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Psychology, Public Policy, and Law
2009, Vol. 15, No. 4, 257–277

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1076-8971/09/$12.00 DOI: 10.1037/a0017233

"WHERE SOULS ARE FORGOTTEN": Cultural Competencies, Forensic Evaluations, and International Human Rights

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Cultural competency is critical in criminal forensic evaluations. Cultural competency eschews reliance on stereotypes, precluding the mistake of assuming that cultural dictates apply with equal force to all who share a cultural background, thus allowing the forensic examiner to provide a comprehensive picture of the defendant to the fact-finder. While raised frequently in death penalty cases, the idea of cultural competency is equally important to the entire criminal process. To better understand the significance of this inquiry, we address how cultural sensitivity in test selection and interview techniques may enhance result validity. In a parallel fashion, ratification of the United Nations Convention on the Rights of Persons with Disabilities has drawn importance to cultural competency. Although international human rights and cultural sensitivity have been considered with regard to race, gender, and religion, applications to criminal matters are still in their infancy. This article considers strategies to enhance the effectiveness of testimony and mitigation efforts.

If one were to ask random samples of lawyers or psychologists about the role of the expert mental health witness in a criminal case, we are confident that a significant percentage of the answers would be limited to answers involving the insanity defense or competency to stand trial. Such answers—predictable and incorrect—lose sight of the critical role of the forensic expert that we wish to address in this paper: the expert's role as an evaluator of a criminal defendant in the penalty phase of capital punishment trials and at sentencing.[1]

In these contexts—just as much (or, in some ways, perhaps *more*) than in insanity or incompetency cases—it is critical that the expert have a deep and textured understanding of what we call "cultural competency" if she is to effectively present the defendant's "story" to the court.[2] There has been some interest in this, but we believe it is seriously (and, literally in some cases, *fatally*)

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We thank Naomi Weinstein for her superb research assistance. Portions of this article were presented at the Western Psychological Association's annual meeting, Portland, Oregon, April 2009.

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[1] On the broader range of issues facing forensic psychologists in the capital punishment context, see McLearen & Zapf, 2007; Fabian, 2009.

[2] We define culture as denoting "ways of approaching, understanding, and acting in the world that are widely (but not necessarily universally) shared by members of a social group—and are often hotly contested by some group members" (Piomelli, 2006, p. 135). On the role of culture in shaping penal practices, see Randle, 2005; Garland, 1990.

under-discussed. We believe that not nearly enough attention has been paid to this issue and its implications for the entire criminal justice system or to the work done by mental health professionals in that system, especially in cases in which the defendant is also a person with a mental disability.

All participants in the forensic system must also understand the significance of international human rights as they affect cases of persons with mental disabilities (Perlin, 2007). Now that the United Nations Convention on the Rights of Persons with Disabilities (2006a) has been enacted (as of this writing, it has not yet been ratified in the United States, but that ratification is likely soon, see Perlin & Szeli, in press), it is essential that forensic witnesses understand the interplay between this body of rights and their role (Perlin, Birgden, & Gledhill, 2009), especially as it involves cultural competency questions.

This article will follow this roadmap. First, we will explain *why* an understanding of cultural competency is critical to forensic evaluations in criminal cases. We will consider the importance of cultural sensitivity in forensic psychological evaluations in this entire area of the law, looking at issues such as test selection and interview techniques that may enhance (or dis-enhance) the validity of results. Next, we will focus on strategies and tactics that will best ensure that the evaluating and/or testifying forensic witness will be able to provide a comprehensive picture of the defendant to the fact-finder. Then, we will consider the strategies that will enhance the effectiveness of testimony and mitigation efforts in the specific context of international human rights developments. We will conclude with some modest recommendations.[3]

I. Why Is an Understanding of Cultural Competency So Critical?

Legal scholars are now beginning to understand how trial lawyers (especially, criminal defense lawyers) must address the potential impact of cultural differences on interactions with their clients (Jacobs, 1997; Piomelli, 2006). An understanding of cultural competency is critical to the criminal justice system because (1) decision-makers must be able to respond to the client's intrinsic humanity, and the defense team must thus investigate and present anecdotal details of the client's life, portraying him as a member of the human community (*Furman v. Georgia,* 1972, p. 274; Brennan, J., concurring), and (2) viewing

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[3] The first part of the title of this article comes from Bob Dylan's song, *A Hard Rain's A-Gonna Fall* (1963). It appears in this verse:

I'll walk to the depths of the deepest black forest,
Where the people are many and their hands are all empty,
Where the pellets of poison are flooding their waters,
Where the home in the valley meets the damp dirty prison,
Where the executioner's face is always well hidden,
Where hunger is ugly, *where souls are forgotten,*
Where black is the color, where none is the number. . .

Although the song is as apocalyptic as any in Dylan's songbook, one of the most respected commentators concludes that in spite of the pictures of "devastation" that populate the song, in the end there are "suggestions of hope" (Trager, 2004, p. 235). We offer this article in the same spirit.

culture from the individual's perspective avoids the misinterpretation of culture as stereotype.

What is cultural competency? One definition provides that it is "a set of congruent behaviors, attitudes, and policies that come together in a system, agency, or among professionals and enables that system, agency, or those professionals to work effectively in cross-cultural situations" (King, Sims, & Osher, 2000). Another influential definition is "the integration and transformation of knowledge, information and data about individuals and groups of people into specific clinical standards, skills, service approaches, techniques and marketing programs that match the individual's culture and increase the quality and appropriateness of health care and outcomes" (Davis, 1997). In sum, culturally competent people can grasp, reason, and behave effectively when faced with culturally diverse situations, where assumptions, values, and traditions differ from those to which they are accustomed (Stevens, 2009).

Cultural competency eschews reliance on stereotype and avoids the mistake of assuming that cultural dictates apply with equal force to all who share a cultural background (Holdman & Seeds, 2008). Moreover, it demands "self-awareness, immersion, repeated revision, open-mindedness . . . and attention to detail," (Holdman & Seeds, 2008, p. 903), reinforces the "reality . . . of personhood" (Haney, 1995, p. 547), and minimizes the likelihood that personal bias and subjective attitudes will contaminate the lawyer-client process (Piomelli, 2006). Simply put, lawyers *must* engage their clients in a culturally competent manner (Miller, Brame, Iverson, & Adele, 2008). Such engagement minimizes the likelihood that lawyers will misunderstand their clients' "goals, behaviors and communications" (Bryant, 2001, p. 42), and will underscore the important point that concepts of *credibility* are culturally determined (*id.*, p. 43). It also will lessen the likelihood that differences in culture will create barriers to "communication, understanding and trust" (Miller et al., 2008, p. 1139). This is why some scholars have argued that "cultural introspection" is a "necessary cross-cultural skill" (Piomelli, 2006, p. 158), and others have called for the creation of a "cultural jurisprudence" (Juss, 1998–99, p. 466).[4] This is all especially critical, given the reality that geography and culture are significant factors in determining the normative beliefs of different societies (DiNicola, 1998).

This issue has been raised most frequently in the context of death penalty cases (*Supplementary Guidelines*, 2008).[5] Here, we refer to the need for cultural competency *both* on the part of lawyers and on the part of expert witnesses working with them in this array of cases. There is a heavy emphasis on culture in most capital defense cases, and failure to be culturally competent may often be literally fatal (O'Brien, 2008, p. 754; *see also* Boulanger & Sarat, 2005, p. 1, discussing the "cultural life of capital punishment"). To a

[4] Juss (1998–99) defines that phrase to require legal system "players" to "use social science and social science facts to determine the extent to which a legal rule of practice or policy promotes or protects the cultural expectation of a person as an aspect of the realization of justice."

[5] This is not to say that issues of cultural competence arise only in death penalty cases. See e.g., Renteln, 2004 (discussing the use of a "cultural defense" in a range of cases from animal cruelty to bribery to hunting out of season).

significant extent, this is because of the *moral* role of jurors in the penalty phase of such cases, in which it is critical that the defense team "speaks" to an "ethic of caring, compassion and mercy" (Stetler, 2007–08, p. 244; Howarth, 1994). In short, questions of cultural competency must be front-and-center in *every* capital case (see O'Brien, 2008, for an enumeration of the aspects of the criminal trial process to which cultural competency is relevant, see Holdman & Seeds, 2008, pp. 894–95; on its specific relevance to assessments of incompetency, insanity and sentencing, see Lee, 2007; on how culture is a "dynamic process," see Carpenter-Song, Schwallie, & Longhofer, 2007, p. 1364, as quoted in Dudley & Leonard, 2008, p. 967 n. 32).

Prof. Eric Freedman has argued that it is "imperative" that the defense team conduct its mitigation investigation in a culturally competent way (Freedman, 2008). The literature here suggests that expert testimony often plays a "critical role" in jury sentencing decisions and legal rulings (Edersheim & Beck, 2005, p. 520).[6] Counsel must work with expert witnesses and must be willing and able to demonstrate to the fact finder how culture is integrated into every aspect of a defendant's life (Holdman & Seeds, 2008). In such cases, it is especially critical for counsel to understand—and subsequently demonstrate to the court—the interconnectedness of cultural competency and mental health issues. (*Id.*; see O'Brien, 2008, p. 754–55 ("culture is a significant factor influencing individuals' perceptions about the existence or cause of mental illness")).

These issues are made even more urgent and complex in light of the US Supreme Court's failure to impose a rigorous standard on defense to provide effective legal aid. In *Strickland v. Washington* (1984, p. 668), the issue presented was "whether counsel's conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result," a standard that one of the authors (MLP) have previously described as "pallid" (Perlin, 2003, p. 348) and "sterile and perfunctory" (Perlin, 1992, p. 53). However, in *Wiggins v. Smith*, (2003), the Court emphasized that a failure to fully investigate a capital defendant's life history fell short of prevailing professional standards, the Court is still clearly disinclined to carefully assess counsel's performance in providing criminal defense services (Williams, 2006).[7] If it were, the failure of the defense counsel to comply with Supplemental Guideline 5.1—requiring cultural competency and knowledge of mental health signs and symptoms (see Stetler, 2007–08)—would be the subject of frequent appellate reversals in cases in which counsel failed to provide effective counsel. This is far from the case (Perlin, 1996). In an interesting statement, one commentator has concluded that there may be an *ethical obligation* on a lawyer to be culturally competent so as to meet his or her constitutional obligations (Stevens, 2009; see also Hartley & Petrucci,

[6] On the role of mental health experts in capital cases in general, see Dudley & Leonard, 2008, pp. 974–80. On the need for competence in expert witnesses in general, see Hiss, Freund & Kahana, 2006. On the ethical responsibilities of expert witnesses in general, see Freckleton, 2004.

[7] To make clear, this article is primarily about strategies and tactics in these cases and is *not* a primer on Sixth Amendment law. There is a robust literature on the *Strickland*-related issues that we raise here. See e.g., Benner, 2009; Graham, 2008; Blume & Neumann, 2007; Perlin, 2003.

2004, arguing that lawyers must be *educated* in cultural competency matters, and Burton, 2004, p. 26, quoting Gardner, 1999, pp. 33–34 on how lawyers must learn to process information "in a cultural setting to solve problems"; on ways that psychologists must become culturally oriented, see Fouad & Arredando, 2007).[8]

This is all especially important in cases involving defendants with mental disabilities (O'Brien, 2008), a statistically significant cohort (Fellner, 2006), especially in death penalty cases (see Perlin, 2003, quoting Stafford-Smith & Starns, 1999, p. 70 n. 92 (estimated that up to thirty percent of all persons on death row have mental retardation)).[9] There is a significant—and continuing (see *Cone,* 2009; *Knowles,* 2009)—array of post-*Strickland* cases involving ineffectiveness of counsel in cases involving defendants with potentially viable insanity or incompetency claims, and it is clear from a reading of these cases (see Perlin, 1998, § 2B-11.3) that counsel in these cases all too often are little more than what Judge David Bazelon characterized some 35 years ago as "walking violations of the Sixth Amendment." (Bazelon, 1973). If such defendants are also from other cultures, the obligations on the defense team are even greater and the stakes are even higher.[10]

II. Strategies to Insure Cultural Competence on the Part of the Expert Witness

It is also critical that the forensic witness, working hand-in-glove with defense counsel, develop strategies that will best ensure that a comprehensive picture of the defendant be painted for the fact-finder.[11] Just as the acquisition of multicul-

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[8] By way of example, consider the case of *People v. Kimura* (1985). There, a Japanese American woman in her 30s—a wife and mother of two children (a 4-year-old son and 6-month-old daughter) —had the intention of committing parent-child suicide (oyako-shinyu) after learning that her Japanese-American husband had been keeping a mistress for many years. The children drowned but she was rescued by a passerby. The prosecution charged her with first-degree murder. However, the Japanese-American community petitioned the court to reduce the charge, emphasizing that parent-child suicide was at the root of her culture directing her to act and behavior should be judged within the context of Japanese standards. Three psychiatric experts opined she was temporarily insane at the time and one protested that she was suffering a "brief reactive psychosis." As a result of both the experts and community input, the homicide was reduced to voluntary manslaughter and the defendant was sentenced to one year in custody and five years probation with psychiatric counseling recommended (see generally, Lee, 2007).

[9] See also Marschke, 2004 (rate of mental illness among prison inmates is three times higher than that of the general population).

[10] On the relationship between cultural diversity and disability, see e.g., Rosenberg (2000, p. 462) ("Cultural diversity generally refers to groups that have been historically oppressed, and an expansive definition includes . . . people with physical, developmental, and emotional disabilities, . . . , and other oppressed and marginalized groups"). In addition, mental disabilities are often "expressed" differently and interpreted differently in different cultures. For example, the *DSM–IV,* Appendix 1 TR (2000) provides a glossary of culture-bound syndromes that describe mental disabilities within different cultures. *Boufee' delirante* (W. Africa, Haiti) refers to an agitated and aggressive state of behavior that can be accompanied by auditory and visual hallucinations. Similarly, in the Latino culture, *bilis* or *colera* (muina) is a state of anger leading to nervous tension, headaches, loss of consciousness, screaming, and chronic fatigue.

[11] On the related question of the impact of cultural competency on the provision of health care in general, see e.g., Ikemoto, 2003.

tural competency is considered a "necessary prerequisite" in providing mental health services to clients from diverse cultural backgrounds (D'Andrea & Daniels, 2001, p. 432), so is such acquisition a prerequisite in providing evaluation services in the criminal trial context (see Kavanaugh, Clark, Mason, & Kahn, 2006, discussing the clinician's responsibility to be aware of potentially relevant cultural factors). Cultural competence is an integral aspect of comprehensive mitigation efforts in criminal capital crimes. (on nurturing and fostering multicultural competence and its relationship to social justice, see Vera & Speight, 2003). As established in *Furman v. Georgia,* (1972, p. 274), a thorough life history involves a careful search into the defendant's background. We argue here that cultural competence in interview and testing strategies will lead to a more robust approach and ultimately more successfully humanize the client and their context.[12] A team approach by psychologists (or other mitigation specialists) and lawyers may be more effective for both legal strategizing and gathering effective mitigation information. Potential pitfalls in communication can more easily be assessed when an integrated effort is made to utilize the strengths of the defense team in laying a roadmap to humanize the client.

This is all the more time-urgent now in light of the new Universal Declaration of Ethical Principles for Psychologists that speaks to "the common moral framework that guides and inspires psychologists worldwide toward the highest ethical ideals in their professional and scientific work," and mandates that "competent caring requires the application of knowledge and skills that are appropriate for the nature of a situation as well as the social and cultural context." (Universal Declaration, 2008). The defendant's history of cultural identification and assimilation of the host culture—including normative values, beliefs and attitudes—is a ripe area for inquiry both for experts and attorneys. Specific knowledge of the legal system and familiarity with consequences associated with behaviors within this context is critical for success in working with clients. Additionally, familiarity with the host culture and associated legal system is important. Such information can be gained from a mitigation specialist who is knowledgeable or an interpreter who is assisting with the case. Atkins, Podboy, Larson, and Schenker (2006) provide detailed guidelines for conducting mitigation in capital cases with the goal of humanizing the client. The methodology involved is complex, but essentially involves the following:

(1) Clinical evaluation including interviewing and psychological testing exploring psychological syndromes, neurological impairment, psychosocial/familial issues, and substance abuse history. Academic, occupational, and mental health records are essential to this stage.

(2) Social and cultural factors affecting the defendant's development and in particular his involvement in the offense including poverty, institutionalization, race, age, foreign culture, military experience, gang involvement, and sexual identity.

[12] For a discussion on the relationship between these issues and *DSM–IV*, see infra manuscript, at p 271.

(3) Prison experience must be gathered if present, including adaptation to prison life, respect for corrections officers, assistance to other inmates, and any other accomplishments during incarceration.

(4) Factors related to the offense, including the defendant's intention at the time of the crime, moral justification and role in the offense. This is a particularly important area in which cultural sensitivity is critical, especially with regard to motivation and anticipation of outcome or consequences.

(5) The defendant's character, including a lack of criminal history, cooperation with authorities, remorse, and rehabilitation.

(6) Victim-related variables, including whether the offense was provoked by the victim and/or the extent to which the victim was a participant in the offense.

Cultural competence includes obtaining relevant information regarding predisposing factors for juvenile and adult delinquency within the context of the primary culture, as well as in looking at the defendant's adaptation to the host culture. These issues include the presence of low IQ and learning disabilities, Attention Deficit and Hyperactivity Disorder, criminal modeling by the parent, peer rejection, childhood aggression, marital separation and conflict, child abuse, mental illness in the family (treated or untreated), and parental absence or neglect (Atkins, Podboy, Larson, & Schenker, 2006).[13] Biological factors including prenatal (genetic, malnutrition, teratogens, chronic stress), perinatal (premature births, low birth weight, delivery complications) or postnatal (chronic nutritional deficiencies, head trauma and loss of consciousness, serious accidents) are similarly important. Familial factors which should be considered include mental illness in the family of origin, criminality on the part of parents, parental substance abuse, breaks in caregiving during formative years, child abuse, attachment issues, and maternal depression. Environmental factors include inadequate or lack of proper adult modeling, parental dependence on illicit substances for coping, parental modeling of violence to resolve conflict, economic difficulties, exposure to toxins or over-involvement in entertainment violence (Atkins et al., 2006).

In such assessments, basic methodological issues include area and scope of measurement, problems of administration, and interpretation of results. By way of

[13] Frequently, defendants present with multiple predisposing factors in their background. These factors should be considered in examining criminal behavior and the circumstances leading to their arrest, and failure to do so by attorneys or experts can erroneously lead to false convictions and inappropriately punitive sentences. For example, in *State v. Pompey* (2001), an African American male was accused of murder. Historical background reviewed by one of the authors (V McC) clearly revealed the diagnosis of mental retardation, learning disability, and issues related to parental absence and economic deprivation. The state argued against a finding of mental retardation, based on IQ test results, on allegations of malingering, and evidence of phone calls placed from jail that purportedly demonstrated high adaptive functioning on the defendant's part. Ultimately, the court acknowledged that the defendant met the mental retardation criteria after it was presented by the defense team with academic records, collateral information from teachers, family and historical documentation of the defendant's disability.

example, the areas of intelligence and pathology of mental illness are not manifested in the same way in some cultures, or given the same name. As an illustration, "dhat" is a folk term in India referring to severe anxiety and hypochondriacal concerns associated with the discharge of semen, discoloration of urine, and feelings of weakness and exhaustion similar to "Jiryan" (India), and "Sukra prameha" (Sri Lanka) (for other examples, see Kiev, 1982). In the Western culture, this would be known as anxiety disorder (American Psychiatric Association, *DSM–IV–TR*, 2000). Modification of concepts of mental illness, and relatedly, items on tests tapping psychological constructs have to be considered.

Administration of tests should include inquiry as to the defendant's familiarity with testing. Assumptions regarding a defendant's ability to self-reflect or make social judgments are presumed in the United States, yet may not apply to people of other cultures. Similarly, the capacity to rank order or use measuring systems in Western tests may be foreign to people who have never experienced testing. A related issue is perception and attitudes the defendant may have about revealing personal information and attitudes toward authority, including trying to please the examiner. For example, the *DSM–IV–TR* (2000) includes an outline for cultural formulation to assist in diagnostic interviews and assessment with multicultural patients. Important areas are highlighted, including a review of the patient's cultural background, the role of cultural context in the expression and evaluation of symptoms and the effect that cultural differences may have on the relationship between the evaluator and patient. It is important to realize that workers in the field of transcultural psychiatry, by way of example, have suggested that some symptoms cannot be universally accepted as signs of abnormality due to the differences in degree of their acceptability from one culture to the next (King, 1999).

The cultural identity of the patient includes understanding the ethnic or reference group, as well as the degree of involvement with the culture of origin and host culture. Chief among the concerns is language ability and preference. Cultural explanations of the illness and the way in which symptoms are expressed by the patient and to the support group are areas of great importance, especially causal explanations of the illness and associated behaviors (on the existence of culture-specific disorders, see, e.g., Laungani, 1997; on the variety of ways cultures understand and express psychological well-being and distress, see, e.g., Kammel, 2008). This is critical when describing how the mental illness is associated with criminal behavior. Cultural factors related to the psychosocial environment and levels of functioning are important in terms of assessing stressors in the social environment and the availability of support including familial, social, and religious affiliation. For example, is there a system by which the individual can receive help once the illness is identified?

The relationship between the clinician and the individual is critical. Difficulties in communication can lead to errors in diagnosis and treatment as well as misunderstandings regarding the cultural significance of the behavior. For example, the behavior may not be pathological within the cultural context, which is an important mitigation issue. Thus, in 1988, a judge in Quebec sentenced two Haitian men who had been convicted of gang rape of a young Haitian woman to 100 hours of community work and 18 months of house arrest, despite the prosecution's request for 5 years of incarceration. The judge offered the rationale

for leniency based on cultural sensitivity. However, the ruling also stereotyped and stigmatized a whole group, suggesting cultural sensitivity can be a double-edged sword (see Bilge, 2005). Finally, the role of culture is important in how best to promote comprehensive diagnosis, care, and rehabilitation.

Interpretation of results must be presented in a culturally meaningful way. Attention to the defendant's culture, and the meaning of the behavior within this context is meaningful to presenting both subjective (interviews) and objective (testing) data accurately. This has particular relevance when trying to explain criminal behavior in the court of law in a culturally competent manner. In comparing cultures, several types of equivalency need to be met (Berry, 1980). Conceptual equivalence requires that tests and concepts have identical meaning in the cultures being studied. For example, the local meaning of concepts within the cognitive systems of the groups being compared must be identified in order to legitimately make comparisons. If, in fact, there is a common meaning, then the comparison can be made. Functional equivalence involves determining whether or not two or more behaviors are related to functionally similar problems. For example, generosity may involve giving money in one culture as compared to giving food in another culture. Semantic or translation equivalence refers specifically to whether concepts can be appropriately conveyed from one culture to another when translated.

Discrepancies can lead to nonequivalence. For example, a Chinese man living in the United States was charged with homicide of his work supervisor. At the trial, interpreters were used by both prosecution and defense. However, the (female) defense interpreter modified the words to avoid using disrespectful curse words, leading to her translating that "dirty words" had been spoken by the victim instead of his actual words, "I will fuck your mother's vagina." Similarly, the prosecution interpreter used the word "killed" the boss more than ten times with a knife instead of "stabbed." Thus, instead of interpreting the defendant's words to say he used a knife to try to defend himself when his boss pulled a knife, his words were interpreted to say that he "killed" the boss (Tseng, Matthews, & Elwyn, 2004).

Technical equivalence refers to the method of data collection. For example, in some cultures unfamiliar with formal testing, results may not lead to valid outcomes due to reluctance to disclose or confusion regarding testing (Tseng et al., 2004). Metric equivalence refers to analysis of the same concepts across cultures and the notion that the construct can be measured through the same scale after proper translation. Statistical behavior of the items in each culture must be the same. Validity of the measurement itself is the most critical issue in the cross-cultural application of testing. In other words, do the results really represent the issues being measured? Validity for the threshold or cutoff point refers to the point at which results should be considered impaired or psychopathological. Decisions about the criteria for threshold should be determined based upon sociocultural considerations and will likely affect various cultural groups differently.

Interview strategies with individuals whose culture and/or language differ from the examinee should include consideration of culturally relevant factors, such as the examiner's cultural sensitivity to other cultures, including attitudes, beliefs, values, and problem solving strategies. The use of a mitigation specialist

or interpreter who is familiar with the language, values, ethics, and laws of the defendant's cultural background can greatly facilitate information gathering. The expert can utilize the specialist or interpreter as a consultant prior to and during interviews with the defendant and collateral parties. Interview questions can be posed using a style (direct v. open, or formal v. informal) that will best accommodate the defendant's interpersonal comfort zone. Interview questions or basic content can be translated to assure functional equivalence and optimize the validity of information (Tseng et al., 2004).

Collateral interviews can be similarly planned to ensure that accurate information is obtained without sacrificing the defendant's trust. For example, in certain cultures, individuals are less likely to disclose personal distress to family members, and are more likely to internalize the responsibility for problem solving. Similarly, familiarity with the culture, cultural empathy, and culturally-relevant interactions reflecting an appreciation of cultural norms in social interactions are critical to the success of the interview. The interview style used to approach the interaction is critical, and includes direct versus open inquiry, which can lead to improved outcomes with regard to information gathering. Formal interview styles may be less successful within some cultures and limit communication, whereas informal strategies, such as "talking story" may lead to greater success in gathering relevant information.[14] The decision to interview family or other familiars in the presence of the client or alone is another important variable, and needs to be considered to enhance information gathering. In some cultures, social shame may be caused by revealing personal information.

Research has shown that available psychological and forensic tests lack the normative database that would permit cross-cultural comparisons. Most standardized tests used by Western clinicians have been designed for use in Caucasian populations and those with Euro-American backgrounds (on potential bias of personality tests, see McCurley, Murphy, & Gould, 2005; on one court's criticism of overreliance on test results (in the context of a parenting capacity case), see *In re B.M.*, 1996; on how the use of such tests must meet the prevailing legal evidentiary standards for admissibility, see Kavanaugh et al., 2006). Considering the application of these tests in clients with non-Western cultural backgrounds at all requires caution and discretion.

Issues regarding admissibility under *Daubert v. Merrill Dow Pharmaceuticals Inc* (1993) or *Frye v. United States* (1923) may also arise.[15] For example, if the

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[14] A "talking story" involves encouraging dialogue with the defendant that begins in an informal and indirect manner but permits building of rapport (see Sunwolf, 2000). This is a technique that is frequently utilized in Hawaii based on one of the co-authors' (VMcC) experience interviewing and testing multicultural clients. *Id.*

[15] *Daubert* allowed jurors to hear evidence and weigh facts from experts whose testimony included novel scientific theories, if the case warranted–even if those theories had not gained "general acceptance" in the scientific community–as long as the testimony was "relevant" and "reliable" (*Daubert v. Merrill Dow Pharmaceuticals,* 1993). Before *Daubert,* the *Frye* test had been the norm. *Frye* allowed judges to exclude evidence from expert witnesses if it had not been "generally accepted" (*Frye v. United States,* 1923) It should be noted that some recent analyses of *Daubert* admissibility questions find a significant pro-prosecution, anti-defendant bias in judicial decision making (see, e.g., Risinger, 2000; Dwyer, 2007; Rozelle, 2007; Perlin, 2009a). See Keierleber and Bohan (2005) on the status of *Daubert* in the various states.

literature regarding the use of tests in multicultural populations does not support the proposition/assertion that they are reliable and valid for a given population, or the test itself is not utilized in that population, the results will likely be rejected. On a related note, the credibility of the testifying expert may be called into question. The end result is inevitably disastrous for the defendant, expert and attorneys involved.

Research regarding the Minnesota Multiphasic Personality Inventory (MMPI)-2, a frequently used personality test in forensic evaluations, has made advances in providing meaningful comparisons with regard to various cultures, including African American, Asian, and Hispanic individuals.[16] By way of examples, African Americans score higher on most scales, with the largest difference on Scale 4 (Psychopathic Deviate) for women (Butcher, Dahlstrom, Graham, Tellegran, & Kaemmer, 1989). Similarly, African Americans as compared to Caucasian Americans in the MMPI-2 normative group showed differences with African American men significantly higher on Scale 8, and African American women significantly higher on Scales 4, 5, and 9 (Timbrook & Graham, 1994). Shondrick, Ben-Porath, and Stafford (1992) compared data for 106 Caucasians and 37 African American men undergoing forensic evaluations. Scores for the two groups on validity and clinical scales were similar. Scale 9 was the only significant difference by 7 T-score points, with African American men significantly higher than Caucasian men. A meta-analytic study by Hall et al. (in press) examined 25 results from 25 studies of African American and Caucasian men and 12 studies of African American and Caucasian women. They concluded that although African American men scored slightly higher than Caucasian men on seven MMPI/MMPI-2 scales and African American women scored higher on eight scales, as compared with Caucasian women, the effect sizes associated with ethnicity were small and not statistically significant or clinically meaningful. Campos (1989) conducted a meta-analysis of 16 studies comparing Caucasians and Hispanics, and concluded Hispanics scored only slightly higher (4 T-score points) than Caucasians on the L-scale.

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[16] The MMPI contains the following validity scales. The L Scale-was constructed to detect deliberate attempts to present oneself in a favorable manner. The F Scale-detects deviant or atypical ways of responding to test items. The K Scale-refers to subtle attempts by patients to deny psychopathology and present in a favorable light or exaggerate symptoms. It also contains the following clinical scales: Scale 1 (Hypochondriasis) is used to identify patients who show a preoccupation with their body and fears of illness and disease. Scale 2 (Depression) refers to symptomatic depressive symptoms including loss of appetite, dysphoric mood, sleep changes, and suicidality. Scale 3 (Hysteria) refers to hysterical reactions to stressful situations leading to involuntary psychogenic loss or disorders of function. Scale 4 (Psychopathic Deviate) refers to patients diagnosed with psychopathic personality symptoms such as anti-social behaviors. Scale 5 (Masculinity-Femininity) refers to the lack of stereotypic interests for both sexes. Scale 6 (Paranoia) refers to patients judged to have paranoid symptoms such as ideas of reference, feelings of persecution, suspiciousness and rigid attitudes and opinions. Scale 7 (Psychasthenia) refers to general symptomatic patterns of obsessive-compulsive symptoms including obsessive doubts and unreasonable fears. Scale 8 (Schizophrenia) refers to patients with disturbances in thinking, mood and behavior including misinterpretations of reality, delusions or hallucinations. Scale 9 (Hypomania) refers to patients with symptoms such as elevated mood, accelerated speech, or motor behaviors. Scale 0 (Social Introversion) refers to a patient's tendency to withdraw from social contacts and responsibilities (Graham, 2000).

Stevens, Kwan, and Graybill (1993) compared Chinese international students with a Caucasian sample that matched age, academic major, and year in studies. The Chinese men scored significantly higher on Scale 0, while Chinese females scored significantly higher on Scale L. Tsai and Pike (2000) addressed the issue of acculturation in Asian Americans and found, in general, Asian Americans scored significantly higher on Scales 1, 2, 4, 6, 7, 8, and 0 as compared to Caucasian Americans. With regard to acculturation levels, Tsai and Pike divided 90 Asian Americans into low acculturated, bi-cultural and highly acculturated groups. As compared to Caucasian Americans, the low acculturated group scored significantly higher on Scales L, F, 1, 2, 5, 6, 7, 8, and 0. Interestingly, no significant differences were found between highly acculturated Asians and Caucasians.

These data suggest that familiarity with the host culture—including social norms, knowledge of interpersonal experiences and language—may reduce differences and enhance the reliability of findings, pointing to an important aspect of history gathering that can help explain discrepancies in findings. The experts' familiarity with the literature, research, and assessment strategies sensitive to these issues helps ensure cultural competency and ultimately optimizes outcomes in the legal setting.

Similarly, forensic competency instruments, such as the MacArthur Competency Assessment Tool-Criminal Adjudication (Mac CAT-CA) (Bonnie, Hoge, Monahan, Poythtres, Eisenbery, & ReuchtHaviar, 1997) rely heavily on intelligence and educational level (i.e., a measure of comprehension). And the Competency Assessment Instrument (CAI)—a semi-structured interview on a 5-point scale developed by Paul Lipsitt, David Lelos, and A. Louis McGarry (Lipsitt, Lelos, & McGarry, 1971; see generally, Barnard et al., 1991; Melton, Petrila, Poythress, & Slobogin, 1997; Nicholson, Briggs, & Robertson, 1988)—is scored subjectively, and is thus potentially affected by the examiner's cultural knowledge (or lack of knowledge) of the defendant. Results from these types of tests, if applied in an indiscriminate way to individuals from the non-dominant culture, can lead to faulty conclusions, and ultimately poor legal decisions.

Neuropsychological assessment in individuals from diverse cultural groups is best accomplished using a standardized neuropsychological battery that permits multiple levels of inference as opposed to a level of performance model (Horton & Wedding, 1984; Reitan & Wolfson, 1992). Multiple levels of inference help control for false positive and false negative errors in detection of brain impairment or diagnosis. Few members of diverse cultural groups have been included in the standardization of most neuropsychological measures. However, the Halsted Reitan Neuropsychological Battery and the measure of executive function known as the Test of Verbal Conceptualization and Fluency (TVCF) (Reynolds & Horton, 2006) are two instruments that have proved useful in multicultural populations. The Halstead Reitan Battery has the advantage of multiple levels of inference which includes left-versus right-sided body differences, presence of pathognomonic signs of head injury, cut off scores, and patterns of scores on different subtests (Jarvis & Barth, 1989). This is critical in multicultural assessment because it permits analysis of deficits and strengths, which are not as dependent on language and cultural differences. The TVCF has also shown good reliability and validity data for ethnic groups (European American, Hispanic American, African American and Asian American; Reynolds & Horton, 2006).

Cultural competence in interview strategies necessarily entails the examiner's sensitivity to attitudes, beliefs, and values unique to the worldview of the defendant. Familiarity with the culture, empathy and an awareness of cultural norms in social interactions are critical to the success of the interview. In the context of mitigation in a capital punishment proceeding, the likelihood that information gathering may yield rich material largely depends on the interviewer's ability to elicit data critical to behaviors leading up to, during, and after the event in question and relevant mental health issues. Stylistic approaches vary; however, a conceptual framework that includes direct versus indirect questioning and formal versus informal inquiry is the basis of a solid interview style. Typically, a combination is utilized to optimize the outcome. Initial discussions regarding personal and familial boundaries and the limits of confidentiality will help to build trust and decrease suspiciousness and paranoia, which are common in forensic interviews. Identifying and inviting the defendant's preferences with regard to collateral interviews will similarly enhance information gathering. Enlisting the help of family in a comfortable manner to provide information regarding the defendant's identification with sociocultural norms unique to his or her culture can lend weight to mitigation concerning motives and behaviors specific to the criminal charges, ultimately influencing the legal outcome (Tseng et al., 2004; see also, e.g., Lee, 2007). In some cultures, social shame may be caused by revealing personal information. Taking time to acknowledge personal boundaries, familial boundaries, and confidentiality prior to beginning the interview can help ameliorate this problem and facilitate communication (Tseng et al., 2004).

III. The Interplay With International Human Rights

Human rights are necessary for all individuals—human rights violations occur when persons are treated as objects or as a means to others' ends (Ward & Birgden, 2007). Offenders have enforceable human rights (Birgden & Perlin, 2008; Birgden & Perlin, 2009; Perlin & Dlugacz, 2009). The Vienna Declaration and Programme of Action (1993) and the Universal Declaration of Human Rights (1948) recognized that inherent dignity and inalienable rights of all individuals are the foundation of freedom, justice, and peace. Through global covenants, individual rights of offenders are safeguarded against cruel, inhuman, or degrading treatment or punishment (International Covenant on Civil and Political Rights [ICCP], Article 7, 1966a), prisoners should be treated with humanity and dignity, and provided with reformation and social rehabilitation (ICCP, Article 10, 1966a), individuals are guaranteed the right to the highest attainable standard of physical and mental health (International Covenant on Economic, Social and Cultural Rights, Article 12, 1966b), individuals are guaranteed respect for human rights and fundamental freedoms in forensic and correctional systems (Vienna Declaration on Crime and Justice, 2001), and prisoners should be treated in a humane manner and with dignity (United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, 1988; See generally, Birgden & Perlin, 2009; Perlin & Dlugacz, 2009).

Most recently, the Convention on the Rights of Persons with Disabilities ("Convention") (United Nations, 2006a) was adopted in December 2006 and opened for signature in March 2007 (United Nations, 2006b). The Convention

entered into force—thus becoming legally binding on State parties—on May 3, 2008, 30 days after the 20th ratification (see Melish, 2007; Stein & Stein, 2007). The Convention calls for "respect for inherent dignity" (Article 3(a)) and "non-discrimination" (Article 3(b)). Subsequent articles declare "freedom from torture or cruel, inhuman or degrading treatment or punishment" (Article 15), "freedom from exploitation, violence and abuse" (Article 16), a right to protection of the "integrity of the person" (Article 17), "equal recognition before the law" (Article 12), and finally equal "access to justice" (Article 13) (United Nations, 2006a). This treaty furthers the human rights approach to disability and recognizes the right of people with disabilities to equality in most every aspect of life (see Dhir, 2005; see generally, Perlin & Szeli, in press; Perlin, 2009b).

Commentators have concluded that the Convention "is regarded as having finally empowered the 'world's largest minority' to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection" (Kayess & French, 2008, p. 4, n. 17). Kayess and French (2008) noted, "Proponents emphasized that a convention on the human rights of persons with disability would give shape to the nature of, and add specific content to, human rights as they apply to persons with disability, and in turn, provide a substantive framework for the application of rights within domestic law and policy" (p. 17). Kanter (2007) had noted, "The extent to which the Convention can realize its goals will depend in large part on the extent to which the Convention is ratified, and whether the world's nations will comply with and further the goals of the Convention through enactment of or changes to their domestic laws" (p. 309).

The need for forensic experts to be culturally competent may be even more pressing in the cases of criminal defendants with mental disabilities who are not from the dominant culture. For example, if forensic witnesses fail to be culturally competent, they contribute to an environment in which criminal defendants with mental disabilities are deprived of effective representation. A strong argument could thus be made that this failure violates both the spirit and the language of the Convention (defendants are deprived of their guaranteed "equal access to justice" (United Nations, 2006a, Article 13). Certainly, this question *must* be "on the table" for lawyers and for expert witnesses in the coming years. Further, the ratification of the Convention underscores the international human rights principle of equal access to justice for all persons with disabilities, whether the "justice" in question relates to the civil or the criminal legal process (See Perlin & Dlugacz, 2009). No such distinction whatsoever is made in the Convention.[17] By way of example, in the "access to justice" article, the Convention specifically mandates state parties to "promote appropriate training for those working in the field of the administration of justice, *including police and prison staff*" (United Nations, 2006a, Article 13(2) (emphasis added); on the potential impact of the Convention on the assignment of counsel in cases involving persons with mental disabilities, see Perlin, 2009b).

The question of the extent to which international human rights norms apply to domestic practice has also been raised collaterally by the U.S. Supreme Court

[17] Cf. *Pa. Dep't of Corr. v. Yeskey* (1998) (Americans with Disabilities Act applies equally to state prisoners).

in a trilogy of criminal procedure and criminal law cases (*Lawrence v. Texas*, 2003, consensual sodomy; *Roper v. Simmons,* 2005, execution of juveniles; *Atkins v. Virginia*, 2002, execution of persons with mental retardation), that has, over vigorous and passionate dissent (see Schauer, 2008, pp. 1931–32, n. 1, discussing dissents) endorsed an expansive reading of international law principles in a domestic constitutional law context. It gets support also by the inclination of other courts to turn to international human rights conventions—even in nations where such conventions have not been ratified—as a kind of "best practices" in the area (see *Roper v. Simmons*, 2005, p. 578).[18] And, of course, there is some important evidence that suggests that, in other nations, in other contexts, ratification of a UN Convention *has* had a salutary impact on domestic law (James, 2008; Piwowarczyk, 2006; Perlin, 2009b; on the ways that this Convention can guide lawyers representing correctional inmates in litigation involving mental health issues in prison settings, see Perlin & Dlugacz, 2009).

Although the United States has not, as of yet, ratified the Convention, we believe that "best practices" mandate that participants in the criminal justice system behave as if the Convention is binding law. Certainly, the Convention's focus—and the focus of the scholarly debate now taking place—has certainly been more on questions of empowerment than on questions of trial procedure (Kayess & French, 2008). Yet, it is clear that it opens up for reconsideration the full panoply of issues discussed in this paper as they relate to persons with mental disabilities. If, by way of example, it appears that forensic psychologists participating in death penalty evaluations and trials provide substandard expert assistance—due to lack of cultural competency—then an important question of Convention compliance is raised (see Perlin, Birgden & Gledhill, 2009; see also Universal Declaration of Ethical Principles for Psychologists, 2008). For the "equal justice" principles embedded in the Convention to be meaningful, persons subject to forensic evaluations in criminal cases—capital cases and others—have a right to culturally competent evaluations as part of the trial and penalty phases processes.[19]

Conclusion

In the 37 years since Justice Brennan concurred in *Furman v. Georgia,* (1972) mental health professionals and lawyers have carefully made the connection between the need for culturally competent forensic evaluations and the right to a fair trial in the context of a capital punishment penalty phase. This article has sought to provide three perspectives to this issue: the perspective of the evaluating forensic psychologist, the perspective of the criminal defense lawyer, and the perspective of international human rights. We believe that all three of these perspectives are essential if Justice Brennan's vision is to be fulfilled, and, it will be less likely that, in the words of Bob Dylan,[20] the "souls" of those facing the ultimate penalty will be "forgotten."

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[18] See Sadoff (2008) on the relationship between international human rights law and death penalty procedures in general.

[19] Compare *Ake v. Oklahoma* (1985) (finding a constitutional right to expert assistance in a death penalty case involving the insanity defense).

[20] *See* supra note 3.

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Received May 16, 2009
Revision received July 22, 2009
Accepted July 22, 2009 ■