture can be defined as the full range of human values, behavior, and social structures indigenous to specific groups around the world that are passed on from one generation to the next. Culture is more than ethnicity and includes beliefs and values about religion, interpersonal relationships, family life, sexuality, and politics. All aspects of society are infused by culture, including medicine and psychiatry. For example, culture influences the specific beliefs that the individual and group hold about the causes and treatment of disease and illness. Culture greatly influences whether a certain set of beliefs, behaviors, or symptoms are considered pathological or merely lie along a spectrum of normality.[1,2] Culture is also an important factor in the dynamic interaction between individual and social systems, such as law and medicine.

Culture helps to determine what are considered normal patterns of behavior between men and women, among generations, and the expected social roles in families and other groups.[3] Cultural psychiatry explores the interaction among these various realms, including how they evolve and change as the result of external forces such as advances in science and technology (and the subsequent evolution of beliefs and values), the social upheaval of war and im-

migration, and certain challenges such as recovery from trauma and acculturation. Excessive focus on racial or ethnic differences can certainly run the risk of undervaluing the great diversity that exists among persons within groups; however, this risk should be weighed against the fact that racial and ethnic categories are useful for exploring hypotheses about genetic and environmental risk factors, as well as interactions between risk factors, for medical outcomes.[4]

Cultural Factors and the Criminal Law

In an early paper, Bloom and Rogers[5] focused on the legal basis for forensic psychiatry within the criminal justice system. They attributed part of the viability of forensic psychiatry to the fact that the law calls for psychiatric diagnosis and opinion at various stages within the criminal justice process. Such required determinations as competency to stand trial or the determination of responsibility at the time of an alleged crime require the involvement of forensic psychiatrists for the rule of law to proceed in an orderly fashion.

Nowhere in the criminal justice process, however, is there a requirement for a determination of how cultural factors influence the behavior of a criminal defendant. Yet, culture helps to shape how we think and what we believe. Given the importance of culture in our lives, it is not surprising that cultural factors are relevant at various stages of the criminal justice process.

As recently pointed out in several articles,[6–8] culture adds essential depth, nuance, and complexity to forensic psychiatric work, including criminal matters. For example, Diamond[9] described the case of a Croatian nationalist who was charged with the crime of skyjacking. Diamond recognized that there was a very clear relationship between the insanity defense and psychiatric diagnosis and that a person acting under a cultural prescription was not the same as a person acting under the influence of a delusional system. However, he argued that there was no reason why cultural factors should not be relevant to a diminished-capacity defense in regard to the relationship between specific intent involved in the crime and the exercise of free will. Bloom *et al.*[10] focused on cultural data in regard to Vietnamese refugees charged with crimes in Oregon. Oregon has a defense of "extreme emotional disturbance" which, if successful, reduces a charge of murder to manslaughter. In two of the cases presented in their paper, use of this statute was successful when cultural data were used to explain the "extreme emotional disturbance" to the trier-of-fact. This specific statute, which exists in some form or another in many jurisdictions, is in essence a type of diminished-capacity defense.

However, regardless of whether some statutes are conducive to the use of cultural testimony at trial or whether some courts allow such diminished-capacity defenses, it is our view, expressed in this article, that cultural factors are most widely useful when presented at the time of the sentencing of criminal defendants. In a paper that was written in response to Diamond's[9] proposition, Bloom and Bloom[11] presented data from the Micronesian Trust Islands Criminal Code that clearly articulated a hierarchy between law and custom in the regulation of the behavior of residents of the Trust Islands. In addition, the Code describes cultural explanations of behavior as most relevant when explaining motive and mitigation of criminal sentences rather than having major relevance earlier in the trial process. The use of cultural factors for the purpose of explaining motive and, by so doing, looking toward the mitigation of the sentence, has been illustrated in studies describing Eskimo defendants in criminal cases in Alaska.[12–14]

Sentencing in the Criminal Law

The sentencing of defendants found guilty of crimes is an important part of the criminal justice system, one that is often overlooked in the forensic psychiatric literature. From the legal point of view, sentencing hearings are governed by federal constitutional considerations, such as due process and rights against self-incrimination and cruel and unusual punishment, but vary from jurisdiction to jurisdiction based on case law, statutes, and court rules. In general, a defendant has the right to be present at sentencing unless he or she waives that right,[15] and is entitled to the effective assistance of counsel at sentencing.[16] Because the key purpose of a sentencing hearing is to mete out punishment that fits the crime, it is of paramount importance that the defendant be sentenced on the basis of accurate information.

The responsibility of the prosecutor at sentencing is not to seek the maximum sentence in every case, but rather to see that justice is done by providing "factual information and reasoned analysis" to the sentencing court.[17] The convicted defendant has a right to be given the opportunity to speak prior to sentencing,[18] at which time he or she may provide,

for example, explanations of extenuating circumstances or arguments for mitigation of the sentence.

Considerations to be taken into account when determining an appropriate sentence were elucidated by the Supreme Court in *Williams v. New York*[19]: (1) the reformation of the offender, (2) the protection of society, (3) the disciplining of the wrongdoer, and (4) the deterrence of others from committing like offenses. The provision of restitution or reparation to victims of crimes is another possible outcome of a just sentence. This may be facilitated at the sentencing hearing by allowing the introduction of victim-impact statements, in which the victim of the crime or family members may describe the effect the crime had on them or provide more details about the crime than came out at trial. Ultimately, the sentencing is intended to provide a forum for the deliverance of a just sentence by balancing the interests of the society, the victim, and the family with the interests of the defendant.

Case Presentation

Background and History

A California capital murder case in which one of the authors participated illustrates well the myriad cultural issues that may come into play in forensic consultation during the penalty phase. The defendant, a 24-year-old Cambodian refugee, was charged with the murder of a physician during the course of a home burglary, in concert with another Southeast Asian refugee who was killed by the murder victim during the burglary. The material presented herein is in the public court records.

This cultural forensic psychiatric consultation was conducted using the Cultural Formulation model, a method that systematically allows clinicians to take culture into account when conducting a clinical evaluation.[20,21] It consists of five primary components: the cultural identity of the individual; cultural explanations of the individual's illness; cultural factors related to psychosocial environment and levels of functioning; cultural elements of the relationship between the individual and the clinician; and, overall cultural assessment for diagnosis and care.[20,22,23] This model can serve as the cornerstone of all contemporary psychiatric clinical work, research, and teaching. It contextualizes the patient's illness, includes both standardized and personalized elements, and, in the forensic context, improves the appreciation of the subject's psychosocial environment.[24]

The defendant was born during the rule of Pol Pot and the Khmer Rouge, who controlled Cambodia from 1975 to 1979. During those four years, approximately one-fifth of Cambodia's population of 7 million were killed, or died of disease or starvation. The elite and educated were primarily singled out for execution, and many families were entirely destroyed during the four years. These events have had tragic consequences decades later for Cambodian individuals and families. In addition to the challenges of immigration and acculturation faced by all refugees, Cambodians have had to deal with the long-term effects of the trauma that they have experienced,[25,26] including a high prevalence of chronic posttraumatic stress disorder (PTSD).[27,28] In turn, chronic PTSD symptoms among multiple family members have put intense strains on intergenerational relationships and the ability of families to function as cohesive and supportive facilitators of growth and health.[29,30]

Five of the defendant's brothers were executed, and other extended family members died during the Khmer Rouge era. The family lived in a rural area of Cambodia and were rice farmers before the war. During the Khmer Rouge period, adult family members and older children were required to work dawn to dusk in work camps cultivating and harvesting crops or digging irrigation ditches. People were worked to exhaustion and often survived on only one bowl of rice water per day. Surreptitious gathering and consumption of wild vegetables, roots, or insects was punishable by death, as were outward shows of emotion or refusing to work if too weak from illness or starvation.

The defendant's mother was in a state of starvation prepartum and while nursing him postpartum, suffered blood loss from leeches, and was beaten in the chest and abdomen by Khmer Rouge soldiers on several occasions. She had a difficult labor and delivery, and he was anoxic during the initial postpartum period. During his infancy and early childhood years, he had numerous febrile seizures and was strangled by Khmer Rouge soldiers on two different occasions as an infant to keep him from crying too loudly while his mother was working in the rice fields and unable to nurse him. During the family's escape from Cambodia after the Vietnamese invasion that liberated the country from the Khmer Rouge, the defendant, his siblings, and his parents were subjected to a great

deal of gunfire and scenes of violence and death on their way to the Thai border.

After several years in refugee camps in Thailand and the Philippines, the family was resettled in the U.S. Midwest. Coming from rural Cambodia and with little formal education, the family faced numerous language and cultural challenges common to many refugees and immigrants. The defendant started elementary school, but did not know English and quickly fell behind. That trend continued after the family's move to California several years later. He was placed in special education classes, and individual education plans were developed during various stages of his education. But, as academic difficulties mounted during middle school, he began to skip classes and associate with other truant children in his rough neighborhood in the Central Valley. His parents noted ongoing developmental differences between him and his six siblings, describing him as "slower" than the other children, having frequent severe headaches and isolating himself during periods when there would be sudden or persistent environmental noise. He suffered two head injuries at the ages of 12 and 16 years.

During his childhood, his parents remained isolated within their Cambodian refugee community, learning virtually no English. The defendant and his siblings began to learn English at school and through interactions with friends but, as the children's Cambodian fluency began to fade, communication between parents and children became more difficult.

Because of unemployment, language and cultural isolation, lack of generativity, the older children's moving away, and growing financial and family problems, both parents became depressed. In addition, focus and concentration were diminished by hypervigilance, startle reactions, and insomnia related to frequent nightmares. Because of the lack of language fluency, lack of awareness of cultural expectations, and their own inadequately treated psychiatric symptoms, the parents did not follow up on the defendant's academic or medical problems, and they began to lose control of his activities and of his association with peers as his adolescence progressed.

Forensic Cultural Consultation During Sentencing

One of the authors (JKB) was a consultant to the defendant's attorneys. Because there was no dispute regarding the facts of the case and the defendant's guilt, the attorneys decided to concentrate much of their efforts on the penalty phase, focusing on mitigating factors that would lead to a sentence of life without parole rather than the death penalty. They retained experts in nuclear medicine, neonatology, and neuropsychology, who presented expert testimony regarding how developmental trauma at various life stages had contributed to brain damage, an IQ in the mid-70s, and academic and behavioral problems. The cultural psychiatric consultant focused on parental and family dynamics influenced by cultural history, parental medical and psychiatric illness, refugee status, and sociocultural environment. In the process of developing a trusting relationship over many months with the defendant's family, the attorneys had noticed significant parental psychological problems and asked the cultural psychiatrist to spend an entire day at the parental home observing the environment and interviewing the parents. Although the defendant was interviewed in custody at another time, limited focus was placed on the defendant in preparation for cultural expert testimony in the penalty phase of the trial. Instead, most of the focus was placed on the family and cultural milieu.

All parental medical and psychiatric records were reviewed prior to the family interview. Those records and the family interviews revealed significant, untreated major depression and chronic PTSD in both parents. Also, anthropological observations of the neighborhood and family home provided ample evidence of poverty, deprivation, and cultural isolation. The interviews were conducted with the assistance of a long-term professional associate of the consultant with a master's degree in social work who had previous forensic experience. As a Cambodian, he had experienced the profound long-term impact of the Khmer Rouge on Cambodian families, and he himself provided compelling expert testimony at trial.

During months of preparation for the penalty phase, the attorneys decided to integrate the cultural psychiatric and neuroscience medical testimony, and the defense team developed a compelling individual and family historical narrative that clearly unified mitigating factors for the penalty phase determination. The cultural testimony focused primarily on family and social issues, rather than on mitigating characteristics of the defendant *per se*. For example, much of the cultural consultant's forensic testimony focused on the mental health of the defendant's parents, not the defendant. Their diminished ability to

parent the defendant effectively throughout his developmental years was directly tied to historical factors in Cambodia and the family's own collective history of trauma. This history was also directly tied to the parents' chronic PTSD and depression that limited their ability to provide effective guidance and nurturance for their son who was developmentally disabled. In addition, at sentencing the jury heard testimony that focused on anthropological and social observations alongside testimony from other experts that focused on neuroimaging and neuropsychology. Not only did this provide a richer picture of the defendant and his milieu, but it also gave important credence to testimony grounded in the social sciences because it was given in the same phase of trial as the neuroscience testimony. Individual versus sociocultural determinants were finely balanced, as were the particular challenges faced by this family versus the universal challenges that all refugee families face. After five days of penalty deliberation, the jury unanimously voted for life without parole instead of the death penalty.

Discussion

Sentencing of criminal defendants is an area that has received little attention in the forensic psychiatric literature. Competency to stand trial and the insanity defense have captured most of our attention over the years. This is certainly understandable, as these are important statutory issues that have formed the bedrock of forensic psychiatry and the criminal law. Many of the landmark cases in mental health law have been focused in these areas and, in addition to the particular forensic questions, these cases often speak to the very basis of our legal system.

Moreover, these areas present the forensic psychiatrist with tried and true questions. Does this person have a mental illness? Can this person understand the trial process and aide his counsel in his defense? Did this person lack a substantial degree of capacity at the time of the crime? Although these questions provide us with a significant challenge, they are nonetheless concrete, and many of us share a common understanding of what these legal tests mean.

Contrast these legal tests with sentencing. There are no tests *per se* in this area. Legal rules are more relaxed and both sides, prosecution and defense, are allowed leeway in what they present.

It is in this less structured arena of the criminal law, and in the area of mitigation, that the defendant may raise all issues that may be relevant to his or her character or to any extenuating circumstances that may help to explain the crime in more human terms. The sentencing is exactly the place where cultural evaluation and testimony can have significant impact on the final outcome of the case.

The case described herein illustrates well the complexity of biopsychosocial factors that can influence the outcome of a case. Because of the broad range of biological, social, and cultural variables, it also illustrates the value of a cultural psychiatric consultation that can integrate those variables.

For example, from extensive independent discovery interviews with older family members who witnessed the defendant's behavior and events throughout his life, it was clear that he had a series of noxious insults that could have caused anoxic or traumatic brain injury. Extensive school records and repeated educational and psychological testing revealed cognitive and learning deficits that very likely were caused by those insults during childhood. Interwoven with these individual biological factors at each stage of development were the family, social, and cultural factors that influenced the defendant and his home and school environment. These vitally important variables were the family's collective experience of war trauma, their years in refugee camps, their immigration to and unresolved acculturation in the United States, and the parents' subsequent psychiatric morbidity, which adversely affected their ability to parent effectively a son with a limited IQ and academic problems. In addition, there were the challenges of the dangerous and impoverished social environment in the United States shared by all family members.

Because of expertise in anthropology and the cultural history of Cambodia, the assessment and clinical care of war trauma among individuals and families, and the core principles of the general and forensic psychiatric assessment, the consultant was able to synthesize all of these mitigating factors for the court during testimony. Continual emphasis was placed on the fact that all of these factors, whether biological or cultural, were interdependent in the process of understanding the defendant's life history. An accurate and comprehensive understanding of the defendant's behavior would not be possible if each of the factors was viewed in isolation or if either biological or cultural factors were artificially viewed as pre-eminent.

We conclude with specific recommendations and cautions in cultural psychiatric consultation to attorneys and the courts. At the very initial contact, assess the exact nature of the cultural question(s) that the attorney or court want answered. These may change during the consultation process as the case evolves and as each party gets to know each other's strengths and limitations, but this initial discussion will allow the cultural consultant to determine how knowledgeable the attorney or court is regarding cultural matters. It may not be possible to answer the cultural questions asked, or the consultant may even determine that cultural factors are irrelevant to the specific case.

Along with a cultural assessment that includes the elements described in detail in this article, it is essential to conduct a comprehensive forensic psychiatric evaluation that includes all the elements of a standard assessment. Otherwise, there is a risk that the evaluation will either overemphasize or underemphasize cultural elements of the case.

It is important not to minimize the role of language fluency or ignore important demographic (age, gender, education) and acculturation factors. It is also important not to ignore basic clinical forensic principles. For example, in the Cambodian case, cultural psychiatric conclusions and expert testimony were based not on just one interview, but on the total consistency of prior informant/family interviews that were reviewed, medical records, and clinical interviews with the defendant and parents.

Psychological testing cross-culturally should be interpreted with great caution. Results are subject to influences of language fluency, the variability of verbal and visual concepts across cultures, the precise level of the subject's acculturation, the test setting, and the interpersonal process between test administrator and subject. Moreover, there are several immigrant and refugee groups for which standard psychological tests are not normed.

Finally, in the realm of theme interference and countertransference, it is vitally important for the cultural consultant to be aware of his or her prejudices or overidentification involving ethnicity, religion, family structure, or cultural belief systems, so that they do not adversely affect the objectivity of the forensic report or the expert testimony. In addition, the consultant should try to assess the degree to which these same factors may influence the perspectives of the attorneys, judge, and jury.

It is our view that cultural evaluation and testimony have a very relevant role at sentencing and should be more seriously considered as an important area of study and expertise within forensic psychiatry. This is not to say that cultural factors are not important in other areas of a trial. However, it is at sentencing that the full scope and power of a cultural evaluation can be brought most effectively to the attention of the court.

References

1. Duncan BJ: Cultural issues in forensic psychiatry. Med Law 9:1220–4, 1990
2. Nathan JH, Wylie AM, Marsella AJ: Attribution and serious mental illness: understanding multiple perspectives and ethnocultural factors. Am J Orthopsychiatry 71:350–7, 2001
3. Lefley HP: Cultural perspectives on families, mental illness, and the law. Int J Law Psychiatry 23:229–43, 2000
4. Burchard EG, Ziv E, Coyle N, *et al*: The importance of race and ethnic background in biomedical research and clinical practice. N Engl J Med 348:1170–5, 2003
5. Bloom JD, Rogers JL: The legal basis of forensic psychiatry: statutorily mandated psychiatric diagnoses. Am J Psychiatry 144: 847–53, 1987
6. Hicks JW: Ethnicity, race, and forensic psychiatry: are we colorblind? J Am Acad Psychiatry Law 32:21–33, 2004
7. Tseng WS, Matthews D, Elwyn TS: Cultural Competence in Forensic Mental Health: A Guide for Psychiatrists, Psychologists, and Attorneys. New York: Brunner-Routledge, 2004
8. Silva JA, Leong GB, Derecho DV: Dissociative identity disorder: a transcultural forensic psychiatric analysis. Am J Psychiatry 21: 19–36, 2000
9. Diamond BL: Social and cultural factors as a diminished capacity defense in criminal law. Bull Am Acad Psychiatry Law 6:195–208, 1978
10. Bloom JD, Kinzie JD, Manson SM: Halfway around the world to prison: Vietnamese in Oregon's criminal justice system. Med Law 4:563–72, 1985
11. Bloom JD, Bloom JL: An examination of the use of transcultural data in the courtroom. Bull Am Acad Psychiatry Law 10:89–95, 1982
12. Bloom JD: Patterns of Eskimo homicide. Bull Am Acad Psychiatry Law 3:165–74, 1975
13. Bloom JD: Cross-cultural forensic psychiatry in Alaska. Bull Am Acad Psychiatry Law 4:252–6, 1976
14. Phillips MR, Inui JS: The interaction of mental illness, criminal behavior and culture: Native Alaskan mentally ill criminal offenders. Cult Med Psychiatry 10:123–49, 1986
15. Thompson v. U.S., 495 F.2d 1304 (Cal. 1974)
16. Strickland v. Washington, 466 U.S. 668 (1984)
17. Sentencing Alternatives and Procedures, ABA Standards for Criminal Justice (ed 2). New York: Little, Brown, & Co., 1988, pp 18–431
18. Green v. U.S., 365 U.S. 301 (1961)
19. Williams v. New York, 337 U.S. 241 (1949)
20. Lewis-Fernandez R, Diaz N: The cultural formulation: a method for assessing cultural factors affecting the clinical encounter. Psychiatr Q 73:271–95, 2002
21. American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition-TR (DSM-IV-TR). Washington, DC: American Psychiatric Press, 2000

22. Lu FG, Lim RF, Mezzich JE: Issues in the assessment and diagnosis of culturally diverse individuals, in Review of Psychiatry, vol. 14. Edited by Oldham JM, Riba MB. Washington, DC: American Psychiatric Press, 1995, pp 477–510
23. Committee on Cultural Psychiatry, Group for the Advancement of Psychiatry: Cultural Assessment in Clinical Psychiatry. Report 145. Washington, DC: American Psychiatric Press, 2002
24. Griffith EEH: Ethics in forensic psychiatry: a cultural response to Stone and Appelbaum. J Am Acad Psychiatry Law 26:171–84, 1998
25. Boehnlein JK: Clinical relevance of grief and mourning among Cambodian refugees. Soc Sci Med 25:765–72, 1987
26. Boehnlein JK, Kinzie JD: Refugee trauma. Transcult Psych Res Rev 32:223–52, 1995
27. Kinzie JD, Boehnlein JK, Leung P, *et al*: The prevalence rate of PTSD and its clinical significance among S.E. Asian refugees. Am J Psychiatry 147:913–17, 1990
28. Boehnlein JK, Kinzie JD, Sekiya U, *et al*: A ten-year follow up study of posttraumatic stress disorder among traumatized Cambodian refugees. J Nerv Ment Dis 192:658–63, 2004
29. Boehnlein JK, Kinzie JD, Leung PK: Cambodian American families, in Working With Asian Americans: A Guide for Clinicians. Edited by Lee E. New York: Guilford Press, 1997, pp 37–45
30. Kinzie JD, Boehnlein JK, Sack WS. The effects of massive trauma on Cambodian parents and children, in An International Handbook of Multigenerational Legacies of Trauma. Edited by Danieli Y. New York: Plenum Press, 1998, pp 211–21