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Is Color Blind Justice Also Culturally Blind?

The Cultural Blindness in Justice

Shiv Narayan Persaud*

INTRODUCTION

As diverse ethnic groups continue to experience numeric growth and societal grounding in America, their advocacies for culturally competent¹ representation within the legal system cannot be ignored or underplayed.² Undoubtedly, some professions such as mental and physical health, and their related sectors, have developed and continue to integrate cultural competencies into their respective practices.³ Others such as the legal profession seem to lag

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1. Today, there are many definitions of cultural competence depending on one's professional practice. But as Lum notes, "an adequate definition of cultural competence must include the concept of cultural proficiency as an operational variable for cultural competence involving both the worker and the client and mutual participatory understanding and learning in a practice growth process. Cultural proficiency involves becoming adept, skilled and to a certain degree competent in a helping relationship where cultural and ethnic diverse issues are involved along with other multidimensional relevant areas ... LaFromboise, Coleman, and Gerton ... suggest that a culturally competent individual possesses a strong personal identity, has knowledge of the beliefs and values of the culture, and displays sensitivity to the affective processes of the culture." DOMAN LUM, *CULTURALLY COMPETENT PRACTICE: A FRAMEWORK FOR UNDERSTANDING DIVERSE GROUPS & JUSTICE ISSUES* 19 (4th ed. 2011).

2. "Although ethnic minorities are slowly increasing in number and in positions of power in the United States, the people who have shaped the U.S. legal system have predominately been white. According to the U.S. Census Bureau's 2000 census, ethnic minorities constitute 25% of the U.S. population and are on the rise. Yet, on examination of people in power within the legal system, ethnic minorities are extremely underrepresented . . . Despite [some] moderate gains in ethnic minority representation, the vast majority of court officials continue to be white." Kari A. Stephens, et al., *Advocacy in the Legal System: Cultural Complexities*, in *RACE, CULTURE, PSYCHOLOGY & LAW* 421- 422 (Kimberly H. Barrett & William H. George, eds. 2005).

3. The term cultural competency in the health industry has encompassed racial and ethnic disparities, as well as "other groups (such as women, the elderly, gays and lesbians, people with disabilities, and religious minorities.)" MARK CAMERON EDBERG, *ESSENTIAL READINGS IN HEALTH BEHAVIOR* 271 (Jones & Bartlett Learning 2009).

in their advocacies and promotion of culturally competent practices.⁴

Advocacy for culturally diverse populations requires cross-cultural competency from the individuals performing the advocacy. From the police officers to the parole officers, from the lawyers to the judges . . . these individuals must be cross-culturally competent to advocate for culturally diverse people. Ethnic minorities are grossly overrepresented in our legal system. The demographics of the legal system demand attention and growth of cross-cultural competency throughout the legal system. Without cross-cultural competency, advocacy efforts will have minimal impact. Ultimately, changing the legal system as a whole to one that guarantees the ethical and just treatment of all people will take years.⁵

In the criminal justice system, where discretionary legal decision-making authority is commonplace and may grossly affect the civil liberties of the citizenry, a paucity of standards requiring cultural competence training in any area of practice is evident.⁶ Without broad-based, mandatory public policy initiatives for cultural competency training among legal services providers and practitioners, the system will continue to be plagued with communicative and interpretive barriers. In all likelihood, these barriers will serve to hinder, if not retard, competent representation and the fair dispensation of justice.⁷

Though relatively new in everyday parlance, the rudiments for cultural competency at a macro-level arguably reside in the very core of American sovereignty—the American Constitution.⁸ A general definition of cultural competency is a “set of congruent practical skills, behaviors, attitudes, and policies that come together in a system, agency, or among professionals and

4. “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. 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,’ and (2) viewing culture from the individual's perspective avoids the misinterpretation of culture as stereotype.” Michael L. Perlin & Valerie McClain, “Where Souls are Forgotten”: *Cultural Competencies, Forensic Evaluations, and International Human Rights*, 15 *Psychol. Pub. Pol’y & L.* 257, 258-59 (2009) (citing *Furman v. Georgia*, 408 U.S. 238, 274 (1972) (Brennan, J., concurring)).

5. See Stephens, *supra* note 2, at 433.

6. See Jessica Jean Kastner, *Beyond the Bench: Solutions to Reduce the Disproportionate Number of Minority Youth in the Family and Criminal Court Systems*, 15 *J.L. & Pol’y* 941, 944-45 (2007).

7. “Our racial, ethnic, and cultural diversity create an urgent demand for professional service provisions that meet the needs that arise for people of particular racial and cultural backgrounds. The dynamics of racism and discrimination impinge broadly on the lives of minority individuals. Addressing these dynamics must occur on multiple levels in evaluations or interventions that take place in legal contexts.” Kimberly H. Barrett & William H. George, *Psychology, Justice, and Diversity: Five Challenges for Culturally Competent Professionals*, in *RACE, CULTURE, PSYCHOLOGY & LAW 4* (Kimberly H. Barrett & William H. George, eds. 2005); see also *id.*

8. See *Preamble*, U.S. CONST.

enables that system, agency or those professionals to work effectively in cross-cultural situations.”⁹ While early explications of cultural competency are likely to be the subject of future academic debates, perhaps one of the best-known illustrations of the concept can be found in Dubois’s *Souls of Black Folk*. Dubois wrote:

[T]he Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world, – a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, *this sense of always looking at one’s self through the eyes of others*, of measuring one’s soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twines – an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.¹⁰

Underlying Dubois’s conceptualization of the African-American “double consciousness” is an understanding and integration of African and Anglo-American cultures. The process requires members of the minority African-American culture to simultaneously understand their own culture and the nuances of the predominately Anglo-American culture, in their adaptation to the American way of life.¹¹ The dominant Anglo-American group, grounded firmly in the ethnocentricities of the prevailing Anglo-American culture, does not have to adhere to a “double consciousness” similar to that of members of the minority community.¹² As such, it became essential for members of the minority group, and not members of the dominant group, to avoid potential conflict or disagreement with the prevailing culture.¹³ The ability to negotiate the distinctions, however, not only provides minority members with heightened cognizance of their dual societal identities, but also instills greater sensitivities of the cultural distinctions customarily absent among members of the dominant group.¹⁴

9. Terry Cross, et al., *I Towards A Culturally Competent System of Care* iv-v (Georgetown University 1989).

10. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 16-17 (10th ed. 1970) (emphasis added).

11. *Id.*

12. *Id.* at 17-18.

13. *Id.*

14. “Cultural imperialism involves the paradox of experiencing oneself as invisible at the same time that one is marked out as different. The invisibility comes about when dominant groups fail to recognize the perspective embodied in their cultural expressions as a perspective. These dominant cultural expressions often simply have little place for the experience of other groups, at most only mentioning or referring to them in stereotyped or marginalized ways. This, then, is the injustice of cultural imperialism: that the oppressed group’s own experience and interpretation of social life find little expression that touches the dominant culture, while that same culture imposes on the oppressed group its experience and interpretation of social life.” Iris M. Young, *Five Faces of Oppression*, in *GEOGRAPHIC THOUGHT* 67 (George Henderson & Marvin

For example, taking off one's shoes before entering the home of an Indian family seems simple enough to convey to a non-Indian visitor.¹⁵ In contrast, explaining the dynamics of interpersonal relationships between Indian parents and their children in a cross-cultural context can be overwhelming to the culturally ethnocentric outsider.¹⁶ For many cultural outsiders, viewing another culture is the inability to discard certain non-relativistic percepts.¹⁷ This is due to the tendency to interpret cultural differences by way of value-laden comparisons laced with personal experiences. Unless we make a conscious effort, we fail to apprehend other cultures contextually and objectively.¹⁸ This conscious effort is crucial if we are to objectively capture the uniqueness and appeal of the other culture.¹⁹ Hence, a patent apprehension of a DuBoisian form of "double consciousness" should be characteristic of every American, regardless of his or her indigenous culture.²⁰

Despite the foregoing discussed societal realities, the necessity for cultural competence²¹ has either received scant attention or is generally ignored in many facets of societal relations and operations, including criminal culpability

Waterstone, eds. 2008).

15. "The taking off the shoes on entering a house is a common Eastern custom, and that may be one reason why slippers are so much worn . . . In India to enter a house barefoot is the polite rule, and in Burma 'the great shoe question,' whether or not Europeans should take off their shoes to enter the presence of the king, was agitated for years. [Americans] may laugh at this 'barefoot' rule, but Europe, and [America] too, have obstinate rules of etiquette, at which an Asiatic would laugh." CHARLES MORRIS, 1 HOME LIFE IN ALL LANDS 298 (J.B. Lippincott 1909).

16. "Socialization of children in South Asian families in the traditional setting tended to focus on sociocultural continuity rather than change. The parents who have emigrated from a traditional society make their adjustment to [the North American] society. They are not willing to give up their culture which they often regard as being more meaningful for their cultural identity. However, the children, especially those who are born in [North America], adapt relatively easily. This of course causes an inevitable gap between the parents and children. The concept of cultural continuity is gradually giving way to respect for initiative which was not a feature of traditional upbringing." GEORGE KURIAN, PARENT-CHILD INTERACTION IN TRANSITION 149 (Greenwood Publishing Group 1986).

17. "The notion of cultural relativism is that any part of a culture (such as an idea, a thing, or a behavior pattern) must be viewed in its proper cultural context rather than from the viewpoint of the observer's culture." GARY FERRARO, CULTURAL ANTHROPOLOGY 16 (7th ed. 2006).

18. "Through our cultural lens, we make judgments about people based on what they are doing and saying. We may judge people to be truthful, rude, intelligent, or superstitious based on the attributions we make about the meaning of their behavior. Because culture gives us the tools to interpret meaning from behavior and words, we are constantly attaching our culturally based meaning to what we see and hear, often without being aware that we are doing so." Susan Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY & LAW 48 (Kimberly H. Barrett & William H. George, eds. 2005).

19. *See id.*

20. *See* Iris M. Young, *supra* note 14, at 66-67.

21. "Cultural competence [is t]he integration and transformation of knowledge about individuals and groups of people into specific standards, policies, practices, and attitudes used in appropriate cultural settings to increase the quality of services; and produce better outcomes." DAWN FRESHWATER & SIAN E. MASLIN-PROTHERO, BLACKWELL'S NURSING DICTIONARY 160 (Juta 1994).

and punishment, areas in which civil liberties are most vulnerable.²² This Article will explore these issues focusing on cultural competency as a necessary and important tool in the dispensation of justice within the criminal justice system.

I. CULTURAL COMPLEXITIES IN OUR ETHNICALLY DIVERSE SOCIETY

More so than any time in its history, American society is constituted of multicultural groups,²³ each maintaining some indigenous uniqueness without assimilating into a cohesive monolithic cultural mass.²⁴ Each ethnic group seems to identify and maintain cultural characteristics, which define their uniqueness; this they do while continuing to adapt and interweave elements of the dominant culture that govern them all and determine their rights and privileges.²⁵ To some extent, the history of the country has shown that cultural differences have served to justify separatism and alienation, rather than fostering mutual acceptance through understanding and tolerance.²⁶

22. Embedding culturally competent ideals in the system should not, however, be equated with the notion that defendant may escape behind their cultural identity simply because it is different from or misunderstood by the mainstream culture. "A minority defendant needs a cultural ombudsman because (1) cultural diversity in society leads to cultural clashes in the courtroom, (2) cultural differences pose a greater problem than language differences, (3) courtroom participants misunderstand the cultural habits of minority defendants, (4) cultural knowledge can help a minority defendant's case whereas cultural ignorance can harm a minority defendant's case, and (5) the cultural ombudsman can provide cultural expertise and guidance when other courtroom participants cannot." William Y. Chin, *Multiple Cultures, One Criminal Justice System: The Need for a "Cultural Ombudsman" in the Courtroom*, 53 Drake L. Rev. 651, 655-57 (2005).

23. "[Although t]here are many definitions for culture[, t]he most common approach [for defining a] culture [is] as a summary of its components. E.B. Taylor, a nineteenth century anthropologist, described culture as 'that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.' A second approach focuses on the social heredity of people, its fundamental ideas, practices and experiences, which are transmitted from one generation to the other, usually from parents to children. In this approach, one becomes a member of a culture not by birth, but by a process of learning." Roberto Gonzalez, *Understanding Immigrant Pro Bono Clients*, 56 R.I.B.J. 13, 13-14 (2007).

24. "[T]he United States is perhaps the greatest conglomeration of cultures ever assembled under a single government. Although often given the moniker, 'melting pot,' the United States is perhaps better described as a mixing bowl, a place where many 'cultural' elements coexist to form a whole without losing their individual flavors. Cultural diversity is part of the essence of the nation, and no single ethnic, religious, linguistic, or social characteristics can define its citizens." Zappa v. Cruz, 30 F. Supp. 2d 123, 136 (D. Puerto Rico 1998).

25. DUBOIS, *supra* note 10.

26. Although educational integration spread throughout the country in the 1970s, there is a greater segregation among minorities and low-income students today. See JAMES H. CARR & NANDINEE K. KUTTY, *SEGREGATION: THE RISING COSTS FOR AMERICA* 28 (Routledge 2008). After the September 11th terrorist attacks, an advertising campaign portraying the religion of Islam as tolerant was initiated by the U.S. Government, yet dominant political rhetoric continued to refer to the religion as the "other." Liora Danan & Alice E. Hunt, *How Did the U.S. Government Look at Islam after 9/11?*, in *THE IMPACT OF 9/11 ON RELIGION AND PHILOSOPHY*:

In ethnically diverse societies such as ours, understanding an individual's existence within the context of the dominant culture starts with an objective view of the accommodations made and integrated into his or her cultural uniqueness and identity.²⁷ Colloquially phrased, "walk[ing] a mile in the moccasins" of another person may be more beneficial than an armchair assessment of his culture and society.²⁸ Being able to put oneself in the cultural context of the perceived stranger helps to reduce one's ethnocentric biases and subjectivity, while facilitating greater understanding and objectivity. In sum, a true appreciation of the *alien* culture is more likely to occur when the individual observer participates and becomes saturated in the cultural context and realities – the wants, needs, fears, interactions and exchanges – of the perceived stranger.²⁹ Such is the process of acquiring cultural competence.³⁰

In our system of justice, the acquisition of cultural competence is rapidly becoming a prerequisite as the nation's diverse ethnic groups continue to maintain their own cultural uniqueness, but must abide by our rule of law in accordance with the same rights and privileges accorded to the dominant cultural group.³¹

A. Ethnocentrism: A Barrier to Cultural Competence

The "tendency to judge others in relation to one's own cultural standards is referred to as ethnocentrism. The ethnocentric eye may see those who are different as inferior, ignorant, crazy, or immoral."³² Hence the emphasis on cultural competency, referred to earlier as the knowledge, skills, behaviors, attitudes, and policies that enable professionals to appreciate and work with peoples of other cultures.³³

Given the stereotypes that exist within the judicial process, the

THE DAY THAT CHANGED EVERYTHING? 55 (Matthew J. Morgan, ed. 2009).

27. PEDRO J. LECCA, CULTURAL COMPETENCY IN HEALTH, SOCIAL, AND HUMAN SERVICES 31-32 (Taylor & Francis 1998).

28. "The study of ethnic people must be just that – the study of the *experiences* of ethnic people. Unfortunately, much of current ethnic studies has not progressed beyond the superficial presentation of the symbols of ethnic groups. [I]t is not simply demonstrating Mexican dances [or] designating a soul food day in the cafeteria . . . While developing an appreciation [we] should delve into the experiential significance behind these symbols. What do the varieties of Mexican dances reveal about the Mexican culture and experience? How did soul food develop historically and how does it reflect the Black experience? . . . In short, to paraphrase a traditional Native American expression, ethnic studies should enable [one] to 'walk a mile in the moccasins of others.'" CARLOS E. CORTES, THE MAKING AND REMAKING OF A MULTICULTURALIST 100-01 (Teacher's College 2002).

29. See Rani Srivastava, *Cross-Cultural Communication*, in THE HEALTHCARE PROFESSIONAL'S GUIDE TO CLINICAL CULTURAL COMPETENCE 103 (Rani Srivastava, ed. 2007).

30. See LUM, *supra* note 1.

31. See Barrett, *supra* note 7, at 3-5.

32. Jon Shepard, *Sociology* 73 (Cengage Learning 2013).

33. See LUM, *supra* note 1, at 6.

establishment of system-wide cultural competency will require aggressive policies in order to achieve an acceptable level of effectiveness.³⁴ Any type of training in cultural competence will therefore require an understanding of the cultural uniqueness of diverse groups. This understanding necessitates the culturally competent participant to relinquish ethnocentric tendencies and acquire the capabilities that would facilitate appreciation for and understanding of the emotions and feelings of others.³⁵

Cultural differences should be appreciated without placing judgment on the values and beliefs of others, based on one's own cultural biases or subjective ethnocentricities.³⁶ In this regard, the culturally competent participant stands in contrast to the dominant group's ethnocentric perspective, which merely integrates the most palatable attributes of the other culture into its own, thereby reinforcing one's biases and subjectivity. By way of examples; listening to Elvis Presley does not mean that that one understands the meaning of rhythm and blues as an integral part of the African-American culture,³⁷ nor does watching the film *Indiana Jones and the Temple of Doom* aid the viewer's understanding of how Hindu philosophy impacts an individual from the Indian culture.³⁸

The justice system is plagued with similar types of stereotypes.³⁹ For example, consider the notion that individuals constituting the power elite receive the same punishment as those without the means to afford legal representation.⁴⁰ From the perspective of cultural competency, unequal legal representation and punishment should serve to foster and strengthen understanding and connectivity with the less fortunate defendants.⁴¹ This should be done from the moment such defendants enter the system.⁴² While training personnel to accommodate defendants from diverse cultures can accomplish this, there must also be sufficient safeguards against the

34. See Stephens, *supra* note 2, at 428-429.

35. NARAYAN PERSAUD, MENTORING WITH A HUMANE FACE 5 (Thompson Publishing 2006).

36. See *id.* at 160-161.

37. "[Elvis] was a popular cultural icon that brought African American culture to a youthful mass audience (primarily young, white, and middle-class) wearing a 'black mask' that was more acceptable than the faces of African American rhythm and blues performers . . . This indicates that while the symbolic barrier between 'black and white' appeared to be breaking down (as evidenced by the popularity of Elvis' [sic] 'black mask' among white teenagers), below the surface the two cultures were not significantly meeting or fusing." JON PANISH, THE COLOR OF JAZZ: RACE AND REPRESENTATION IN POSTWAR AMERICAN CULTURE 17 (Univ. Press of Miss. 1997).

38. See KHYATI Y. JOSHI, NEW ROOTS IN AMERICA'S SACRED GROUND 96 (Rutgers Univ. Press 2006).

39. See GEORGE F. COLE & CHRISTOPHER E. SMITH, CRIMINAL JUSTICE IN AMERICA 26 (5th ed. 2007).

40. CAROLYN BRADLEY ET AL., FORENSIC SOCIAL WORK 7-8 (Springer 2009).

41. *Id.*

42. *Id.*

legitimization of stereotyping.⁴³ Educating and training individuals from diverse socio-economic, social and cultural backgrounds to become culturally competent professionals must serve to further the understanding and appreciation for divergent cultural uniqueness. Educating and training these individuals should not foster a one-dimensional portrayal of the dominant culture.⁴⁴ Preconceived stereotypes of prospective culturally competent individuals must be assessed throughout the legal system in order to facilitate the integration and understanding of patterns and behaviors of divergent cultures without ethnocentric biases.⁴⁵ As Chris Jordan observes in a discussion about the movie *Trading Places*,

[E]xposure to a street culture defined as black masculinizes [the Caucasian character while the African American character's] reeducation by the white upper class renders him racially invisible. In this way, *Trading Places* illustrates that upper class white culture draws upon the atavistic energies of a street culture defined as black, even as it struggles to disassociate itself from street culture. It does so by equating masculinity with entrepreneurial savvy and hunger. It is thus [the Caucasian character] who mediates these opposing cultures by serving as a missing link in the story of social (as opposed to biological) evolution. Qualities associated with blackness like street savvy and masculinity serve as a platform for the white upward mobility in the film, which in turn makes possible the trickling down of wealth to working-class people, white and black, male and female.⁴⁶

Unscrupulous in their business practices, the antagonists and their methods of adaptation and acquisition endangered a lasting relationship by the end of the film.⁴⁷ The methods used by the antagonists clearly forced the protagonists to survive by adapting to each other's culture.⁴⁸ While the methods may seem obscene according to mainstream societal norms, a competent level of understanding was attained when all of the parties worked together to seek revenge against the antagonists: the entrepreneur, con artist, prostitute and the butler.⁴⁹ Besides being an excellent portrayal of interpersonal relationships, the

43. "Overgeneralization by legal personnel occurs when they assume that all cultural / ethnic groups understand and comprehend the customs of the white dominant culture. Legal personnel make the assumption that everyone shares 'normal' patterns of behavior. Although [training programs] can help shed light on these assumptions, this self-reference is ingrained and complex, and an extensive cross-cultural competency program is needed to combat self-referencing and stereotyping tendencies." Stephens, *supra* note 2, at 423.

44. *See id.* at 423-24.

45. *See id.* at 428.

46. CHRIS JORDAN, MOVIES AND THE REAGAN PRESIDENCY 93 (Praeger Publishers 2003) (citations omitted).

47. TRADING PLACES (Paramount Pictures 1983).

48. *See id.*

49. *See id.*

idea of a cultural exchange through adaptation is sound.⁵⁰ When viewed through legal lenses, it becomes evident that the development of a culturally competent program within the justice system must be capable to portray a realistic mile in the defendant's moccasins.⁵¹ It is in this spirit that a uniform standard for developing cultural competency within the justice system should be initiated.⁵²

II. THE COMPETENCY OF THE LAWMAKER AND THE FACT-FINDER

Within the framework of cultural competency, specific language and idiomatic expressions are necessary and important elements in transmitting intent, including the idea of criminal culpability.⁵³ Within the legal system, we find that attorneys are trained to affix plain meaning to words based on definitional interpretations rather than assessing contextual applications and meanings.⁵⁴ Yet, while lawyers are trained to search for the plain meaning of words in defining culpability,⁵⁵ culturally neutral apprehension seldom occurs.⁵⁶

For example, the definition of the word "abuse" must have the same meaning to all parties and listeners.⁵⁷ For the parents whose beliefs are strongly grounded in cultural traditions, whipping a child, even with some degree of

50. See CORTES, *supra* note 27.

51. See *id.*

52. See *id.*

53. "For culture represents the whole complex of the behavior and thought of a society—the customs and mores, economics and history, moral and religious values, the arts and sciences, law and government—which nourish and enrich its life. The transmission of culture depends on education, which is rooted in the faculty of language and the knowledge and thought which language embodies." *Alston v. Massachusetts*, 661 F. Supp. 2d 117, 122 (D. Mass. 2009).

54. See *United States v. Handy*, 752 F. Supp. 561, 563 (E.D.N.Y. 1990) (citing *Friedrich v. City of Chicago*, 888 F.2d 511, 514 (7th Cir.1989)).

55. "Our duty is to give effect to the legislation of congress, and not to defeat it by an interpretation plainly inconsistent with the words used." *U.S. v. Johnson*, 173 U.S. 363, 380 (1899); "[T]he doctrine is well settled that, when the meaning of a statute is plain, there is no room for interpretation. The consequences are for the lawmaking power. If the intention of the legislature 'is expressed in a manner devoid of contradiction and ambiguity, there is no room for interpretation or construction, and the judiciary are not at liberty, on considerations of policy or hardship, to depart from the words of the statute; that they have no right to make exceptions, or insert qualifications, however abstract justice or the justice of the particular case may seem to require it.'" *Territory of Hawaii v. Mankichi*, 190 U.S. 197, 247-48 (1903) (quoting Sedgw. Stat. & Const. Law, 253, 328); see also *Boyde v. California*, 494 U.S. 370 (1990).

56. See generally, PERSAUD, *supra* note 35; Bryant, *supra* note 17, at 49; ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 75 (Duke Univ. Press 1994).

57. "[I]nterpretation must begin with the linguistic and cultural competence presupposed by the author of the statute. 'Language is a process of communication that works only when authors and readers share a set of rules and meanings' judges realize in their heart of hearts that the superficial clarity to which they are referring when they call the meaning of a statute "plain" is treacherous footing for interpretation. They know that statutes are purposive utterances and that language is a slippery medium in which to encode a purpose." *Handy*, 752 F. Supp. at 563 (quoting *Friedrich v. City of Chicago*, 888 F.2d 511 (7th Cir. 1989)).

severity, may be a method of instilling acceptable behavior. Statutorily, such behavior constitutes “child abuse.” To the parent who sees physical punishment as culturally acceptable, “physical abuse” may not rise to the level of criminal behavior.⁵⁸ But a court is likely to interpret the action otherwise, as the distinction between child punishment and culpability may be a stricter norm for the dominant societal group.⁵⁹ The officer, the prosecutor, and the judge should have some awareness and understanding of the relationship between meaning and cultural understanding of the action, that the “plain meaning” of the law may not be so “plain.”⁶⁰

A. Culturally Divergent Interpretations: From Policy Maker to Fact Finder

Achieving cultural competency within the justice system would require that policy makers and practitioners have a mutual understanding of cultural and linguistic variations and interpretations among society’s ethnic groups.⁶¹ In looking at the example above, a common definition for “child abuse” enacted by a legislative body is the intentional act of a person that could reasonably be expected to result in physical or mental injury to a minor.⁶² The individual legislators may debate that any unwanted touching of a child may be a form of abuse, regardless of whether the parent’s method of child-rearing differed from that of the dominant societal group.⁶³

When parents innocently follow traditions considered acceptable in their cultures, they may face prosecution because their conduct is misinterpreted by the dominant culture as child abuse. Their child may be taken out of the home because the courts regard this as being in the child’s best interest. A classic example of this phenomenon is coining, or cao gio, a form of folk medicine commonly practiced among Southeast Asians believed to cure individuals of influenza and other physical ailments. The technique requires applying mentholated oil to the body and then rubbing the skin with a coin with a

58. Alison Dundes Renteln, *In Defense of Culture in the Courtroom*, in ENGAGING CULTURAL DIFFERENCES 204-06 (Richard A. Shweder, et al., eds. 2002).

59. *Id.*

60. *Id.*

61. An example of the necessity for understanding is the swastika. While it is an unspoken taboo in Western culture because of its association with “white supremacy”, its origins have been and its meaning always remained a highly respected and sacred symbol in Indian culture. A reference to the swastika gives the listener an impression of the speaker’s predisposition and the quantity of merit to attribute to his or her empathic understanding. While a swastika will enrage the dominant social culture, it continues to mean peace and harmony to an Indian, who reveres it as a projection of universal evolution. As America has been a blending of different cultures, then should not the expression of its law be interpreted with an understanding of these differing cultures that the law has been designed to benefit? See DONALD B. POPE-DAVIS, HANDBOOK OF MULTICULTURAL COMPETENCIES IN COUNSELING & PSYCHOLOGY 358 (Sage 2003) (discussing examples of culturally competent legislation).

62. See *Ochieng v. Mukasey*, 520 F.3d 1110 (10th Cir. 2008).

63. See Renteln, *supra* note 58.

serrated edge hard enough to break blood vessels. The pattern of bruising caused by the coin massage looks to the untrained eye like child abuse. Despite its gruesome appearance, coining involves only mild discomfort, and the bruises disappear in a few days.⁶⁴

Well before the legal interpretation of a cultural group is advanced, the decision of an individual lawmaker—usually a member of the dominant societal group—can affect other minority cultural groups.⁶⁵ Lawmakers should take heed of cultural interpretative differences when determining whether particular definitional exceptions may be warranted, and when providing courts with the authority to interpret cultural issues not otherwise specified or defined by the legislature.⁶⁶ As explored later, although the court may develop its own legal standards of cultural competence, it is also incumbent upon the legislature to enact specific standards, as well as require competency training, in order to ensure fair applications of the law.

A criminal act, once statutorily defined as such, is subjected to a variety of cultural interpretations. This becomes problematic where such interpretations are summarily left to the fact-finder, and often determined without consideration of “cultural defenses.”⁶⁷ Although a defendant may benefit at the onset of cultural competency programs geared toward improving the cultural sensitivity of lawmakers, he or she ultimately will need some type of understanding by the fact-finder.⁶⁸ The fact-finders, who are under the obligation to apply the statutory definition, may not represent an amalgamation of cultural viewpoints, and will therefore be left searching for similarities rather than attempting to understand and appreciate the cultural differences of the defendant.⁶⁹ The system therefore, requires culturally competent legal advocacy at both ends of the criminal justice arena, from the legislature to the fact-finder, to fully protect and preserve individual and civil liberties.⁷⁰

64. *Id.* at 204 (citation omitted).

65. See Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the “De Minimus” Defense*, B.Y.U. L. Rev. 51, 58-59 (1997).

66. See POPE-DAVIS, *supra* note 61.

67. See *State v. Wanrow*, 559 P.2d 548, 559 (Wash. 1977) (where the court declined to allow evidence of “the effects of defendant’s [Native American] Indian culture upon her perception and actions” on the issues of self-defense and child abuse).

68. See ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 23-47 (Oxford Univ. Press 2005).

69. “The jury will process evidence about another seemingly foreign and different culture only to the extent that the jury can relate to it and understand it. Thus, where the jury finds common ground with the defendant, its deliberation and verdict become an exercise in recognizing cultural sameness, not difference.” Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 Cal. L. Rev. 1053, 1114 (1994).

70. See Mary Kreiner Ramirez, *Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing*, 57 Drake L. Rev. 591, 641-42 (2009); see also Adam Hime, *Life or Death Mistakes: Cultural Stereotyping, Capital Punishment, and Regional Race-Based Trends in Exoneration and Wrongful Execution*, 82 U. Det. Mercy L. Rev. 181, 217 (2005).

B. Impartiality vs. the Homeless

More so than any time in our history, we live in a culturally diverse society in which peoples' behaviors and modes of everyday existence are shaped by their cultures of origin. This cultural diversity is not only reflected in the social and economic arenas but also in our criminal justice system.⁷¹ Generally, people feel more comfortable around other individuals who understand their behavior.⁷² However, when a minority cross-cultural defendant is facing criminal charges, the jury may not necessarily be comprised of individuals from the defendant's culture.⁷³ Although not specifically written in the U.S. Constitution, the selection of a jury comprised of one's peers is considered a fundamental acknowledgement of individual liberties,⁷⁴ but this does not guarantee that the prospective juror understands the interplay of a defendant's own cultural consciousness with that of the dominant social consciousness.⁷⁵ This begs the question: How can we ensure that such a system is impartial if we fail to give credence to the notion of cultural competency?

Neither the fact-finder, nor lawmaker, has any incentive to relinquish or disregard ethnocentric prejudices unless he or she is confronted by other members of the jury or public.⁷⁶ Although impartiality is openly advocated in the selection of prospective jurors, it amounts to a superficial examination of possible cultural bias, especially in cases involving a cross-cultural defendant and jurors who are unfamiliar with, or lack appreciation for cultural differences.⁷⁷ From the time of selecting prospective jurors in cases involving cross-cultural defendants, the services of culturally competent professionals should be utilized to instruct on both impartiality and cultural bias. Merely instructing a jury to "use your common sense" does not guarantee that people would readily relinquish ethnocentric tendencies.⁷⁸

A defendant from the same social-cultural milieu as the fact-finder does not necessarily have to explain his background, whereas a cross-cultural defendant would likely be at a disadvantage, due to the absence of mechanisms for the promotion of cross-cultural understanding.⁷⁹ The judge, as a fact-finder

71. ROBERT MC NAMARA & RONALD BURNS. *MULTICULTURALISM IN THE CRIMINAL JUSTICE SYSTEM* 4-5 (Mc Graw Hill. 2009).

72. *Id.* at 20.

73. See COLE, *supra* note 39, at 246-47.

74. See KERMIT HALL & DAVID SCOTT CLARK, *THE OXFORD COMPANION TO AMERICAN LAW* 685 (Oxford Univ. Press 2002).

75. See *City of Mobile v. Bolden*, 446 U.S. 55, 75 fn. 24 (1980).

76. "[W]hen practical economic or social reasons suggest that the law should be changed, the pressure for such change must also operate on the culture." ALAN WATSON, *LEGAL ORIGINS AND LEGAL CHANGE* 101 (Continuum Int'l. Publishing 1991).

77. See *United States v. Bear Runner*, 502 F.2d 908, 910-12 (8th Cir. 1974).

78. See *id.* at 913 (Ross, J., dissenting).

79. See Kimberly H. Barrett & William H. George, *Judicial Colorblindness, Race Neutrality, and Modern Racism: How Psychologists Can Help the Courts Understand Race Matters*, in *RACE, CULTURE, PSYCHOLOGY & LAW* 38-39 (Kimberly H. Barrett & William H.

for example, may be concerned with whether a defendant understands and voluntarily accepts a negotiated plea. However, to ensure impartiality, the judge must also understand why the cross-cultural defendant may equally be concerned with the possibility of judicial assumptions and stereotypes.⁸⁰ Whereas the fact-finder is more at ease with a defendant from his or own culture, there is no guarantee of the same sensitivity and understanding toward a cross-cultural defendant.⁸¹ Social scientists have long argued that America is a culturally plural society in which ethnic groups have maintained their cultural uniqueness.⁸² The adherence to ethnic cultures militated against assimilation into the dominant culture and gave rise to stereotypic assumptions, prejudices and discrimination based on lack of understanding and appreciation for cultural values and beliefs across ethnic groups,⁸³ and cross-cultural defendants.⁸⁴ This lack of understanding for a cross-cultural defendant extends to juries as well:

When judges claim that race and culture are not relevant in a courtroom involving a minority, they are being either naïve or dishonest. Judges and juries come to court with their life experiences, biases, prejudices, and stereotypes. These simply are not dropped at the courthouse door. [For example, when they are led to believe by the news media that African Americans commit all the crimes, this is what they are going to see when an African American is a defendant in a criminal trial. Race and culture are always relevant and extant when middle- or upper-class white persons are defendants in a courtroom.⁸⁵

By way of extrapolation, common sense might tell a wealthy patron to shun a loud and aggressive homeless person begging in an expensive shopping center. Their opposite cultures, developed in light of their respective social locations and class distinctions, do not give rise to intermingling or empathetic understanding.⁸⁶ A culturally competent law enforcement officer called to the scene might inquire with the other shoppers regarding the homeless suspect's actions.⁸⁷ However, the officer, for the sake of impartiality, cannot attempt to impart information to the wealthy patron regarding cross-cultural differences

George, eds. 2005).

80. See Rudolph Alexander, Jr., *Trials and Tribulations of African Americans in the Courtroom*, in RACE, CULTURE, PSYCHOLOGY & LAW 88 (Kimberly H. Barrett & William H. George, eds. 2005).

81. See *id.*

82. See Bernard Whitely and Mary Kite, *The Psychology of Prejudice and Discrimination* 1-38 (Wadsworth Publishers, 2010).

83. See *id.*

84. See WALKER, S. CASSIA, S. & DELONE M, THE COLOR OF JUSTICE 235 (Wadsworth 2012).

85. Alexander, *supra* note 80, at 88.

86. See MEGAN RAVENHILL, THE CULTURE OF HOMELESSNESS 156-66 (Ashgate Publishing 2008).

87. See KURT BORCHARD, THE WORD ON THE STREET: HOMELESS MEN IN LAS VEGAS 23 (Univ. of Nev. Press 2005).

unless the patron is willing to set aside stereotypic biases.⁸⁸ And, faced with a demanding shop owner who wants the homeless person arrested for a breach of the peace, the officer must maintain professional comport that he or she is arresting a person and not a stereotypic homeless criminal.⁸⁹

From the homeless defendant's point of view, it may be difficult to attain mutual understanding with the fact-finder before purporting a credible defense.⁹⁰ And, in case of a trial, the jury pool will likely be comprised of individuals unfamiliar with the homeless culture. In fact, those on the jury are more likely to relate to the accuser merely through mainstream cultural association.⁹¹ Moreover, prospective jurors may be predisposed to relegate judgments of credibility against the defendant based on mass media information and other everyday stereotypes that typify the homeless as mentally-impaired criminals.⁹² While these stereotypes are usually embedded in the psyche of potential jurors, the jury system relies on the sworn impartiality of individual jurors and not on their mental constructs of impartiality.⁹³

In other words, while individuals may have prejudices outside of the jury box, the system hopes they will temporarily set aside such prejudices when formally participating in fact-finding and deliberations regarding the civil liberties of another person from a different culture.⁹⁴ The system also relies on the notion that the wealthy patron will leave the mall, go to the courthouse, swear in front of a judge, and set aside bias feelings about the homeless if given a set of objective facts involving the homeless defendant. The defendant may ask the patron and jurors to use common sense during the trial and to recognize that the stereotype of being homeless does not mean he is a criminal; when in fact this notion of common sense itself is shaped by stereotypes.⁹⁵

Stereotyping other cultures is prevalent yet silent in mainstream society. It needs to be confronted and addressed directly by both the legislator and fact-finder, with input from culturally competent professionals. Stereotyping should also be addressed through culturally competency training and education for

88. *See id.*

89. *See id.*

90. *See* Stephens, *supra* note 2, at 433.

91. *See* COLE, *supra* note 39, at 246-47.

92. "Rather than punishing people for crimes they commit, the regulation of poor bodies served to punish the poor and homeless for what they might do. As [articulated,] the purpose of the police is to contain the homeless: 'containment is a mode of response that seeks to minimize the threat they pose to the sense of public order by curtailing their mobility or ecological range and by reducing their public visibility.'" TALMADGE WRIGHT, *OUT OF PLACE* 195 (State Univ. of N.Y. Press 1997) (citation omitted); *see also* PAUL JAY FINK & ALLAN TASMAN, *STIGMA AND MENTAL ILLNESS* 108-10 (American Psychiatric 1992).

93. *U.S. v. Nell*, 526 F.2d 1223, 1233 (5th Cir. 1976).

94. *See Patton v. Yount*, 467 U.S. 1025, 1028 (1984).

95. *See* Lance E. Caughfield, *Credibility*, in *THE LITIGATION MANUAL: JURY TRIALS* 133-136 (Weyman I. Lundquist & Alyson Pytte, eds. 2008).

judges.⁹⁶ It must also include the use of preemptory strikes to screen prospective jurors.⁹⁷ The representative juror or judge should ordinarily be placed in positions similar to the protagonists in the film *Trading Places*, fighting against the antagonism of stereotyping.⁹⁸ Cultural and racial stereotyping has become subtle and persistent in our society, “hidden or denied through illusions of integration and the endorsement of egalitarian beliefs.”⁹⁹ A legitimate method of eroding and eliminating such stereotypes is through cross-cultural interaction and understanding.¹⁰⁰ Both the lawmaker and fact-finder must feel at ease in his or her own culture as well as the culture of others. This ability to acculturate will aid in harmoniously merging the afore-stated two souls of America’s double consciousness.¹⁰¹

III. THE COMPETENCY OF THE LAW ENFORCEMENT OFFICER

Usually, a defendant’s first contact with the justice system is by way of law enforcement officers.¹⁰² The officers’ investigation is not only the gateway to government’s prosecution; it is also an adversarial portrayal of the defendant to the government’s agents who represent jurisdictional residents.¹⁰³ For all intents and purposes, a law enforcement agency is the sentinel of the justice system, designed to pursue criminals and uphold societal order.¹⁰⁴ However, in order to protect and effectively maintain social order and societal peace more effectively, an understanding of the dynamics of cultural communities is essential.¹⁰⁵ Hence, ongoing cultural competency training for the purposes of conducting criminal investigations is in accord with providing defendants fairness through the court system. Such training will also ensure commitment

96. “Education may take a variety of forms, many of which focus on broadening the judge’s perspective through increased awareness of the diversity of actors the judge may encounter and the variety of sources for the judge’s unconscious or sub-conscious reactions. The National Judicial College offers a model curriculum for judges to promote cultural competence . . . The curriculum is founded on research that demonstrates that people with low-prejudiced beliefs who remind themselves of these biases are better able to minimize their impact through vigilant awareness of the biases’ potential impact on discretionary decision making.” Mary Kreiner Ramirez, *Assessing the Values of Punishment: The State of Sentencing in the United States Criminal Justice System*, 57 Drake L. Rev. 591, 630-32 (2009).

97. One of the current tools used in the system to combat this type of ethnocentrism during jury selection is the preemptory strike. See *Batson v. Kentucky*, 476 U.S. 79, 121 (1986).

98. See Barrett, *supra* note 7, at 37-40.

99. *Id.*

100. See *id.*

101. See *id.* at 43-44; see also DUBOIS, *supra* note 10.

102. See KAREN M. HESS, INTRODUCTION TO LAW ENFORCEMENT AND CRIMINAL JUSTICE I (9th ed. 2008).

103. See *U.S. v. Orozco*, 590 F.2d 789, 793 (9th Cir. 1979).

104. See Cecily E. Baskir, *Fostering Cultural Competence in Justice System “Gatekeepers”*, 92 *Judicature* 232, 234-36 (2009).

105. See *id.*

to effective law enforcement without yielding or submitting to stereotypes.¹⁰⁶

In the event of a cultural divide, the officer should strive to reconcile differences without resorting to pre-existing misconceptions.¹⁰⁷ For example, requiring officers and judges to ascertain the proper application of *Miranda* in cross-cultural situations in accordance with principles of cultural competency would facilitate a fair and uniform application of laws across every strata of society.¹⁰⁸ In the event an officer has difficulty explaining the *Miranda* warning to a cross-cultural suspect, the court system could find it difficult to rationalize that a modicum of understanding is sufficient in light of the officer's cultural subjectivity - his or her lack of cultural competency.¹⁰⁹ The tendency to interpret behavior through the officer's emic knowledge and world view should be avoided, because such subjectivity causes difficulties in the fair application of law.¹¹⁰ Law enforcement agencies can reduce cross-cultural linguistic barriers by educating and training officers to be culturally competent professionals.¹¹¹

A. Cultural Blindness and Enforcement

Currently, a law enforcement officer may be seen as a protector in one community and a distrusted outsider in another.¹¹² The legitimization of an officer's authority without requiring that the officer understand and appreciate cultural diversity is problematic to the principles of the justice system and the maintenance of law and order.¹¹³ For example, during investigations involving child abuse or battery, officers are likely to be trained to look for the "primary aggressor" in the incident,¹¹⁴ consistent with statutory and internal agency policies.¹¹⁵ However, officers are also likely to approach a cross-cultural situation with certain stereotypical assumptions about a suspect, due to a lack

106. *See id.* at 235-36.

107. *See id.*

108. *See State v. Vu*, 770 P.2d 577 (Or. 1989); *see Miranda v. Arizona*, 384 U.S. 436 (1966).

109. *See State v. Torres-Garcia*, 689 S.E.2d 245 (N.C. Ct. App. 2009).

110. *See id.*; *see also* FRED E. JANDT, *INTERCULTURAL COMMUNICATION* 186 (6th ed. 2010).

111. *See id.* 235-36.

112. *See Illinois v. Wardlow*, 528 U.S. 119, 135 fn. 7 (2000); *see also U.S. v. Nguyen*, 267 Fed. App'x. 699 (9th Cir. 2008).

113. *See Baskir*, *supra* note 104, at 236.

114. *See Holder v. Town Of Sandown*, 585 F.3d 500, 506-07 (1st Cir. 2009).

115. "The implementation of mandatory arrest statutes has also been accompanied by some unanticipated consequences. These statutes were intended to protect women in domestically violent relationships, where men are almost always either the sole perpetrator or the primary physical aggressor. But there is evidence that women are increasingly arrested, either as part of dual arrest or as the sole arrestee, and that these arrests occur even in jurisdictions where police have been instructed to arrest only the primary physical aggressor when they have probable cause to believe both parties have used violence." LeeAnn Jovanni & Susan L Miller, *Criminal Justice System Response to Domestic Violence: Law Enforcement and the Courts*, in *SOURCEBOOK ON VIOLENCE AGAINST WOMEN* 305 (Claire M. Renzetti, et al., eds. 2001) (citations omitted).

of knowledge about the suspect's cultural behavior or a personal predisposition formulated long before the officer's graduation from the training academy.¹¹⁶ As individuals whose professional actions are formalized and have broad-reaching effects, officers are likely to approach problems with strict authority rather than with cultural competence.¹¹⁷ Through training and understanding of cross-cultural aggression, officers can bridge the behavioral misapprehensions that exist between protecting and serving the public.¹¹⁸

The tendency to deny a suspect of his or her civil liberties by arrest is sanctioned by the dominant culture's ethnocentric standards.¹¹⁹ In allowing officers to act without a proficient understanding of the norms and mores of diverse cultures they have sworn to protect, the government may inadvertently contribute to undermining the trust and reputation for fairness between the polity and minority cultural groups.¹²⁰ Essentially, the culture of law enforcement should be indicative of our society, which is constitutionally color blind, and social-culturally tolerant and accommodating.¹²¹ As such, the emphasis on cultural competence will eventually produce more informed officers.¹²² Furthermore, cross-cultural training can also help to alleviate many

116. "Another factor affecting the arrest decision is officer attitudes, which may reflect stereotypes about domestic violence and battered women. Battered women are often viewed as inconsistent complainants who call the police to arrest and later drop the charges." *Id.*; see also EVE S. & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 139 (3rd ed. 2003).

117. *See id.*

118. *See Baskir, supra* note 104, at 234-36.

119. *Liu v. State*, 628 A.2d 1376 (Del. 1993); see also *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988).

120. "'Police culture' has long been a topic of interest and inquiry among researchers and observers of the law enforcement scene []. The best literature on the police culture has been the writing of police officers themselves, sometimes as reflections on their own careers or as the observations of 'insiders,' and occasionally as popular fiction . . . The findings of many studies that nonwhite officers in some locales use force in more incidents than might be expected given their representation on police forces is, on occasion, reported as if it were evidence in support of the proposition that the police are not racially discriminatory, i.e., if nonwhite officers use force (albeit not necessarily excessive force) frequently, the problem of police misuse of force cannot be one of racial attitudes or bias. An alternative conclusion might be that the overaggressive peer culture of policing in some agencies is so strong that it pressures Black officer, who might know better, into abusing minority-race citizens . . . [S]tudies suggest that residential and deployment patterns in many jurisdictions place officers of color in exceptionally dangerous places – where they are, more than fellow white officers, likely to have to use deadly force legitimately, both on and off duty . . . If empirical evidence were to suggest disproportionate use of excessive force by officers of color, then it might indeed be valuable to research whether organizational climate and peer pressure – the culture and subculture of policing – are so influential as to override even racial background in shaping officer behavior." Hubert G. Locke, *The Color of Law and the Issue of Color: Race and the Abuse of Police Power*, in POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 142 (William A. Geller & Hans Toch, eds. 1996) (citations omitted).

121. *See RUSSELL W. GLENN, TRAINING THE 21ST CENTURY POLICE OFFICER* 98-100 (Rand 2003).

122. *See id.*

of the negative issues facing law enforcement agencies: community perception and complaints of harassment, negative publicity, authoritarianism and the overzealous use of force.¹²³ Regarding the media's role in shaping this training, Lawrence notes:

The subject of police brutality[, for example,] has been a steady source of public relations woes for many police departments and a serious source of friction between the police and particular communities. And while it would be simplistic and misleading to attribute single perspectives to entire social groups, divisions between whites and minority groups, particularly African Americans, on the subject of brutality have often been sharp . . . As the gap in perceptions between minorities and whites continues to loom deep and wide, incidents of alleged police brutality continue to spark conflict across the country. In New York City, for example, the deaths of Anthony Baez in 1995, Nathaniel Gaines in 1996, Kevin Cedeno in 1997, and Amadou Diallo in 1999, and the brutalization of Haitian immigrant Abner Louima in 1997, raised continued outcry from minority communities... Race does not neatly capture all the dividing lines in the public perceptions of the issue of brutality, nor is brutality exclusively a white-on-black phenomenon. Other ethnic groups often complain of police misconduct, as do homosexuals and the poor, while minority officers are just as capable of brutal behavior and just as vulnerable to perceptions of brutality as white officers . . . Yet minority communities, [such as] African Americans, often have a particularly ambivalent relationship with police.¹²⁴

Some law enforcement agencies in New York City, Los Angeles and a few other places have responded to the need for cultural understanding by incorporating culturally competent practices into their law enforcement and justice training programs.¹²⁵ However, unless these programs truly embrace and appreciate cultural diversity as a societal reality, they would not likely dispel negative stereotypes and indifferences directed toward cross-cultural groups.¹²⁶ Cultural competence requires that agencies evaluate and reformulate their policies and goals to ensure standards of inclusion, and also encourage community involvement as a way to effectuate cultural inclusion.¹²⁷ While many ethnic minority communities are suspicious of law enforcement officers,

123. *See id.*

124. REGINA G. LAWRENCE, *THE POLITICS OF FORCE; MEDIA AND THE CONSTRUCTION OF POLICE BRUTALITY* 21-23 (Univ. of Ca. Press 2003).

125. *See* MARY FRANCES BERRY, ED., *U.S. COMMISSION ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEWYORKCITY(2000)*(accessed August 2010) <http://www.usccr.gov/pubs/nypolice/main.htm>; *see also* Baskir, *supra* note 103, at 135 (California police departments have created programs where participants can "explore the belief systems of immigrant and other ethnic and religious groups through panels and presentations by various department employees . . . [The Fremont police department even hosted] speakers from the Sikh and Muslim communities, to educate officers about their beliefs and practices").

126. *See* GLENN, *supra* note 121, at 98-100.

127. *See id.*

some police departments have worked to overcome the suspicion and promote cultural competence through the employment of ethnic officers. Additionally, through placing emphasis on recruitment by education, intelligence, moral character, and attitudes toward culturally diverse groups, such suspicion should be alleviated.¹²⁸

B. Bridging the Cross-Cultural Divide

As noted earlier, culturally competent learning and understanding should extend beyond the classroom.¹²⁹ For instance, a law enforcement officer who attends a cross-cultural social event could benefit by actively participating in the same festive activities as would a member of the residential community.¹³⁰ The officer cannot engage in and develop an appreciation for such type of cross-cultural interaction simply through classroom attendance and training.¹³¹ In addition to participating in programs on diversity, or interacting with members of diverse cultural groups within the agency, every officer should also learn to value cross-cultures through interaction without the badge; that is, interacting with an ordinary citizen with an intent of understanding, *rather than* for purposes of gathering information for later use as a basis for reasonable suspicion against members of the community.¹³² In the event that the community learns to trust the officer enough to accept him or her as a member of its cultural group, the officer must be able to differentiate his acceptance from his responsibilities as law enforcement personnel.¹³³ The officer should also guard against becoming too paternalistic toward residents by providing assistance as a “one-size fits-all” model, which is really a model that’s designed by and intended for whites.”¹³⁴

During the development of culturally competent initiatives, it is necessary

128. See SAMUEL WALKER AND CHARLES KATZ, *POLICE IN AMERICA 168-178* (6th ed. McGraw Hill 2008).

129. “Process learners recognize that the journey itself is the ‘learning’ [and that] there is no final end product labeled ‘cultural competence . . . Memorizing a multitude of ‘facts’ about a culture [is not as] important [as] comprehensively understanding, applying, and appreciating the cultural context or rationale behind the ‘fact.’” MARIANNE R. JEFFREYS, *TEACHING CULTURAL COMPETENCE IN NURSING AND HEALTH CARE 20* (Springer 2006).

130. See JAMES ANDREW CONSER, ET AL., *LAW ENFORCEMENT IN THE UNITED STATES 328* (Jones & Bartlett Learning 2005).

131. See *id.* at 327-330.

132. See *id.*

133. “[S]ome ‘universal’ or ‘one-size-fits-all’ programs that ignore issues of culture can be described as ‘culturally blind,’ programs that are insensitive to cultural needs . . . The development of [a] culturally informed program should be guided by relevant theories that are also culturally sensitive and that are designed as best practice or model programs for the [particular culture]” Felipe Gonzalez Castro, *A Cultural Approach for Promoting Resilience*, in *RACE, CULTURE, PSYCHOLOGY & LAW 336* (Kimberly H. Barrett & William H. George, eds. 2005); see also U.S. DEPARTMENT OF JUSTICE, *PRINCIPLES FOR PROMOTING POLICE INTEGRITY* (U.S. Justice Department 2001).

134. JOHN BATESON, *BUILDING HOPE 119* (Praeger Publications 2008).

for the law enforcement agency to consult with the community in designing a model for effective communication, conducting and disseminating information, and hiring culturally competent individuals from the community.¹³⁵ The cultural conscience of a community should be appreciated, respected, and receptive to changes.¹³⁶ Community-law enforcement relationships that bridge cultural differences require reciprocal exchanges that foster understanding and mutual respect.¹³⁷ Awareness of the cultural influences on a defendant can contribute to the understanding of present, and the curbing of, future criminal behaviors while serving in the overall balance of society's well-being and harmony.¹³⁸ For example,

The law-enforcement system can address [unfair treatment in the justice system] by working with community leaders to improve its own policies and procedures, improving data collection procedure, and training its staff in cultural competence. The criminal justice system can improve itself by actively addressing its contributions to the problem of disproportionality, by improving its methods of data collection by way of instituting more standardized procedures that include valid indicators of race and ethnicity, by increasing cultural competence in administering racially unbiased needs assessments, by developing guidelines for greater accountability, and by hiring and training practices that promote cultural competence in their own personnel. Policymakers can [further] help by enacting legislation that aims to reduce disproportionality and by developing initiatives to reduce [an overall] reliance on incarceration.¹³⁹

Law enforcement officers' acquisition of cultural competence and their integration into cross-cultural communities would facilitate the promotion of overall fairness within the justice system.¹⁴⁰ In understanding the cultural behavior of residents, officers would be able to focus attention on deterring individuals from committing crimes and not primarily concentrating on arresting suspects as is the prevailing perception.¹⁴¹

135. See Castro, *supra* note 133, at 412-414.

136. See Peg McCartt Hess & Andrew Billingsley, *Cultural Competence: At the Heart of Capacity Building*, in COLLABORATING WITH COMMUNITY-BASED ORGANIZATIONS THROUGH CONSULTATION AND TECHNICAL ASSISTANCE 74-75 (Patricia Stone Motes & Peg McCartt Hess, eds. 2007).

137. See *id.*

138. See Gonzalez, *supra* note 133, at 338.

139. See *id.*

140. "Cross-cultural competency training manuals are available to any legal personnel including law enforcement. However, currently no culturally sensitive training is mandated for police officer, prosecutors, defense attorneys, or judges. Unfortunately, these legal professionals are not trained to be cross-culturally competent unless they take the initiative to acquire the training voluntarily." Stephens, *supra* note 2, at 428.

141. See Walker, Cassia and Delone, *supra* note 84, at 165-182. "In order for an agency to improve its cultural competency, it must educate and promote the understanding of valuing cultural diversity, cultural self-awareness, cultural interactions, and cultural knowledge. Valuing cultural diversity includes respecting cultural differences and valuing our differences. This includes integrating cultural diversity themes into policies, programs, and services that are

IV. CULTURAL COMPETENCY THE PROSECUTOR AND DEFENSE ATTORNEY

The criminal justice system prides itself in constantly promulgating standards that are fair and reasonable with regard to a defendant's rights, instead of being arbitrarily discretionary and unpredictable.¹⁴² In this regard, the promulgation of standards and methods that utilize a culturally competent approach to criminal defendants could help in building a level of communication that benefits both sides.¹⁴³ For example, a defendant who lacks an understanding of the nuances of the legal system may be more apt to submit to counsel from an institutional representative with some cultural competence before agreeing to communicate on a more personal level.¹⁴⁴ Lacking awareness of problems that the defendant's community may have experienced with the justice system, or the defendant's fear of being stigmatized by the community, can be alleviated through heightened cultural sensitivity.¹⁴⁵

The actions of prosecutors and defense attorneys reflect and refashion cultural artifacts (caste and color) and social norms (character and community). Acting as sociolegal agents, prosecutors and defenders infuse legal discourse with images and tropes gleaned outside the law, inscribing cultural and social meaning into law. At the same time, they apply a juridical gloss to such images and tropes, restyling popular meaning by force of law. Through this semiotic and iterative process, prosecutors and defense lawyers acquire the role of double signifier. Not only do they translate social meaning into law, but they also construct social meaning out of law. Whether inside the courtroom or outside the courthouse, prosecutors and defense lawyers are interpretive agents engaged in sociolegal construction.¹⁴⁶

When prosecutors and defense attorneys can carry out their respective responsibilities with cultural competence, the dispensation of fair justice to all will most likely be assured.

A. Justice and the Homeless Defendant Constructions of Reality

From a defense perspective, cultural competency is vital in building a

being developed. Cultural self-awareness is assessing your own sense of self, developing a sense of one's own culture, and understanding how one's culture's way of doing things interacts with other cultures in the community."

142. See *Wells v. Petsock*, 941 F.2d 253, 257 (3rd Cir. 1991).

143. See *Stephens*, *supra* note 2, at 424-425.

144. "Legal representation and outcomes for ethnic minority [] offenders may be worsened by a lack of familiarity with the legal system, a learned lack of trust for the legal system, or a combination of these. There may also be language barriers that prevent these offenders from receiving appropriate advocacy. When offenders, their families, or community members are immigrants, legal processes are especially confusing." *Id.* at 412.

145. See *id.* at 426-427.

146. Anthony V. Alfieri, *Race, Community, and Criminal Justice*, in *RACE, CULTURE, PSYCHOLOGY & LAW* 64 (Kimberly H. Barrett & William H. George, eds. 2005).

relationship between the defense attorney and his or her client.¹⁴⁷ These circumstances will provide the attorney insight into the defendant's construction of social reality that helped shape his devolution into homelessness.¹⁴⁸ As such, the attorney should be cautious not to stereotype the defendant as being mentally unstable or an addict of some kind.¹⁴⁹ Moreover, from his standpoint, the homeless defendant may harbor suspicions about the quality of his representation, especially since his attorney earns his livelihood by adhering to mainstream culture.¹⁵⁰ Hence, the attorney-client relationship necessitates mutual trust, which could be established through open and frank discourse.

From a prosecutorial perspective, the disparagement of cultural consciousness eventually leads to a decline and loss of public faith in the state's utilitarian objectives.¹⁵¹ By the very nature of his or her role as the defender of the public's interests, a prosecutor does not customarily engage in interpersonal contact with the defendant.¹⁵² Given the realities of our multicultural society, it may be beneficial for him or her to intentionally avoid structural or hierarchical barriers and acquire cultural competence that facilitates discretionary decisions.¹⁵³ Although focused mainly on colorblind application of the law, the prosecutor should also be alert to cultural norms, and that representing the state necessarily entails an understanding of the community and culture of the defendant.¹⁵⁴ Let me illustrate from the real life account of a homeless defendant accused of stealing tires at a gas station:

It is strange how a person's mind works . . . Before my arrest, I wanted to go back to prison . . . [but] between arrest and trial, however, I became unsure. I had violated my parole, and with my trial for burglary looming, I . . . [was] afraid because of frightening newspaper accounts regarding the conditions in the Oklahoma State Prison. Headline after headline indicated that prison conditions could erupt into a riot at any time . . . [My] attorney, whom anyone could see as most incompetent, had already made a deal with the prosecutors. He accepted on my behalf, a plea of ten

147. "When lawyers and clients come from different cultures, several aspects of the attorney-client interaction may be implicated. The capacity to form trusting relationships, to evaluate credibility, to develop client-centered case strategies and solutions, to gather information and to attribute the intended meaning from behavior and expressions are all affected by cultural experiences. By using the framework of cross-cultural interaction, students can learn how to anticipate and name some of the difficulties they or their clients may be experiencing." Bryant, *supra* note 17, at 48.

148. See RAVENHILL, *supra* note 86, at 156-166.

149. See *id.* at 145-155.

150. See *id.* at 157.

151. See Alfieri, *supra* note 146, at 71.

152. See ULYSES B. HOOKS & NARAYAN PERSAUD, *GUARDIAN ANGELS ALONG MY HOMELESS PATH* 70 (Authorhouse 2006).

153. See JOYCELYN M. POLLOCK, *ETHICAL DILEMMAS AND DECISIONS IN CRIMINAL JUSTICE* 337-340 (6th ed. 2007).

154. See PERSAUD, *supra* note 152, at 68-69.

years imprisonment to be served consecutively for probation violation and concealing stolen property. When I protested, the incompetent attorney angrily argued with me. He screamed that had he not made the deal, I would have had to spend a longer time in prison because of my past arrests . . . He ended by saying, "I've already made the deal and that's it." I guessed this meant that I should shut up and do my time . . . [Fancying myself a legal mind who could really take on the system, I later filed a lawsuit for cruel and unusual punishment while in prison.] Before I could recollect my thoughts and listen to the judge's instructions [at the hearing,] I heard the prosecutor saying, "Your Honor, the State will prove that this man (pointing directly at me) . . . was never mistreated . . . The State will further prove that [he] has not been treated any worse than he had treated himself over the years." The prosecutor obviously had done his home work and found out that I was a substance abuser who lived in cars, streets and alleyways prior to my imprisonment. He narrated my past misgivings with great confidence, enunciating each incident as if he was there by my side, living them with me.¹⁵⁵

For attorneys representing opposite sides, as a prosecutor or public defender, it is usually the first time that they come into meaningful contact with another culture such as that of the homeless, the economically disadvantaged, cross-cultural minority groups, religious sects, or the hearing-impaired.¹⁵⁶ Yet, prior to the initial contact, it is presumed that both sides are culturally competent with the language and behavior of the cross-cultural victim or defendant.¹⁵⁷ As attorneys, prosecutors and public defenders alike need to avoid stereotypes or ethnocentric assumptions regarding the homeless defendant's social cultural status in attempts to promote judicial fairness.¹⁵⁸ A criminal

155. *See id.* at 63-64 & 74.

156. For example, although a prosecutor has discretionary authority but may not have had personal experience with the particular crime or understand the defendant's behavior in a cultural context, the reality is that he or she is given broad authority over the individual's life. The culture of a prosecutor's office is further structured to give the citizenry an impression of staunch opposition to the criminal element, especially through tough plea offers and sentencing recommendations. Again, the result of this internal culture creates an atmosphere where plea negotiation with underprivileged cultures is greatly encouraged in order to obtain a higher rate of success with incarceration rates from the prosecutor's perspective, and to clear heavy backlogs in the system from the public defender's perspective. *See* Alissa Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, in *JUDICIAL POLITICS*, 260-63 (Elliot E. Slotnick, ed. 1999).

157. *See* RAVENHILL, *supra* note 86, at 166.

158. "Inverse hierarchies, in part, developed and are reinforced by the homeless industry, medical profession, social services and housing departments. For example, when applying for social housing, the more problems you have the more points you gain. If you have complex multiple needs, you are a 'special case,' one meriting more time and more elaborate support. In court, if you can claim to have a dysfunctional family, this is a useful status that excuses or dilutes the strength of the crime committed. There was evidence to suggest that language and jargon of professionals is incorporated into the homeless culture's vocabulary. Common understandings were assumed that shortened explanations of common problems or sets of circumstances. This avoided painful, complicated explanations. The use of jargon acted as a

record in the homeless community involving theft or violence, for instance, may actually serve to elevate the status of the homeless defendant.¹⁵⁹ The defendant may also have assimilated into the homeless culture, and strongly feel the rejection of mainstream society which is reflected in the behaviors of the attorneys.¹⁶⁰ Assimilated into the homeless culture, the defendant then finds it difficult to comprehend legal concepts from the mainstream cultural perspective.¹⁶¹ Hence, the attorneys cannot assume that a particular punishment that serves to deter a reasonable person in the mainstream culture from committing a crime would do the same for a reasonable person from within the homeless community.¹⁶²

B. Cultural Sensitivity and the Adherence to Internal Policies

Cultural competency standards for prosecuting attorneys and public defenders should take into consideration the assumptions and expectations relating to their respective office entity's internal cultural policies and procedures.¹⁶³ Generally, these attorneys' assumptions about the accused are based on personal experiences, and those developed over time by adherence to policy directives.¹⁶⁴ For example, a prosecutor's office may have an internal culture of agreeing to a time-served for nonviolent homeless defendants based on time held in jail and his or her criminal history.¹⁶⁵ Likewise, the public defender's office may inform alleged victims in domestic cases about a declination of prosecution in the event that it might lead to a dismissal.¹⁶⁶ Although policies engender internal cultural practices, they are usually carried

series of labels adopted by people within the homeless community that in mainstream society would have viewed as negative, embarrassing or shameful. These labels represent more badges of honour." *Id.* at 166.

159. *See id.*

160. *See id.*

161. *See id.*

162. "The homeless [do not generally] care about individual rights. In their world, there [are] no such thing as *rights*." PERSAUD, *supra* note 152, at 96. *See also* Leon D. Caldwell, *Counseling with the Poor, Underserved and Underrepresented*, in CROSS CULTURAL AWARENESS AND SOCIAL JUSTICE IN COUNSELING 288-289 (Cyrus Marcellus Ellis & Jon Carlson, eds. 2009) ("Counseling the [underserved] requires an acknowledgement that old pedagogy and approaches need revision. In many ways, the profession must admit that it has contributed to creating the underserved by maintaining methods that only serve the few who fit its parameters.").

163. *See* ARTHUR POMPONIO, ED., INVESTIGATION AND PROSECUTION OF CHILD ABUSE EDITOR 11 (3rd ed. 2004); *see also* MIM CARLSON & MARGARET DONOHOE, THE EXECUTIVE DIRECTOR'S GUIDE TO THRIVING AS A NONPROFIT LEADER 71 (2nd ed. 2010).

164. *See* Worden, *supra* note 156, at 260-263.

165. In my experience as an assistant state attorney, this was used in conjunction with the time limitation for charging a defendant in custody; *see also id.*; *see also* WRIGHT, *supra* note 92, at 195.

166. In my experience as an assistant public defender, this was discussed after a court order granting a defendant peaceable and nonviolent contact with the alleged victim; *see also* PAUL B. WICE, PUBLIC DEFENDERS AND THE AMERICAN JUSTICE SYSTEM 183-85 (Greenwood Publishing 2005); Jovanni, *supra* note 115, at 305.

out without cultural sensitivity, that is, without competent understanding of clients' socio-ethnic realities.¹⁶⁷

In some instances, opposing attorneys may extend their respective organizational cultural policies into societal cross-cultural stereotypes, as in cases of African American females who, as alleged victims of domestic battery, are more likely to sign a declination due to the cultural stigma of being 'battered.'¹⁶⁸ Although African-American women statistically may be more likely to report domestic abuse than any other race, they are less likely to follow through with a prosecution that could jeopardize the familial or communal norms and expectations.¹⁶⁹ This allows for both the prosecution and defense to impute cultural tendencies to their benefit without concern for the true cultural realities of the minority group.¹⁷⁰ On the one hand, the prosecutor may entice the alleged victim into seeking unnecessary counseling as part of a plea agreement, while on the other, the defense attorney may encourage unnecessary counseling through familial or community intervention without a conviction.¹⁷¹ This is especially so in cases where the counseling does not address the core issues that led to the abuse. Dasgupta emphasizes the importance of cultural context in cases involving battered women:

Many activists have suggested that explanations of cultural contexts need to end so that individual cases are judged on their own merit. [However,] culture cannot be overlooked if we are to fully understand human conduct. Culture envelops life and permeates [the] living. It affects the ways we experience and react to battering. Yet, the assumption that battered women experience culture homogenously and react to it generically is misleading. Although there are common motifs of a culture that characterize a country or region, it is culture at the micro level of province, village, class/caste, and home that influences an individual woman's perceptions, experiences and behavior. It is not the use of

167. "[T]he prosecutor customarily stands as [a] public sentinel [in the system], and the defense lawyer as constitutional guardian." Alfieri, *supra* note 146, at 65.

168. "[R]esearch has found minorities to be less likely to trust the criminal justice system. In the African American community, the label of victim or offender may create an unwanted stigma. Many African American women perceive domestic violence as a concept of 'white feminism and male bashing.' Many domestic violence victims simply want 'restoration' or redress, not vengeance or absolute punishment. They may be far less concerned with the abusers' punishment than using the criminal justice system to achieve these purposes." BUZAWA, *supra* note 116, at 139.

169. *See id.*; *see also* Callie Marie Rennison & Sarah Welchans, U.S. Department of Justice, Bureau of Justice Statistics, Intimate Partner Violence (2000) at <http://www.ojp.usdoj.gov/bjs/pub/ascii/ipv.txt> (accessed August 2010) (finding that "[a]bout half the intimate partner violence against women [between] 1993-98, was reported to the police; black women were more likely than other women to report such violence . . . Overall, blacks were victimized by intimate partners at significantly higher rates than persons of any other race between 1993 and 1998. Black females experienced intimate partner violence at a rate 35% higher than that of white females, and about 22 times the rate of women of other races").

170. *See id.*

171. *See id.*

cultural explanations but the misuse and misrepresentation of culture that becomes a problem for [minority] anti-domestic violence advocacy... The success of nuanced presentations of a culture is predicated upon the U.S. legal practitioners and law enforcement officials' knowledge about [minorities] and its cultural diversity. In fact, there must be an overall increase in the understanding of how culture affects battering, batterers, and battered women in general. The tendency of the dominant community to assume that 'others' have culture but it is devoid of any impact must be altered.¹⁷²

Both sides of the justice system, in the fair dispensation of justice, need to be sensitive to the cultural uniqueness of communities they seek to protect without perpetuating stereotypes.¹⁷³ However, a prosecutor whose task it is to ensure that the victim understands the legal procedures is not customarily trained to be sensitive to cross-cultural credos.¹⁷⁴ For the fair dispensation of justice, the victim's life must be understood within its cultural context.¹⁷⁵ This can be accomplished to a certain degree by a victim's advocate, who is knowledgeable about both the manifest and salient norms of the victim's community.¹⁷⁶ Under such circumstances, the advocate must keenly assess aspects of the dominant culture to avoid the legitimization of ethnocentric tactics with a cross-cultural victim.¹⁷⁷ In similar fashion, a defense attorney representing an African-American male may need to understand the client's background regarding his relationship with the alleged victim, as well as discuss the effectiveness of treatment programs that may not be culturally sensitive.¹⁷⁸

Although the legal system can provide relief to victims, it cannot effectively influence societal changes within cultural groups unless competency

172. Shamita Das Dasgupta, *Battered South Asian Women in U.S. Courts*, in BODY EVIDENCE: INTIMATE VIOLENCE AGAINST SOUTH ASIAN WOMEN IN AMERICA 225 (Shamita Das Dasgupta, ed. 2007).

173. With regard to the issue of race relations, lawyers "operating inside the criminal justice system construct racial identity in the routine acts of daily advocacy. Prosecutors, for example, compile investigative targets, rank jury profiles, estimate flight risks, formulate sentencing recommendations, and pronounce judgments of wrongdoing in indictments, trial statements, and appellate arguments. Granted, these acts establish neither a clear racial imprint nor a deliberate racial intent. But taken together and accrued over time, they evoke images of color and character that bear the mark of race and the influence of racial consciousness . . . Criminal defense lawyers similarly exploit the imagery and rhetoric of race in advocacy. Race informs their arguments and objections, direct and cross-examinations, and proposed jury instructions. The symbolic and rhetorical presence of race is magnified in cases of racially motivated violence, both black on white and white on black." Alfieri, *supra* note 146, at 65.

174. See Lisa A Fontes, *Cultural Competence*, in 1 ENCYCLOPEDIA OF INTERPERSONAL VIOLENCE 157-159 (Claire M. Renzetti & Jeffrey L. Edleson, eds. 2008).

175. See *id.*

176. See Stephens, *supra* note 2, at 428.

177. See Fontes, *supra* note 174, at 157.

178. See *id.* at 158-59.

is integrated into the operations of the system.¹⁷⁹ A system that favors utilitarian forms of punishment must incorporate cultural sensitivities in order to effectuate the goals of deterrence or rehabilitation.¹⁸⁰ The system must also avoid preconceptions, as well as the tendency to uphold mainstream cultures as imparting “civilized” values onto the perceived “inferior” cultural group.¹⁸¹ And, in order for lawyers in the legal system to treat all of society equally, they must fully understand how the system functions for the cultural group they intend to or are likely to represent.¹⁸²

V. THE CULTURAL IMPARTIALITY AND THE DISPENSATION OF JUSTICE

Historically under the common law, the imposition of culpability and punishment was interlocked with religious morale and norms.¹⁸³ Today, the modern standard of reasonableness within the justice system has sought to steer legal analyses away from subjective morals toward a uniform standard of general applicability that is grounded in societal norms and acceptable codes of conduct.¹⁸⁴ However, the concept of “reasonableness” seems to be more of a reflection of the dominant cultural values without consideration of the uniqueness of the individual:¹⁸⁵

Reasonableness is a misleading concept. While some jurists believe that it establishes the boundary between acceptable and nonacceptable behavior, in reality, it is a flawed concept that opens the door for judges and jury alike to import their own values, morals, and ideals into the definition of

179. *See id.*

180. *See* Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. Crim. L. & Criminology 335, 386 fn. 243 (2002).

181. *See* FORREST B. TYLER, *CULTURES, COMMUNITIES, COMPETENCE, AND CHANGE* 161-64 (Springer 2001).

182. Both the prosecutor and defense attorney may reject relativistic attitudes based on a need for retribution or a lack of resources respectively, but cannot ignore the need for cultural understanding with the increasing rate of recidivism. The social policy of deterrence should further consider its applicability in the cultural setting; for example, the stigma of a criminal background may be considered a badge of honor compared to a member from the dominant societal group that initially enacted the prohibitory law. *See* Jisheng Li, *The Nature of the Offense: An Ignored Factor in Determining the Application of the Culture Defense*, 18 U. Haw. L. Rev. 765, 771 fn2 (1996).

183. “We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.” *Powell v. Texas*, 392 U.S. 514, 535-36 (1968).

184. *See* HISHAM M. RAMADAN, *RECONSTRUCTING JURY INSTRUCTIONS IN HOMICIDE OFFENSES* 40-41 (Univ. Press of America 2004); *see also* DENNIS R. COOLEY, *TECHNOLOGY, TRANSGENICS AND A PRACTICAL MORAL CODE*, 37-40 (Springer 2009).

185. *See* RAMADAN, *supra* note 184, at 41-42.

reasonableness. To make matters worse, reasonableness indirectly invites the jurors to nullify the law by justifying the defendant's behavior when they believe that any reasonable person (including perhaps, themselves) "would have acted similarly under the circumstances." The reasonable person standard stands as a barrier that precludes consideration of the unique characteristics of an individual defendant. For instance, if a defendant is from a minority group his cultural background will be ignored because the "reasonable person" standard reflects only the norms of the dominant culture and excludes the values of the other groups in society. The problem materializes when a defendant from a different culture is denied the opportunity to explain why his actions were reasonable within the traditions of his culture.¹⁸⁶

Our justice system prides itself in dispensing justice impartially without regard to the individual.¹⁸⁷ But who determines the meaning of impartiality?¹⁸⁸ Is it possible to be impartial with a one-dimensional mind without an awareness and understanding of a double consciousness?¹⁸⁹ In other words, a reasonable person cannot truly entertain the notion of impartiality if he or she is not fully competent to assess another's culture independently of his or her own ethnocentricities.¹⁹⁰ As previously discussed, an impartial individual, in evaluating facts cross-culturally, should be mindful of his or her own cultural beliefs so that these do not impinge on a defendant's belief system or create false expectations on the part of the defendant.¹⁹¹

The impartiality and effectiveness of the justice system can be enhanced through cross-culturally competent professionals through whom the defendant would have an opportunity to fully present him or herself fairly to the legal system devoid of cultural biases and contradictions.¹⁹² This should not be

186. *Id.* at 41.

187. See LAWRENCE MEIR FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 180 (Sage Foundation 1975).

188. *See id.*

189. *See id.* at 65-67.

190. *See id.*

191. "The gist of [the reasonableness] tool of legal analysis is that the defendant's state of mind and personal beliefs are not relevant when judging his guilt. Instead, it becomes the idealized observer's state of mind and personal beliefs that determine the outcome, with the mere subjective opinions of the actor herself deemed inconsequential. What would the generic society member have done, known, and felt under like circumstances as those that confronted the defendant? The further the individual has deviated from this stereotyped expectation, the greater the perceived fault: she acted unreasonably." JAMES DONOVAN, *LEGAL ANTHROPOLOGY* 104 (Rowman & Littlefield 2008).

192. "The reasonable person standard stands as a barrier that precludes consideration of the unique characteristics of an individual defendant. For instance, if a defendant is from a minority group his cultural background will be ignored because the 'reasonable person' standard reflects only the norms of the dominant culture and excludes the values of the other groups in society. The problem materializes when a defendant from a different culture is denied the opportunity to explain why his actions were reasonable within the traditions of his culture." RAMADAN, *supra* note 184, at 42.

construed as simply a plea for granting the defendant an affirmative cultural defense to excuse or justify his or her actions in a trial.¹⁹³ It is more of a process to ensure equal treatment during the course of trial proceedings.¹⁹⁴ Thus, the defendant would have an avenue to purport cultural influences and impact into the question of reasonableness,¹⁹⁵ as it pertains to such issues as consent after *Miranda*, requesting additional preemptory strikes during jury selection, ineffective assistance of counsel allegations, or even judicial recusal requests.

A. Cultural Competency and Due Process

The cultural competency of the system starting from pre-trial proceedings will depend upon the legal standards the court utilizes to ensure that the principles of competency were followed at every stage of the process. At each stage of the legal process as discussed within this Article, competency is essential so that each level can ensure that the rights of the cross-cultural defendant are not circumvented, and that each level is able to respond with cultural neutrality.¹⁹⁶ The goals of cultural competency training would be rendered useless without proper mechanisms at each level to effectuate the training.¹⁹⁷ The actions of the competent participant should be objectively assessed by the court devoid of public opinion pressures from the dominant cultural group.¹⁹⁸ Lutz explains the significance of this objective approach in a heterogeneous society:

Much of formal, legal constitutional law around the world involves courts in the struggle between competing cultures, subcultures, or the interpretation of a unified culture with multiple ideological constructions. Thus, judicial decisions can be deeply controversial in a way that impedes or prevents the implementation or enforcement of judicial decisions... Court members are almost certainly too embedded in the dominant culture to easily see their way to new and innovative decisions; and when they do, they are too many ways for their will to be thwarted through other political means. We have often seen the phenomenon of a national court enunciating a legal principle that is at odds with the dominant cultural mores through the use of dissenting opinions or speculative international reasoning, while at the same time reaching an overall decision that does not act on that new legal principle but instead affirms the dominant culture. The contracultural reasoning that accompanies the culturally expected decision is a way of floating trial balloons in order to

193. Tracy J. Davis, *Cultural Defense*, in 1 ENCYCLOPEDIA OF INTERPERSONAL VIOLENCE 158-159 (Claire M. Renzetti & Jeffrey L. Edleson, eds. 2008).

194. *See id.*

195. *See id.*

196. *See* Stephens, *supra* note 2, at 427-28.

197. *See* DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 18 (Cambridge Univ. Press 2006).

198. *See id.*

encourage the broader political process to rethink the matter.¹⁹⁹

Clearly, cross-cultural advocacy will require involvement of competent participants upon judicial review, or the advocacy would have no impact, or could even be detrimental.²⁰⁰ Let us consider a North Carolina case involving the *Miranda* rights during a routine traffic stop, where the defendant allegedly consented to a search of his vehicle after being asked to do so in Spanish by the officer and which led to his arrest for various drug-related offenses.²⁰¹ The officer, who had studied Spanish in college and high school, used the word, “ravisar,” in his verbal request, which the court found the defendant understood to mean, “Can I search the car?”²⁰² In his defense, the accused’s attorney argued that his client had only been in the U.S. less than four months and was not familiar with the justice system.²⁰³ He further argued that the words the officer used, including “ravisar,” were not even Spanish words.²⁰⁴ Even the closest possible Spanish word, “revisar” meaning “to check,” was not used by the officer in conjunction with any Spanish word for car.²⁰⁵ Although the officer used words the defendant could not fully understand, the court interpreted the defendant’s testimony as though he consented to the officer’s request to search his vehicle.²⁰⁶ As far as the court was concerned, the officer’s words conveyed the meaning intended under *Miranda* based primarily on the defendant’s responses.²⁰⁷ As such, the court rejected the defendant’s argument that he did not voluntarily consent to the search.²⁰⁸

In rejecting the defense’s argument, the court based its reason on a technical premise; that the defendant had not specifically challenged, on appeal, that the trial court’s findings of fact was not based on competent evidence.²⁰⁹ Rather, the defendant had argued that the findings of fact did not support the conclusion of voluntariness.²¹⁰ And as such, the review of the lower court’s conclusions was based on the accepted factual findings.²¹¹ “Despite any language or cultural barriers [that the] defendant may have faced, [the court

199. *Id.*

200. *See State v. Torres-Garcia*, 689 S.E.2d 245, 2009 WL 4912730 (N.C. Ct.App. 2009) (unpublished opinion).

201. *Id.* at 2.

202. *Id.* An important step in cultural competency is to train officers about cultural differences. “One starting point is for police to develop language capacity that enable them to communicate effectively with members of the community who do not speak English or have limited English proficiency.” *See Walker* at *supra* note 84 at 135-136.

203. *See Initial Brief for Appellant* at 13, *State v. Torres-Garcia*, No. COA09-409 (N.C. Ct. App. filed May 6, 2009).

204. *Id.* at 7-8.

205. *Id.*

206. *Id.*

207. *Torres-Garcia*, 689 S.E.2d. at 2.

208. *Id.* at 4.

209. *Id.*

210. *Id.*

211. *Id.*

stated,] the record [did] not indicate [the] defendant had any problems understanding [the officer] throughout the entire conversation leading up to the search.”²¹² Given its ruling, where should the court’s determination as to whether or not there was mutual understanding begin? Should it only begin and end solely from the point of view of the officer, or should it have also taken into consideration whether a reasonable person in the mainstream culture could have interpreted the defendant’s actions as consent? It is under such circumstances of competing cultural claims that levels of the system need to work together in a culturally competent manner for the fair dispensation of justice.²¹³

Utilizing cultural competence could have led the court to view the defendant’s statement as simply acquiescing to the officer’s authority based on gaps in communication, in light of the conflicting testimony.²¹⁴ Based on the analysis, it appears that the court took an ethnocentric approach to the problem, focusing solely on the defendant’s reaction.²¹⁵ While the defendant stated he inferred from the officer’s words a literal request to search, he also stated that he “just accepted the car would be searched.”²¹⁶ Of interest is the contradiction that, although the defendant apparently did not understand the implications of his attempt to translate the officer’s misuse of Spanish words, this cultural misapprehension of the meanings of words was left unresolved by the lower court, and ignored by the appellate court based on a totality of the circumstances.²¹⁷ The appellate court simply attributed meaning to the defendant’s literal translation of the officer’s request,²¹⁸ based on its own cultural nearsightedness.²¹⁹

Fundamentally, the court determined that both the speaker and the listener understood the request as a voluntary act.²²⁰ This reasoning, however, designates the defendant as a reasonable person, one who is already a part of the dominant socio-cultural milieu,²²¹ and capable of correcting (or could have

212. *Id.* at 5.

213. *See Chin, supra* note 22, at 53.

214. *See Appellant’s Brief, supra* note 203, at 9.

215. *See Torres-Garcia*, 689 S.E.2d. at 5.

216. *See Appellant’s Brief, supra* note 203, at 7-8.

217. *See id.*; *see also Torres-Garcia*, 689 S.E.2d. at 5.

218. *See Torres-Garcia*, 689 S.E.2d. at 5.

219. “Cultural nearsightedness often results in making assumptions that simple things are the same everywhere... For example, people in the United States often use the word American to refer to U.S. citizens but actually that word is the correct designation of all people in North and South America.” JANDT, *supra* note 110, at 85.

220. *See Torres-Garcia*, 689 S.E.2d. at 5.

221. “[T]here is no data to support the claim of the protective function of reasonableness. The jurists who pursue this claim mistakenly assume that reasonableness, or the conduct of a ‘reasonable person,’ is known. Rather, it is an elastic concept implemented to address a factual inquiry. If the concept of reasonableness is coherently understood by all individuals, the claim of the protective function of reasonableness will stand. Nevertheless, no court has tried to give a definition of reasonableness . . . [W]hile the objective of setting a standard of conduct

chosen not to correct) the officer's misuse of linguistic expressions with its proper meaning; in other words, a listener who understood precisely what the speaker meant.²²² Such socio-linguistic barriers, coupled with different cultural interpretations, places ethnic minority groups at a disadvantage.²²³ Rather than focusing on whether there was a communication of consent by the defendant to the officer, the court merely inferred consent by its own interpretation of the defendant's responses.²²⁴ The reasoning legitimizes a need for cross-cultural defendants to develop the proficiencies of a double-consciousness simply to avoid stereotypical biases held against them because they must also conform to the standards set by the dominant culture.²²⁵

B. A Cultural Proposal

Instead of an ethnocentric approach in which a person's culture is considered superior, a court should interpret cultural situations using a subjective-objective standard, proposed by this writer as follows: (1) Whether the defendant in his or her particular circumstances understood the law enforcement officer's competent request and consented; and if so, then (2) Whether a reasonable person in the defendant's position, who is culturally relativistic, would have understood and consented to the officer's request. The subjective portion of the analysis would require the court to determine whether the officer was acting in a culturally competent manner when making the request. The objective portion would require that a reasonable person is one who is capable of setting aside his or her own ethnocentricities. Short of institutionalizing cultural defenses, this two-pronged analysis undertaken early, from pretrial proceedings onwards will ensure that the system is not solely dependent on the representatives in the legal system to voluntarily undergo cultural competency training. Arguably, it is at least necessary until there is no longer a need for the cross-cultural defendant to develop a double-consciousness in order to successfully negotiate through the system.²²⁶

manifesting the social moral norms is false, the other objectives of educating the public and protecting individuals from unjustified and unexpected behavior are sound and legitimate. However, the reasonable standard [alone] does not advance these objectives." RAMADAN, *supra* note 184, at 42.

222. See WALKER, *supra* note 128, at 413-414.

223. See *id.*

224. See Torres-Garcia, 689 S.E.2d. at 5.

225. See CYNTHIA LEE, MURDER AND THE REASONABLE MAN 103-112 (N.Y. Univ. Press 2003).

226. "Double consciousness is trenchantly political. It describes precisely what is misguided and disingenuous about an easygoing multiculturalism, by demonstrating that not all difference is equivalent. That, in fact, relationships among racial and ethnic groups are unequally structured with correspondingly inequitable political options determined by the history of formulations of political membership in a given place, in particular, by the unique political significance of which group's subordination has been made a racialized condition for the freedom of other full-fledged members." Jane Anna Gordon, *The Gift of Double Consciousness: Some*

To assess the benefits of this proposal, consider the case involving consent in Oregon, where a Vietnamese defendant driving away from a shooting was stopped by an officer for a traffic infraction and later arrested for murder.²²⁷ During the encounter, the officer was alerted to the vehicle and the suspect's description, and requested to search the defendant's vehicle, in which the defendant allegedly at first consented, then withdrew his consent.²²⁸ "[T]he officer became aware that [the] defendant had difficulty understanding English. Because of this concern, others with whom the officer was in communication requested [an interpreter]. Later, after [the] defendant was later identified at the scene of the stop by witnesses to the shooting, the officer advised defendant of his constitutional rights."²²⁹ The defendant then signed a written consent-to-search form, and the weapon used in the murder was located in his vehicle.²³⁰ Although the form was translated verbatim by an interpreter, the defendant afterward argued that his consent was not voluntary due to cultural differences and a lack of "English language skills."²³¹

In its opinion, the court reasoned that the defendant had not contended that "the cultural differences coerced him into making the false statements or that he misunderstood the question because of his poor language skills."²³² From the court's point of view, without evidence of cultural disparities or a deficiency in English language communication, and absent any other evidence of intimidation by the officer, it had to find that the statement was made voluntarily.²³³ The reasoning indicates, to some extent, an understanding within the realm of cultural competency, or at the very least, a willingness to apply the proposed standard of review.²³⁴ Although initially, a language barrier in the case was not clearly evident, the defendant would have benefited from the proposed standard without having to resort to a cultural defense at trial to excuse criminal culpability.²³⁵

By way of analogy, although the listener may have understood the word "car" from the speaker, he should have specifically purported how his cultural interpretation of the word "car" prevented him from even considering that there was a voluntary aspect to the encounter.²³⁶ The court noted,

[I]n the abstract, [while] the [defendant] made a strong showing of

Obstacles to Grasping the Contributions of the Colonized, in POSTCOLONIALISM AND POLITICAL THEORY 155 (Nalini Persram, ed. 2007).

227. *State v. Vu*, 770 P.2d 577 (Or. 1989).

228. *See id.* at 578.

229. *Id.*

230. *See id.*

231. *See id.* at 580.

232. *Id.*

233. *Id.* at 425.

234. *See id.* at 580-81.

235. *See id.* at 424.

236. *See id.*

differing cultural values or core beliefs that [would] make a person more compliant with governmental authority or cause the creation of cultural barriers, [the court found that the] defendant himself [had not asserted] either the cultural or the linguistic differences as a basis for his consent.²³⁷

Unlike the North Carolina case, the Oregon court's analysis indicated an attempt to take an independent view of the situation. At the very least, the Oregon court confirmed that there is a place for cultural competency in the legal profession.

Another example of the necessity for the dual subjective-objective approach occurred in a sexual assault appeal in Colorado. Here, the defendant argued that, as a recent refugee from the Sudan, he did not completely understand his *Miranda* rights.²³⁸ After the officer obtained an interpreter who spoke in the defendant's native language, the officer asked whether the defendant understood that he had a right to remain silent.²³⁹ The defendant responded, "Why should I keep quiet? I have the right to tell the truth."²⁴⁰ The court indicated that the interpreter's translation tactics were flawed, noting that she had difficulty sufficiently expressing the concepts of *Miranda*, such as the right to counsel, into the defendant's native language.²⁴¹ Rather, the interpreter described the concepts contextually, using words from another language that the defendant appeared to understand.²⁴²

In reviewing the trial court's decision to suppress the statements, the appellate court apparently agreed with the lower court's subjective analysis of the situation from the defendant's cultural perspective.²⁴³ Based on the testimony at the suppression hearing, the trial court found that the defendant "had limited, if any, English language skills, and those skills were mostly learned from watching daytime television after his arrival in [the] country."²⁴⁴ Using this information, the appellate court went on to note several important distinctions in the defendant's culture; for instance, that problems were solved through familial intervention, that a family member had the right to tell the truth and further that speaking to authorities in the defendant's culture was a compulsory act.²⁴⁵

The facts of this case exemplify a situation in which the judicial system can compromise the rights of an cross-cultural defendant, particularly because its representatives act blindly to its responsibility of ensuring fairness and

237. *Id.*

238. *People v. Redgebol*, 184 P.3d 86 (Colo. 2008).

239. *See id.* at 89.

240. *Id.*

241. *See id.* at 95-96.

242. *See id.* at 91.

243. *See id.* at 95-96.

244. *Id.* at 92.

245. *Id.* at 91.

equality.²⁴⁶ The defendant was exonerated because the trial and appellate courts in large part examined the issues in a culturally competent manner.²⁴⁷ In finalizing its affirmation of the suppression ruling, the appellate court stated that the defendant's language did "not include the abstract ideas that form the basis of our *Miranda* rights."²⁴⁸ Here, the court took on the burden of ensuring adequate competency in the system and protection of the defendant's liberties, instead of relying on the interpreter to bridge the cultural gap.²⁴⁹

In light of the contrasting nature of reasons in these three decisions, there appears to be a need for a uniform check and balance system for all cross-cultural defendants. The cases emphasize the importance of cultivating competency throughout the justice system, with legal standards that seek to equalize the cultural disharmonies between that of the defendant and the dominant societal group. The primary burden rests with the cross-cultural defendant to prove that his or her years of socialization in another culture can, in a matter of moments, be subjected to the justice system—a system that is generally not attentive to the fact that it is a product of the dominant culture.²⁵⁰ The culturally competent practitioner can help ensure that these cultural variants are not ignored from the initial investigation to the sentencing or plea hearing.

The overall objective of a culturally competent program requires

246. *See id.*

247. *See id.* at 92-96.

248. *Id.* at 98.

249. "The judiciary has long failed to recognize the complexity of legal interpreting and has consequently expected the court interpreter to act as a conduit, transmitting message between the accused, witness and member of the court without any intervention, and irrespective of linguistic and cultural differences among participants." Muhammad Y. Gamal, *Cultural Translation*, in ROUTLEDGE ENCYCLOPEDIA OF TRANSLATION STUDIES 65 (Mona Baker & Gabriela Saldanha, eds. 2008); *See also*, CARMEN VALERO GARCÉS, ANNE MARTIN JOHN, CROSSING BORDERS IN COMMUNITY INTERPRETING 87 (Benjamins Publishing 2008) ("The role of interpreters as agent of culture . . . is underestimated and reduced to that of a translation device. The deficiencies of the legal norms in this field places [sic] emphasis on the need for a formal system that will establish clearer patterns of interpreting behavior and allow legal interpreters to play an active role in court interactions . . . [However, this is not to] suggest that interpreters should intervene to explain [] behavior, but rather places the burden on the legal profession to become more familiar with the culture and customs of the peoples they encounter in the court system.") (citations omitted).

250. "It has been argued that it is through language that we create and maintain meanings and beliefs about the world and that the language available to us (through having been passed on to us) contains an implicit set of values/ beliefs from previous generations and the prevailing dominant culture." Rachel Tribe, WORKING WITH INTERPRETERS, in RACE, CULTURE, PSYCHOLOGY & LAW 164 (Kimberly H. Barrett & William H. George, eds. 2005); *see also* Cleveland v. U.S., 329 U.S. 14, 26 (1946) (Murphy, J., dissenting and discussing the definition of marriage under the Mann Act) ("We must recognize . . . that polygyny, like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears. It is equally true that the beliefs and mores of the dominant culture of the contemporary world condemn the practice as immoral and substitute monogamy in its place"); Elaine M. Chiu, *Culture in our Midst*, 17 U. Fla. J.L. & Pub. Pol'y 231, 260 (2006).

communication conducive to trust and cultural exchange among the community and participants.²⁵¹ Furthermore it entails a level of communication and legal standards that is devoid of bias and prejudgment.²⁵² In addition, the culturally competent participants must value cultural diversity, interaction and self-awareness, and also seek to continually expand their applications and integration of cultural knowledge, to rectify any inequities and possible exclusion of others.²⁵³ In order to dispense justice uniformly and impartially, the system should be comprised of judicious individuals who represent or are capable of understanding and appreciating America's diverse cultures.²⁵⁴

C. Molding Competent Participants

In developing the components of a culturally competent training program we need to identify how individuals relate to, and are affected by their own her cultures. The identification of these cultural preferences help in structuring culturally competent education that would be part of a lifelong learning process, as a culture is always changing and requires continual nurturing.²⁵⁵ Cultural competency cannot begin and end with a few training sessions. The culturally competent participants must be willing to ask difficult questions of themselves and their culture, and demonstrate an aptitude and willingness toward cross-cultural adaptation.²⁵⁶

This initial stage of identification begins with participants assessing the beliefs, practices and attitudes that have influenced and shaped their views regarding a particular cultural group.²⁵⁷ These views may be the result of interactions with other family members and friends, or acquired through information from the media or wireless social networks.²⁵⁸ This personal examination then extends outward to a more in-depth exploration of the dynamics of participants social membership groups.²⁵⁹ Arguably the process is like mediating one's own internal bias and cultural influences in order to expose the traits to determine how they affect daily life.²⁶⁰ In doing this, the participant should be able to honestly answer the following: "Are there [any] antagonisms or stereotypes about the relationship between [my culture] and the [other culture.] Will [I] feel comfortable discussing [my] views, knowledge, or

251. See Stephens, *supra* note 2, at 427-29.

252. See *id.*

253. See *id.*

254. See *id.*

255. See Kimberly H. Barrett, *Guidelines and Suggestions for Conducting Successful Cross-Cultural Evaluations for the Courts*, in RACE, CULTURE, PSYCHOLOGY & LAW 115 (Kimberly H. Barrett & William H. George, eds. 2005).

256. See LUM, *supra* note 1, at 276, 426.

257. See *id.*

258. See Barrett, *supra* note 255, at 115.

259. *Id.*

260. *Id.*

lack of knowledge about the group [face to face]?”²⁶¹

An individual’s interpretation of society is shaped by his or her cultural upbringing and personal experiences.²⁶² This cultural adaptation begins within the family early in life.²⁶³ The individual takes on the attributes of his or her familial-cultural group or consciously makes a decision to deviate in a different direction.²⁶⁴ Nonetheless, it is this cultural foundation—one that is grounded in a system of values and norms—that the individual uses to structure his or her life. In doing so, this person sometimes adheres to cultural mores that deter accommodation of opposing traditions and lifestyles.²⁶⁵ Whenever misunderstandings arise, these may be personalized at a micro-level and shared with other family members or others within the social-cultural groups.²⁶⁶ Over time, a broader spectrum of discourse generally follows through peer, educational or public interactions and associations without the loss of cultural identity.²⁶⁷

Cultural identity includes both feelings and appreciations, likes and dislikes, that are reflected in the presentation of self.²⁶⁸ And, while it is difficult to change one’s culture, it is even more difficult to avoid the prejudices and stereotypes shaped by outside influences.²⁶⁹ Cultural competence requires that the participant first identify the prejudices and stereotypes and biases and the extent to which these have shaped his or her perceptions of cultural reality.²⁷⁰ This experience is akin to learning another language by re-learning how to position one’s lips in order to produce the sounds of the other language similar to a native speaker, rather than equating words and idiomatic expressions of the other language in accordance with one’s own.²⁷¹ The result is a greater appreciation and understanding of the language both during and after the learning process.²⁷² Through this retrospective appreciation of the linguistic self, the stage is set for understanding across cultures, one that is likely to be integrated into a new type of personal awareness and presentation of self.²⁷³

This level of personal awareness, acquired at the macro-level of

261. *Id.*

262. See Fred Beauvais, *Ethnic Identity Development Measures: Orthogonal Cultural Identification Scale*, in *ENCYCLOPEDIA OF MULTICULTURAL PSYCHOLOGY* 187-88 (Yo Jackson, ed. 2006).

263. *See id.*

264. *See id.*

265. *See id.*

266. *See id.*

267. *Id.*

268. *See LUM, supra* note 1, at 136.

269. *See id.*

270. *See* JudyAnn Bigby, *Beyond Culture: Strategies for Caring for Patients from Diverse Racial, Ethnic, and Cultural Groups*, in *CROSS-CULTURAL MEDICINE* 7-8 (JudyAnn Bigby, ed. 2003).

271. *See* PAUL FEYERABEND, *FAREWELL TO REASON* 265 (Verso 1987).

272. *See LUM, supra* note 1, at 19.

273. *See* LECCA, *supra* note 27, at 33.

institutional interactions, would serve to facilitate interaction with cross-cultural group members in a similar fashion to the personal level of communication established at the micro-level with family members and peer groups.²⁷⁴ Cultural competency seeks to transfer such interaction patterns into the cross-cultural context.²⁷⁵ It is not simply to empathize with cross-cultural defendants or victims in the justice system; the culturally competent professional seeks to truly understand how culture shapes one's thoughts, feelings, emotions and actions.²⁷⁶ In short, the dynamics of the culture must be understood regardless of personal preferences or ideology.²⁷⁷ This will enable the culturally competent to honestly empathize rather than merely patronize.²⁷⁸

D. Integrating a Mentoring Initiative

In order to develop an empathic understanding with a cross-cultural defendant, the culturally competent professional must actively participate in the defendant's culture.²⁷⁹ In addition to attending training programs, the culturally competent may benefit from involvement in neighborhood justice initiatives, such as mentoring.²⁸⁰ "Promoted as an activity whereby individuals can 'give back to their communities', mentoring seems to have permeated all sectors of society, bringing into closer contact with one another, the privileged and underprivileged, old and young, achievers and underachievers, college students and grade schoolers etc."²⁸¹ Giving back to the community allows mentors to develop a keener insight into cross-cultural behavior and identity.²⁸²

In the justice system, officers, fact-finders or attorneys could assume the role of mentors to individuals from cross-cultural groups.²⁸³ By instituting mentoring into the training goals of cultural competence for the justice system, the seeds for diverse cultures that truly understand one another can be nurtured, without reliance on mandated policy initiatives, or a legal interpretation of cross-cultural interpersonal relationships.²⁸⁴ Mentors are likely to find themselves more in touch with other cultures than they thought possible, one that extends beyond personal goals of tolerance and understanding to one of

274. See Beauvais, *supra* note 262, at 88.

275. See *id.*

276. See Charles R. Ridley, et al., *Cultural Confrontation: A Skill of Advanced Cultural Empathy*, in COUNSELING ACROSS CULTURES 385 (Paul Pedersen, et al., eds. 2007).

277. See *id.*

278. See *id.*

279. See GIUSEPPE COSTANTINO, ET AL., TEMAS (TELL-ME-A-STORY) ASSESSMENT IN MULTICULTURAL SOCIETIES 74 (Routledge 2007).

280. See PERSAUD, *supra* note 35, at 1.

281. *Id.*

282. See *id.* at 1.

283. See *id.* at 9.

284. See *id.*

societal harmony and peaceful coexistence.²⁸⁵ For example,

[A]s [a mentor] of economically disadvantaged African-American youths, it is counterproductive to formulate opinions, or conceptualize African American families within the context of the nuclear family framework and ideals. To do so is to be oblivious to the network of kin relationships that are unique and significant to this cultural group. African Americans network of kin relationships is rooted in the very history and economic conditions of American society. From the early days of plantation production, the precarious mode of survival forced Blacks to modify or reconstruct their indigenous African culture to cope with the harsh social and economic realities of a commoditized existence... Given that African American families tendency to incorporate non-blood members into its extended structure, it is not unusual for mentors to incorporate non-blood members into the family group. When this occurs, mentors can be overwhelmed by the warmth and respect they receive from family members. Initially, accommodation into the family may create some uneasiness for some mentors,; but they quickly adjust when they realize the sincerity with which they are accepted.²⁸⁶

Here, the individualistic focus perpetuated by the dominant societal culture comes into contact with the group dynamics of African-American communal culture.²⁸⁷ African Americans have historically faced fundamental problems within the dominant culture. Thus, it may be beneficial for cultural competence training programs to develop an appreciation for the African-American experience.²⁸⁸ Due to a lack of mutual understanding African Americans are not only over-represented in the prison population,²⁸⁹ they are also the true representatives of a culture historically intertwined with the dominant American culture.²⁹⁰ The difficulty in identifying a common ground between the dominant culture and African Americans is largely due to the historic economic inequality and racism that continues to thrive.²⁹¹ As a

285. *See id.* at 27.

286. *Id.* at 27 (citations omitted).

287. *See id.* at 96.

288. *See* Jacqueline P. Butler, *Of Kindred Minds: The Ties that Bind*, in CULTURAL COMPETENCE FOR EVALUATORS 23-25 (Mario Ed Orlandi, ed. 1998).

289. *See* Shiv Narayan Persaud, *Conceptualizations of Legalese in the Course of Due Process, from Arrest to Plea Bargain: The Perspectives of Disadvantaged Offenders*, 31 N.C. Cent. L. Rev. 107 (2009).

290. *See* THOMAS P. BONCZAR, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 1 (2003) (accessed August 2010) <http://www.bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf>.

291. "Racism affects arrest rates and victim perceptions . . . Police officers may be ignoring mandatory arrest rules due to biased exercise of discretion. [A 2001 study] found that police were more likely to make an arrest of the perpetrator if the victim was white, if the defendant was African American . . . On the other hand, police were less likely to make an arrest if the victim was young, black, poor, and residing in an inner-city area . . . Evidence of racism exists at the prosecutors' level and within juries as well. [A separate 2001 study] to investigate which characteristics most influenced a prosecutor's decision to prosecute [found] that African

cultural group, African Americans have had difficulty co-existing with the dominant culture because of slavery, Jim Crow laws, segregation and the denial of cultural advancement— indignities that have stripped African Americans of their indigenous cultural uniqueness.²⁹² The dominant societal culture will benefit from personal interactions with the African-American culture, and a mentoring initiative can be the catalyst to ensuring cultural competency.²⁹³

The foregoing discussion lends support to the argument that cultural competency can only be achieved when a culturally neutral approach is undertaken with a defendant in the justice system.²⁹⁴ “Any mentoring assistance, no matter how well intentioned, is likely to be counter productive if it seeks to impose on the [] mentees social-cultural values and beliefs that are inconsistent with their culture.”²⁹⁵ A major reason for such hindrance is a participants’ personal inability to identify their prejudices, thereby thwarting the opportunity for cross-cultural understanding due to restrictive cultural predispositions.²⁹⁶ In order to promote cross-cultural unity, it is “essential for [participant] mentors [in a cultural competency training program] to adopt a ‘cultural neutrality’ approach, which seeks to integrate assistance within the cultural framework of the mentees, rather than work in opposition to it . . . [Even in a mentoring program,] the mentors should always be alert to their own ethnocentric ideals.”²⁹⁷ Initiating a program that truly seeks to understand the African-American experience can assist with eradicating the stereotypes that have existed in the emotional and sometimes volatile relationship between the cultures of the dominant group and that of African Americans.²⁹⁸

There is perhaps no greater way to learn about a defendant’s culture than to walk in the defendant’s shoes.²⁹⁹ By declining to fully embracing neighborhood justice programs such as mentoring, the dominant societal culture has failed to understand not only the African-American culture, but almost every other minority culture.³⁰⁰ In general, we live in a society that is becoming less intimate through person to person contact. We talk on our cell phones in crowded places instead of greeting one another, we research all our questions on the Internet, and we learn whatever little we care to about another individual’s culture from television or the movies.³⁰¹

American defendants were significantly more likely to have their cases prosecuted than white offenders.” Stephens, *supra* note 2, at 422 (citations omitted).

292. See PERSAUD, *supra* note 35.

293. See *id.* at 96-7.

294. See *id.*

295. *Id.* at 96.

296. See *id.*

297. *Id.* at 96-7.

298. See Butler, *supra* note 288.

299. See CORTES, *supra* note 28.

300. See PERSAUD, *supra* note 35.

301. “Although we live in continual contact with other people we have far fewer opportunities to interact with them in more than superficial ways. We long for close human

While the efforts of community justice programs focus on the affect of specific criminal cases in a community, or the overall degree of contact between the public and its public servants,³⁰² there is a shortage of similar mechanisms on a larger scale in society specifically focused on cultural competence.³⁰³ We can accommodate cultural diversity by embracing cultural competent programs and mentoring initiatives which promote interpersonal contacts and help to bridge cross-cultural divides. This will bring about a greater understanding in our dispensation of justice.³⁰⁴

CONCLUSION

Cultural competence can help ensure that the justice system avoid imposition of the dominant cultural values and morals on cross-cultural defendants.³⁰⁵ In the same manner that employees must undergo “harassment in the workplace” training as a way to promote tolerance and understanding, we can begin to accomplish similar objectives with cultural competency training, in order to erode embedded ethnocentric ideals that affect impartiality within our system of justice.³⁰⁶

In legal matters involving culturally specific actions, the culture of the dominant societal group can become a barrier to enhancing cultural competence when behavior and language are arbitrarily and ethnocentrically interpreted.³⁰⁷ In order for cultural competence to prevail throughout the system, the enforcement, interpretation and application of laws require that each level of the system avoid imputing its own idiosyncratic understanding cross-culturally.³⁰⁸ In short, the more we encourage discourse on cultural competence

relationships and the satisfying feeling of being truly known and understood. The society we have constructed has made such relationships ever more difficult to come by. Opportunities for close interaction and dialogue provided former generations by the family, neighborhood and stable workplace are gone, or made more tenuous . . . [T]he automobile [has] made us highly mobile – and destroyed the neighborhoods in which former generations had a sense of community. The cell phone and the internet make it easy to speak to people on the other side of the world – but how about the people on the other side of the fence? As one critic said of New York City, ‘In New York people don’t know their neighbor but they suspect them!’” ROBERT A. BLUME & ARTHUR W. COMBS, *THE CONTINUING AMERICAN REVOLUTION* xiii (iUniverse 2004).

302. “The ‘community justice’ label can be found sewn into a wide range of ideas and policies . . . Advocates of community justice argue that instead of working with the public to reduce crime, resolve dispute and repair the damage done by crime, the state and its criminal justice agencies has tended to claim ‘the fight against crime’ for itself. [It] goes beyond restorative justice, in its concern not just with the handling of specific cases of crime, but with [the] role of citizens, victims and local publics, in governing and running criminal justice.” BEN M. ROGERS, *NEW DIRECTIONS IN COMMUNITY JUSTICE* 5 (Institute for Public Policy Research 2005).

303. See Kastner, *supra* note 6, at 945-46.

304. See *id.*

305. See Barrett, *supra* note 7, at 433.

306. See *id.* at 427-29.

307. See *id.*

308. See *id.*

within the justice system, the more we will be able to establish realistic standards of impartiality and reasonableness for defendants and victims, accusers and accused across the nation's cultural divides.³⁰⁹

309. *See id.* at 433.