Naturalising Cultural Difference and Law: Author's Introduction

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I. Culture, interpretation, and incommensurability

Cultural Difference on Trial: The Nature and Limits of Judicial Understanding[1] is a systematic philosophical inquiry into the nature and limits of the judicial understanding of culturally different phenomena. By this latter term, I mean the thoughts, actions, and associated artefacts of people who are members of a culture (however defined)[2] different from that of the judge presiding over a legal hearing in which evidence of and argument about these things arise.[3] As an inquiry into both the nature *and* limits of judicial practice in this context, the book provides an account of the cognitive and practical *processes* by which judges seek an understanding of culturally different phenomena, as well as the *constraints* – general and legal, psychological and institutional – which operate upon

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1 Anthony J Connolly, *Cultural Difference on Trial: The Nature and Limits of Judicial Understanding* (2010).

2 Whilst acknowledging the controversial nature of the notion of culture within the social sciences, I argue in the book that members of culturally different groups may be identified as such by reference to some combination of factors, including their language, conceptual scheme or world view, genetic characteristics, historical origins and experience, and geographic location, as well as distinctive behavioural and artefactual features. See, for example, Adam Kuper, *Culture: The Anthropologists' Account* (1999) on this.

3 Though one might be tempted to conceive of such proceedings as a relatively narrow class comprising obviously cross-cultural matters such as refugee applications or indigenous and minority rights claims, in fact, cultural difference regularly presents challenges in all kinds of matter, ranging from domestic criminal prosecutions to international trade disputes.

them in this pursuit. Further, to the extent that judicial understanding here may be seen as representative of intercultural understanding by agents within a range of institutional settings – both public and private – the book might also be seen as something of a prototype for a more general work of institutional epistemology and design.

What is most distinctive about the culturally different phenomena in question here, of course, is that they are *meaningful*. The thoughts, actions, and artefacts of culturally different agents and groups are informed by intentional states with propositional and conceptual content. It is in relation to this content that the meaning of these things subsists. By virtue of their meaningfulness, culturally different phenomena must be subject to a process of interpretation on the part of a judge in order to be understood and appropriately responded to within the context of a legal hearing. Such an interpretive response may be called for by a direct evidential encounter on the judge's part with the phenomena in question or by an encounter with testimonial or other indirect evidence or with argument about the phenomena. Either way, both evidence of or arguments about cultural difference demand an interpretive mode of judicial practice.

A judge cannot perform her judicial role and respond appropriately to any such difference without understanding it – to some practically adequate degree, at least.[4] And she cannot understand it without engaging in an interpretive process in relation to it. This book is my attempt to theorise the nature of this dimension of judicial practice. Because such practice takes place necessarily within the practical and regulative context of a legal hearing, we might construe this book as an account of the *interpretive architecture* of the contemporary legal hearing. As I try to show in the latter parts of the book, such architecture presently possesses features facilitative and obstructive of the understanding judges need to gain in order to perform their adjudicative role.

My interest in this topic was motivated in part by a longstanding intellectual and political unease I have felt in regard to the once popular idea of radical cultural incommensurability – the notion that people from different cultures are so different in their conceptual schemes or worldviews that there is no hope of them ever understanding and effectively cooperating with each other – and its operation in the practice of law.[5] From the time of

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4 Except, perhaps, by error or accident. The degree to which she needs to understand a culturally different phenomenon depends in large part on the legally defined character of her role in the matter in question. I have more to say on this below.

5 Dorit Bar-on defines cultural incommensurabilism as the view that 'different cultures view the world through conceptual schemes that cannot be

my undergraduate studies in philosophy, anthropology, and law, I have encountered the idea (in one version or another) that judges and other agents of the dominant institutions of modern liberal democratic nation states such as Australia are so different in their worldview from those culturally different 'others' that come before them that they are unable to understand them and appropriately respond to them and their claims.[6]

My philosophical scepticism about the truth or even coherence of such a claim was only a part of my overall unease here. This is because the truth or falsity of the radical incommensurabilist claim is not merely of intellectual consequence. A great deal of concrete political, social, and economic import hinges on the truth of the claim for the millions of people who constitute the culturally different minorities in question here. For if the incommensurabilist claim – or even something approaching it – were correct, there would be little reason to believe that the legal systems of nation states such as Australia would be able to provide what they purport to provide culturally different groups by way of minority rights and the like – namely, the proper recognition of their ways of life and the effective protection of those ways of life from interference by the dominant society. The reason for this is that any such recognition and protection requires a degree of understanding of such way of life on the part of those legal agents charged with providing that recognition and protection. One cannot properly respond to a set of beliefs or practices which one does not understand – to some sufficient degree, at least.[7] If a radical version of the incommensurabilist claim were correct, it would appear that all legal attempts to address the ongoing disruption of distinctive minority cultures by way of minority rights and the like were futile wastes of effort and resources, doomed to failure. Political and legal quietism in the face of cultural difference would be the only rational course.[8] This struck me as unacceptable. So – eventually – came the inquiry that comprises this book.

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reconciled.' Dorit Bar-On, 'Conceptual Relativism and Translation' in F Siebelt G Preyer, and A Ulfig (eds) *Language, Mind and Epistemology: On Donald Davidson's Philosophy* (1994) 145.

6 Statements of this claim are legion. In the book I survey a number of them, including the Australian legal theorist Penelope Pether who stated that 'it is a commonplace of accounts of indigenous culture ... that connection with the land is at its heart, in a way radically incommensurable with the non-indigenous... legal consciousness.' Penelope Pether, 'Principles or Skeletons? Mabo and the Discursive Constitution of the Australian Nation' (1998) 4 *Law Text Culture* 118.

7 Again, except, by error or accident.

8 On the politically and ethically quietistic dynamic of certain so-called 'postmodern' strands of incommensurabilist thought, see, for example, Jurgen Habermas, *The Philosophical Discourse of Modernity: Twelve*

II. Concepts and culture

Perhaps the most important and distinctive feature of the book's analysis is its concept-theoretic orientation.[9] On this approach, judicial understanding is taken to involve the possession by a judge of a *working concept* of a culturally different phenomenon at some point over the course of a legal hearing. To understand a culturally different *practice*, for instance, is – in important part – to possess a concept of that practice.[10] Because, as I argue in the book, possessing a concept of a specific practice involves possessing some set of the concepts actually informing that practice, the judicial understanding of a culturally different practice involves the possession of concepts which are in turn possessed by those very agents engaged in the practice.[11] It involves possessing, what I term, culturally different concepts.[12]

Lectures (1987). Of course, not all postmodernist theorists subscribe to a radical incommensurabilist view.

9 An orientation, in part, provoked by what seems to me to be the concept-theoretic orientation of those advocating the existence of a radical cultural incommensurability in law. I argue in the book that the most plausible way of making sense of claims of cultural incommensurability is to construe them as involving the claim that judges are unable to adequately *conceptualise* the thought and practice (and associated material artefacts) of the members of different cultures. They do not and cannot possess an adequate *concept* of culturally different phenomena. As a result, they cannot acquire or maintain true beliefs about these things. They cannot understand them and respond appropriately to them - in any significant sense. One advocate of the incommensurabilist view, the indigenous Canadian theorist Mary Ellen Turpel, hints at such an orientation in her claim that 'cultural differences are not such that they can be managed within the dominant legal *conceptual*-framework' (my emphasis). Mary Ellen Turpel, 'Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences' (1997) 6 *Canadian Human Rights Yearbook* 3-45. See also Stuart Motha's claim, in the context of a critique of the law of native title in Australia, that 'the European subject was and is unable to recognise the indigenous relationship to land other than *through their own conceptions of it*' and that 'the actual experience and particularity of the [indigenous] other cannot be accessed *through the concepts* we invent' (my emphasis). Stuart Motha, 'Mabo: Encountering the Epistemic Limit of the Recognition of Difference' (1998) 7 *Griffith Law Review* 88.

10 Such a concept may, admittedly, be quite complex. It is for this reason, amongst others, that I am sympathetic to philosophical and psychological accounts of higher-order concepts which conceive of them as a kind of theory. See Susan Carey, *The Origin of Concepts* (2009), for a detailed, as well as scientifically and philosophically sophisticated, theory-theory of concepts. My thinking on this has shifted somewhat since I wrote the book.

11 This is a feature of conceptualising any meaningful phenomena. Because

Where such concepts are not possessed by a judge at the commencement of the legal proceedings in which they arise for consideration – that is, where a situation of *conceptual difference* obtains – then the judge must acquire those concepts by some or other interpretive means over the course of the proceedings. She must learn enough about the culturally different thought, practice, or artefact in question as will enable her to appropriately respond to it and adequately perform her judicial role in the proceedings. In the book I construe this learning (and the process of interpretation which accompanies it) in terms of the acquisition of new concepts. It is the challenge posed by such learning that serves as the main focus of the book. This is to say that I am predominantly concerned in the book with that species of cultural difference which involves *conceptual* difference.[13] For reasons I outline in the book, it is this species of cultural difference which is the most philosophically interesting and practically problematic (from the point of view of legal institutional design).

In light of comments made on this by Glaskin and Edmond, it is important to note that the judicial learning at work here need not be as extensive as that engaged in by the culturally different agents themselves in the course of their own socialisation into their culture. It need not even be as extensive as that pursued by an anthropologist seeking to understand some aspect of a different culture for some anthropological purpose.[14] The judge need only acquire sufficient number or degree of culturally different concepts as will enable her to perform her adjudicative role in the matter at hand. Her only obligation is to acquire, what I term in the book, a *practically adequate* understanding of the culture in question. The actual degree of understanding required of a judge will vary from case to case and may range from the superficial to the relatively deep. Consequently, the

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meaningful phenomena are importantly constituted and individuated by their conceptual content, maintaining a concept of them involves maintaining some set of that conceptual content. Donald Davidson, *Inquiries into Truth and Interpretation* (1984).

12 I have more to say on the notions of culture and culturally different concepts which I adopt in the book in my response to Katie Glaskin's paper below.

13 Amongst theorists there is little disagreement that at least *some* of the concepts informing culturally different phenomena may not be possessed by a judge at the commencement of a hearing involving such phenomena. Those theorists I refer to in the book as radical cultural incommensurabilists deny that *any* culturally different concept is possessed by a judge who is not a member of the culture in question. That is, they claim that all *culturally* different concepts are *conceptually* different as far as such a judge is concerned. A significant part of the book is taken up responding to this extreme view of cultural and conceptual difference.

14 Judges need not be (in Edmond's terms) 'amateur anthropologists or lazy anthropologists'.

interpretive *effort* required of her may vary from case to case and range from the relatively light to the extremely onerous. And in some cases, of course, no learning at all may be required of her in the face of those concepts she might happen to share with members of another culture.[15]

The concept-theoretic approach adopted in the book operates, then, at two levels. It proceeds by way of an inquiry, firstly, into the possession and enactment of a conceptual scheme by culturally different agents and groups and, secondly, into the acquisition of some part of that conceptual scheme by a judge over the course of a hearing. In pursuing these inquiries, the book elaborates a theoretical model of the *nature* of culturally different thought and practice and the judicial understanding of those things. With this in hand, it goes on to explore the *limits* of any such understanding – which is to say, the extent to which and the conditions under which, any such understanding is *possible*. Interrogating the radical claim that by virtue of some set of individual or institutional factors, a judge might be *utterly incapacitated* from understanding a culturally different phenomenon, the book sets out to identify those aspects of judicial practice and legal process which might affect such understanding, either positively or negatively.[16] In many ways, the book is a work of legal epistemology – though the kind of knowing at stake in it is of an interpersonal and intercultural kind: a kind of knowing more akin to hermeneutics than cognition.[17]

III. Philosophical analysis and law reform

I said earlier that the book comprises *for the most part* an inquiry into the nature and limits of judicial understanding in the face of cultural difference. It is, for the most part, a descriptive philosophical enterprise. Additionally, though, and in light of the descriptive account of things it develops, the book also aims to provide a framework for thinking about the reform of judicial practice and legal process in the service of more effective and ethical cross-cultural communication. This is to say that the book is in part a *normative* work, comprising both a critique of current legal practice and

15 There is a tendency in much discourse surrounding the issue of cross-cultural understanding to think that the only understanding *that matters* is a deep understanding, approaching the self-understanding of the culturally different agents in question. The model of understanding employed in this book challenges that tendency and acknowledges successful understanding is always context-dependent and always a matter of degree.

16 These include things such as the rules of evidence, the selection criteria for appointment to the judiciary, and even the physical architecture of the courtroom. I discuss these in some detail in Chapter 7 of the book.

17 As such, it also falls under the model of social epistemology developed over the past two decades or so by Alvin Goldman and others. See, for example, Alvin Goldman, *Knowledge in a Social World* (1999).

process and a blueprint for institutional reform in the future. Intersecting, as it does, with the political and ethical concerns which originally motivated the project, the book's normative dimension is as important to its integrity as its descriptive aspect.[18]

As should be apparent by the vocabulary and style of my summary so far, the theoretical tradition informing the book is that of analytic philosophy. The book draws substantially on contemporary analytic philosophy of mind, action, and interpretation – as well as associated current theories within cognitive and developmental psychology – with only the occasional nod to related lines of thought within the continental tradition.[19] In the application of these philosophical sub-disciplines to a quite concrete social and legal problematic, the book constitutes a contribution to the increasingly prominent discipline of applied philosophy.[20] Like many within the contemporary analytic tradition, I adopt a philosophically naturalistic metaphysics and methodology.[21] In fact, in pursuing my inquiry I explicitly and systematically employ a rigorously *physicalist* set of metaphysical and methodological presuppositions.[22] Within this philosophical framework, all of the phenomena invoked in the judicial understanding of culturally different actions – concepts, intentional states, actions, cultural difference and the very process of understanding these – comprise an integral and ordinary part of the natural world, metaphysically continuous with all of the other things in the world. Very importantly, though,[23] these higher order discursive things are not crudely

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18 Indeed, the critical project opened up by the book comprises a substantial part of my present research agenda.

19 This is not because of any antipathy on my part towards the continental tradition. My concerns (mentioned above) are directed only at certain radical incommensurabilist strands of that tradition. I have more to say on this below in my reply to Davies who identifies a number of issues surrounding the analytic-continental 'divide' in philosophy as importantly implicated by the book.

20 The book was published in Ashgate's *Applied Legal Philosophy* series.

21 In doing so, the book comprises a contribution to the 'program for a naturalized jurisprudence' which these days is most notably advocated by Brian Leiter. This is to say that I think Leiter is on the right track in his naturalistic critique of traditional jurisprudence. The most succinct and effective presentation of his views on the nature and rationale of naturalised jurisprudence are, in my view, to be found in the Postscript to Part II of his 2007 collection of essays, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* 183-199.

22 Even if one doesn't accept physicalism, the book may be of value in outlining what a physicalist approach to the question of cultural difference and law might look like.

23 Given the concerns of Davies and Glaskin in their papers that, as a physicalist, I am engaged in an illegitimately reductive project.

reducible to any of those other things. Contemporary physicalists are alert to the defects of earlier, unsophisticated, and overly reductive versions of the approach.[24] In adopting a naturalistic line of this kind, of course, the book diverges from the metaphysical and methodological preferences of many notable theorists within the continental tradition.[25]

An important part of what motivated me in writing this book in this vein was a curiosity about how issues of cultural difference and cross-cultural understanding in law – for so long the preserve of non-analytic (indeed, *anti*-analytic) theorists – might look from a robustly analytic and naturalistic perspective. Analytic philosophy has for decades been subject to a popular misunderstanding that in its objectives, its methods, its style and its values it is an ethically and politically sterile school of thought. This book is my attempt to challenge that view. It constitutes an effort on my part to realise what I have long considered to be the unfulfilled practical and political potential of analytic philosophy and to make a space for it within the theoretical terrain of cultural politics and social critique.[26]

IV. Structure of the book

Very briefly, the book proceeds as follows. Following the introductory scene-setting of Chapter 1, the second chapter draws on certain widely held ideas within contemporary analytic philosophy in order to provide a general, naturalistic, and functionalist account of the object of judicial understanding in this sphere – thought and action (both individual and collective)[27], together with its associated intentional and conceptual content. In Chapter 3, I provide a concrete legal context for the inquiry by providing an overview of an area of law in which the judicial understanding of

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24 On the nature and rationale of non-reductive physicalism, see John Post, *The Faces of Existence: An Essay in Nonreductive Metaphysics* (1987); Jeffrey Poland, *Physicalism: The Philosophical Foundations* (1994); Jaegwon Kim, *Mind in a Physical World* (1998); and Andrew Melnyk, *A Physicalist Manifesto: Thoroughly Modern Materialism* (2003).

25 For example, Levinas, Foucault, Derrida, and Lyotard. See Christopher Norris, *The Truth About Postmodernism* (1993) and Lee Braver, *A Thing of This World: A History of Continental Anti-Realism* (2007) on the influence on these theorists of the dualist and idealist metaphysics of Kant.

26 Of course, numerous philosophers before me have engaged in this kind of project, going back to those members of the Vienna Circle (Neurath and Schlick, for example) for whom the social and political dimensions of their work were as important as the metaphysical and methodological dimensions.

27 The discussion here intersects with developments in the emerging philosophical field of social ontology. See, for example, Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (2011).

culturally different thought and practice is commonly pursued in a number of the world's jurisdictions – namely, indigenous land title law. By virtue of their form and content, indigenous land title claims embody the theoretically significant aspects of virtually all modern legal proceedings involving cultural difference. By outlining a paradigm procedural and conceptual context for the interpretive encounter of judge and culturally different other, Chapter 3 enables the legal and practical relevance of the substantially philosophical chapters to do with concept acquisition, cross-cultural understanding and conceptual incommensurability which follow to be better appreciated.

In Chapter 4, I return to a more substantive philosophical discussion by establishing and elaborating upon the connection between judicial understanding and concept possession referred to above. Drawing upon the physicalist-functionalist theory of action and intentionality articulated in Chapter 2, I outline in this chapter a general theory of the nature of concepts, their possession and their acquisition, drawing, as I've said, on a range of sources in contemporary philosophy and cognitive and developmental psychology. In establishing a basis for making sense of the notion of culturally-based conceptual difference, Chapter 4 also serves to flag the discussion of the *limits* of conceptual and cultural difference which takes place later in Chapter 6.

Chapter 4 argues that where a judge does not possess culturally different concepts at the commencement of a legal proceeding, she must acquire them over the course of such proceeding. In Chapter 5, I follow this up with an argument that the key *means* by which a judge acquires culturally different concepts over the course of a hearing is by interpreting testimonial evidence about those concepts and the culturally different phenomena those concepts implicate. Much of Chapter 5 is devoted to outlining a naturalistic account of the nature of such interpretation. Broadly speaking, my approach to the question of interpretation here is a methodologically monist one, drawing heavily on the 'theory-theory' approach currently influential within much analytic philosophy, psychology and linguistics.[28]

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[28] By 'monist' here, I mean that the interpretation of testimony may be seen as constituting a distinctive mode of the naturalistic explanation of higher-order phenomena – in this case, roughly, the explanation of testimonial behaviour with reference to that behaviour's intentional cause – of a kind with other modes of explanation pursued in everyday life and the social and natural sciences. A 'theory-theory' approach to interpretation emphasises the role played in judicial interpretation by a judge's (largely) folk-psychological theory of agency and mind, as well as her theory of the testimonial agent, noting how these theories are implicitly and explicitly

As mentioned, Chapter 6 is concerned with the important question of the *limits* of conceptual incommensurability within the legal sphere – that is, with the extent to which a judge might be incapacitated from understanding culturally different actions over the course of a proceeding. The argument in this chapter proceeds by critically engaging as a physicalist and functionalist with an extreme but heuristically valuable construal of the cultural incommensurabilist view, which I term the radical cultural incommensurability thesis.[29] This thesis maintains that as a matter of theoretical necessity no judge possesses or is able to acquire any culturally different concept. Over the course of Chapter 6, I rely upon various findings in recent neuroscience and developmental psychology, as well as upon certain lines of thought in contemporary analytic philosophy, in order to mount a series of arguments rebutting the two limbs of this thesis – namely, the limb asserting the necessity of a radical conceptual *difference* obtaining between judges and culturally different agents, and the limb asserting the necessity of a radical conceptual-acquisitive *incapacity* afflicting judges in relation to culturally different concepts.

The outcome of the analysis in Chapter 6 is that on a naturalistic and functionalist approach a significant (though not a global) degree of conceptual difference between a judge and a culturally different agent or group is possible, but is not necessitated by any (plausible) metaphysical, natural, or social state of affairs. The degree of difference which obtains in relation to a given judge and a given set of culturally different concepts at a given point in time depends, for the most part, on certain contingent facts to do with the judge's prior conceptual development, the nature and relevance of which I describe in Chapter 6. Likewise, it is contingently possible (but again, it is not necessarily the case) that a judge is not able to acquire a culturally different concept or set of concepts over the course of a legal hearing. Again, whether she can or not depends upon two contingent factors – the concepts already possessed by the judge at the commencement of the hearing and, what I term, the epistemic conditions which obtain over the course of the hearing. Such conditions include the sensory and cognitive capacities of the presiding judge, the availability of evidence about the

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applied by the judge in response to and in interpretation of evidence led at hearing. On this, see, for example, David K Henderson, *Interpretation and Explanation in the Human Sciences* (1993); Peter Carruthers and Peter K Smith, *Theories of Theories of Mind* (1996); and Shaun Nichols and Stephen P Stich, *Mindreading: An Integrated Account of Pretence, Self-Awareness, and Understanding Other Minds* (2003).

29 As I argue in the book, though there are, in fact, a number of theorists who hold – or at least, seem to hold – the radical view, exploring its plausibility for the purposes of motivating a positive account of the limits of understanding would still be a valuable and legitimate project even if there were no theorists who actually held that view.

culturally different concept or action in question, the legal norms regulating the use of any such evidence, and the quality of the hearing environment.

Simply put, a failure of judicial understanding – even a widespread failure across the whole of the judiciary in relation to all culturally different actions which might be subject to claim – is entirely possible within the legal sphere. But, equally, a *successful* exercise in judicial understanding is possible, for any and all judges and for any and all culturally different actions. Everything here depends upon the content of the judge's conceptual scheme at the commencement of the hearing and upon the epistemic conditions which obtain for that judge (or for judges, generally) over the course of the hearing. As I said earlier, this position is compatible with the views of many, if not most, cultural difference theorists, whether they be of an analytic or a continental stripe. What it is *inconsistent* with is the view of those who hold for a *global* degree of conceptual difference (that is, no concepts in common) or for a *necessary* interpretive incapacitation on the part of judges in relation to any cultural-cum-conceptual difference which might exist.

Following up the normative dimension of the book, what most importantly emerges from Chapter 6 is that the various factors conditioning the capacity of a judge to acquire culturally different concepts and understand culturally different phenomena are not only contingent, they are amenable – in principle, at least – to a significant degree of regulation and reform. Because of the contingency of these factors, it lies within the power of those responsible for the operation of the legal hearing process to affect them to some degree, for the better or for the worse. The legal system is open to the effective reform of its capacity to understand culturally different actions. As a matter of institutional design it is possible for those presently constituting and controlling the interpretive architecture of the legal system to act so as to affect both the contents of the conceptual scheme possessed by its judges at the commencement of those hearings they preside over and the epistemic conditions those judges act under over the course of such hearings.

In the concluding Chapter 7, I pursue this line of thought and attempt to fulfil the modest practical and critical aspirations of the book, which in earlier chapters remain largely implicit, by identifying and reflecting upon a number of key features common to many contemporary legal systems which affect – both favourably and unfavourably – the judicial understanding of culturally different actions. To the extent that a legal system might be oriented towards the improvement of its epistemic and interpretive capacities under conditions of cultural difference, the provision and cultivation of facilitative conditions and the removal or amelioration of obstructing conditions are objectives those controlling and constituting that

system might want to pursue. Whilst noting that it is not the primary aim of the book to elaborate a detailed set of reform proposals in relation to legal process – its primary aim is to provide a philosophically and legally informed *framework* for the development of any such proposals – Chapter 7 does identify a number of areas of potential reform. These include the selection and ongoing education of judges, the adversarial mode of fact-finding, the rules of evidence, and the physical design of the legal hearing space.

V. Making room for difference

One of the more interesting outcomes of the inquiry undertaken in the book – from my point of view, at least – is that the analytic and naturalistic approach to cross-cultural understanding adopted there is quite capable of providing theoretical space for a substantial degree of conceptual and cultural difference to exist between judge and other – indeed, as much difference as most non-analytic theorists would want. That this is so is contrary to a view maintained by many non-analytic theorists that the analytic tradition is somehow committed to an overly universalistic, ethnocentric, or otherwise difference-denying conception of human being, society, and law.[30] It isn't. Consequently, non-analytic theory need not be the *only* option for those intuitively concerned to maintain room in their account of the world for the existence of significant difference between cultures.[31] But, in addition to sustaining a concern for cultural difference, an analytic and naturalistic approach is capable of guiding an effective and appropriate institutional recognition of that difference. As I argue in the book, such an approach can enable theorists of cultural difference 'to pursue their theoretical, ethical and political interests without the great theoretical, ethical and political *costs* demanded by the false and disempowering necessity inherent in some of the more radical accounts of such difference.'[32]

As I mentioned earlier, the modern liberal legal system has, for a number of years now, been subject to a sustained campaign of critique by those concerned to make adequate theoretical and political space for cultural difference within that system. I argue in the book that much of this critique has been based on conceptually and empirically unsound premises. An important part of what this book is about involves rebutting the non-naturalistic approach implicated in this critique: an approach 'which is not

30 One gets a sense of this view in Glaskin's paper where she expresses concerns about my acceptance of the universal existence of certain innate concepts.

31 Though it is certainly a legitimate option for those so concerned.

32 Connolly, above n 1, 24.

only theoretically flawed but is ethically and politically counterproductive in its implicit promotion and perpetuation of a quietistic pessimism about the possibilities of legal, political and social reform in relation to cross-cultural matters.'[33]

The aim of the book is not to defend liberal democratic legal systems from critique in relation to cultural difference but to provide a sounder basis for any such critique. Having worked in the field of indigenous rights law in Australia for a number of years, I share the general concern of many critics of the liberal democratic legal system in regard to the capacity of its agents to adequately understand culturally different action and to properly recognise and protect culturally different ways of life. However, any diagnosis of the legal system's deficiencies on this score must proceed on the basis of our best account of how the world actually is. This is, in my view, a philosophically naturalistic (and, thus, scientific) account. Only on such a basis can we hope to persuade those maintaining control over a legal system to make changes. Only on such a basis can we hope to make an ongoing and effective difference in the world. For some (analytics and continentals alike), this kind of language and sentiment may seem foreign to the contemporary analytic philosophical endeavour. It is a premise of my book that it need not be.

33 Ibid 23.