

An Examination of the Use of Transcultural Data in the Courtroom

JOSEPH D. BLOOM, MD*
JACQUELINE L. BLOOM, JD

We propose to examine the presentation of cultural data as part of the psychiatric evaluation conducted for the legal-judicial process. In a series of articles^{1,2,3} we attempted to examine the relationship between transcultural and forensic psychiatry. This endeavor was the result of a decade of experience with forensic psychiatric evaluations of Indians and Eskimos charged with criminal acts in Alaska, Washington, and Oregon. During this period we found many instances where relevant cultural data facilitated the court's understanding of the alleged offender. It was not always clear, however, where the cultural data fit into the procedural framework of a court of law and whether there is a place for such data outside of presentation of psychiatric illness as it affects culpability. Our thinking was conceptually enhanced during the past three years during which time we had the opportunity to evaluate three individuals charged with homicide in Micronesia. In reviewing the Micronesian Legal Code we noted a clear statement that dealt specifically with the relationship of law and custom.

In this article, we present two models discussing the relationship between law and culture. One will use the Micronesian statutory and case law definitions of law and custom. The second comes from a recent article by Bernard Diamond⁴ that attempts to delineate the relationship of cultural factors to the diminished capacity defense. We conclude with an attempt to synthesize an approach toward use of the cross-cultural interview data in the courtroom, in keeping with recent trends in forensic psychiatry.

Sociocultural Factors and Diminished Capacity

Diamond argues that social and cultural data should be accepted as evidence in a diminished capacity defense, if relevant to the issue of intent with or without a concomitant psychiatric disorder. He accepts the "historical reality of the close association between the insanity defense and the medical model of deviance." However, his argument cites "no valid reason why the same should hold for the diminished capacity defense." Diamond states that

If a specific intent is required by the statutory definition of the crime and if that specific intent must be proven, any evidence which tends to show that the defendant did not possess that intent should be admissible. Sheer logic requires that evidence such as relevant, cultural, or social factors which can be demonstrated to significantly restrict the exercise of free choice and

*Professor of Psychiatry and Director, Community Psychiatry Training Program, Oregon Health Sciences University, 3181 S.W. Sam Jackson Park Road, Portland, OR 97201.

This work was supported in part by NIMH-Psychiatry Education Branch Grant No. 5 TO 1 MH 13462.

power of decision must be relevant to the existence of the capacity for such intent, and if no capacity for the intent existed then the intent did not exist and the crime as defined by such specific intent was not committed.⁵

Diamond's argument rests on linking social and cultural variables to the exercise of free choice. However, opening the diminished capacity defense to arguments based on the inability to exercise free choice because of cultural imperatives is a step the courts have not been willing to take. Diamond cites a 1964 decision, *State of Connecticut v. Rodriguez*, in which the Supreme Court of Connecticut ruled that the sentence imposed for manslaughter in the particular case was overly harsh. The defendant was a 21-year-old Puerto Rican man who had been involved in an argument with other Puerto Ricans that culminated when the defendant killed one of the group. One reason for the sentence reduction was the defendant's "racial heritage."⁶ Diamond notes that "similar mitigations of sentences because of sensitive consideration of ethnic and cultural factors probably are not uncommon, but go unreported in the law case books."⁷

Diamond points out that he is not advocating use of the diminished capacity defense based on social and cultural factors for every defendant whose ethnic or cultural background differs from the standard "middle American." It is applicable to those defendants who could not have engaged in intentional behavior as defined by a particular offense and is a matter to be decided in each case by the trier of fact. Diamond comes exceedingly close at this point to describing the recognized use of diminished capacity for individuals with mental disease or defect when he says "that decision must reflect the careful weighing of particular factors of the defendant's background, the impact of these factors upon his mental faculties and their relevance to the criminal act and to the mens rea."⁸ He postulates the social and cultural factors as operating on one individual's mental faculties. However, he does not attribute the resultant changes in the defendant's mental faculties to the conceptual categories of mental disease or defect.

Diamond presents a case illustrating his point of view in describing the influence of social and cultural factors on a Croatian nationalist who was arrested and tried for skyjacking.⁹ Diamond evaluated the defendant and was prepared to testify the skyjacker lacked the intent to commit the crime and could thus claim a diminished capacity defense, not based on mental disease but on the inability to exercise free will because of the complicated social and cultural factors associated with the Croatian political cause. However, the U.S. District Court that heard the case, refused to admit the evidence at the time of trial because the defense explicitly stated the testimony was not offered in support of an insanity defense, and it was held not admissible to show capability of forming intent. The U.S. Court of Appeals affirmed the District Court's findings that the offense of aircraft piracy required only a showing of general criminal intent. Without the requirement that the government show specific intent, there was no diminished responsibility defense, and thus the issue of what constituted valid psychiatric

testimony was avoided. Diamond's attempt to have testimony admitted that would speak to other than traditionally defined abnormal mental states was thus not fully tested, for reasons other than his theory itself. Courts have, however, considered the question of the limits to which the law will go in the consideration of behavior in assessing criminal responsibility. In a first degree murder case cited by Diamond an appeal was based on the court's rejection of psychiatric testimony regarding circumstances that had affected the personality of the defendant and had impaired his ability to premeditate. In this decision¹⁰ the Supreme Court of New Jersey stated that criminal responsibility must be judged at the level of the conscious. Unconscious influences such as "genes" or "lifelong environment" cannot be used to argue against criminality of an act.

Micronesian Code and Case Law

Micronesia came under United States trusteeship following World War II. Of the 2,000 islands comprising Micronesia some 100 are inhabited. There are about 120,000 people with diverse ethnic background, culture, and language.

A Micronesian legal code (Trust Territories Code) was adopted in the early 1950s, based on Anglo-American law.¹¹ The code has an insanity defense that is a modified M'Naughten test and lists degrees of homicide based on traditional definitions of first and second degree murder and manslaughter. Section 102 of the code speaks to local customs and customary law.¹²

The customs of the inhabitants of the Trust Territory, not in conflict with the laws of the Trust Territory, shall be preserved. The recognized customary law of the various parts of the Trust Territory shall have the full force and effect of law so far as customary law is not in conflict with the laws mentioned in other sections of the code.

Following the short declaration in the statute regarding the relationship of law and customary law in Micronesia there appear citations from 17 different court decisions dating from 1953 that define and comment on the relationship.

Definition of custom In one case custom is defined as "such usage as by common consent and uniform practice has become law of the place. It is a law established by long usage."¹³ In the same case, "customs may change gradually and changes may be accepted by some of the people affected who agree to some new way of doing things. New ways of doing things do not become established and legally binding or accepted customs until they have existed long enough to become generally known and have been peaceably and fairly uniformly acquiesced in by those whose rights would be naturally affected."¹⁴ In another decision, "if local custom is firmly established and widely known the court will take judicial notice of it."¹⁵

Relationship of customary and statutory law Both the language in the Micronesian code and the case law interpreting the code are clear in regard

to the relationship of customary law and statutory law. In one opinion, the court states that "The customary law of the various parts of the Trust Territory is in effect only so far as it has not been changed by laws promulgated in the Trust Territory code."¹⁶ In another, "Trial courts in the Trust Territory may properly base decision on local customs where customary law is not in conflict with the laws of the Trust Territories or laws of the United States affecting the Trust Territories."¹⁷ In another case, "When there is conflict between customary law and municipal ordinances, written law prevails."¹⁸ In another case, "custom in conflict with existing statutory provision is void."¹⁹

Proving the existence of custom Finally, it has been noted that establishing the existence of custom is difficult, especially in an area in which rapid social change is taking place. Thus different individuals or groups may have different versions of exactly what constitutes local customs. The decisions that speak to this problem state "where there is a dispute as to the existence or effect of local custom, and the court is not satisfied as to its existence or applicability, custom becomes a mixed question of law and fact."²⁰ "Where there is a dispute as to the existence or effect of local custom, custom becomes a mixed question of law and fact and the party relying upon it must prove it to the satisfaction of the court."²¹

In a 1969 criminal case, *Fiqir v. Trust Territory*,²² a writ of habeas corpus was sought in the High Court of the Trust Territories after the conviction for arson of a Yapese man named Fiqir. Fiqir claimed that his detention was illegal. The argument presented to the High Court was that under the circumstances of this case it was not unlawful to burn the dwelling of another person because Yapese custom condones this action. Fiqir contended that "under traditional custom 'it is the right and duty' and therefore not unlawful to atone for or obtain revenge for a prior homicide by killing the murderer or by burning his house or by stealing his canoe." Fiqir had burned the house of another Yapese man who had been convicted of second degree murder in the death of Fiqir's father. Fiqir's contention was that he was acting out of necessity and that it was both his right and his duty to burn his father's murderer's house to the ground and that he had no choice in the matter. The High Court took a very strong position in relation to Fiqir's case. The court held that

Yapese custom which called for the methods of revenge asserted by the petitioner, if it ever did prevail, would not make any of the crimes committed in revenge lawful. The petitioner attributes the act to the compulsion of custom. This goes to motive for commission of the act, not its justification. Motive may be shown as a defense in mitigation of the punishment. It does not make the criminal statute inapplicable to the person who acted under compelling motive.

The High Court relied on the U.S. Supreme Court Decision in *Davis v. Beason*,²³ a polygamy case that involved members of the Mormon Church. In *Davis*, the U.S. Supreme Court said:

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The only question which remains is whether those who make polygamy a part of their religion are excepted from the operation of the statutes. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished while those who do must be acquitted and go free. Laws were made for the government of action; and while they cannot interfere with mere religious belief and opinion, they may with practices. Suppose one believed human sacrifices were a necessary part of religious worship. Would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?

The High Court stated:

We consider it equally absurd to contend that the statutes making arson a crime and defining it as unlawfully, willfully, and maliciously burning is not applicable to the Yapese under their culture, but is applicable to all other Micronesians who do not assert the similar practice as their traditional custom. Motive, no matter how compelling, does not make that act lawful which is declared by the statute to be a crime. Arson as a crime under the written law of the Trust Territories necessarily supercedes and replaces any applicable customs pursuant to this code.

In final comment to the case, the Court said:

... whether old customs permitted a victim's family to retaliate by murder, by arson, or by larceny as the petitioner alleges, is now immaterial because custom has been abrogated by the statutory punishment for murder. The punishment imposed upon Moolong, the murderer of Fiqir's father, by the Trust Territory government for killing the petitioner's father replaced the private right of revenge asserted by the petitioner. The old custom is no longer the law; only the statutes are now applicable in this situation.²⁴

Discussion

In exploring the use of transcultural data in the courtroom, we have presented two divergent models. The legal code of the Trust Territories provides a clear statement of the limit of using cultural data within the legal system. In recognizing that custom exists and is often as powerful a force as law to people who follow the custom, the code acknowledges the cultural diversity of the islands and peoples of Micronesia. The code and the cases indicate clearly that where there is a conflict between custom and law in regard to what is accepted behavior, the law takes precedence. Finally, the code recognizes that those persons whose actions violate the law because of custom are fully responsible to the law of the Trust Territories. Their motives, however, can be fully examined at sentencing.

At that point in the process the law provides for complete presentation of the individual, including the facts of ethnic and cultural diversity. In applying this generally accepted explication of the place of custom vis-à-vis the law to the presentation of a diminished capacity defense, evidence of the impact of culture is limited to those situations where cultural proscriptions affect an individual's behavior such that they produce a diagnosable psychiatric disorder. In this model, cultural data in a diminished capacity

defense is dependent on the presentation of such information in a psychiatric defense.

The position taken by Diamond argues for opening of the diminished capacity defense to individuals who do not suffer from a diagnosable mental disease but whose free will and choice are hindered by social and cultural proscriptions. This model proposes a broader use of culture data, arguing that a just decision by a court should take into account during the trial phase those limitations on the actor's abilities to freely decide on an action, which are prompted by culture differences that affect an individual's ability to think logically, to follow the law, and to exercise free choice of action. The strength with which the law has traditionally viewed the concept of responsibility for action would be modified to a more individualistic view of the forces affecting behavior. The concept of responsibility would thus move from an absolute position to a relative position to be determined in each case, governed by testimony presented from any relevant source.

We are in an era when the courts, legislatures, and the field of forensic psychiatry are faced with a challenge in the insanity and the diminished capacity defenses. The challenge comes from attacks on these defenses by individuals and groups who view these defenses as antithetical to a more narrowly defined concept of responsibility before the law. Forensic psychiatry increasingly will be called on to use such concepts as mental disease and mental defect in a manner that speaks to true mental disorganization at the time of the alleged criminal actions. Whether the original framers of DSM-III knew this would take place in the courtroom setting or not, it seems an irrefutable fact that the structure and categories imposed on diagnostic psychiatry by DSM-III will carry over to the court situation and that concepts such as free will, the unconscious, or temporary insanity will have less and less utility in the courtroom. To open the diminished capacity defense to other than disease of the mind categories, as Diamond proposes, is a policy antithetical to the current attempts to narrow exculpatory defenses.

The more relevant problem for the field of forensic psychiatry is the training of psychiatrists in transcultural psychiatry so they can evaluate ethnically and culturally different individuals with skill, precision, and ability to differentiate just where culturally prompted behavior falls into a "mental disease" category and where it is regarded as culturally syntonetic and normal.

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