

The 'recognition' of cultural background in Indigenous sentencing

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Introduction:

In this paper I raise more questions than I do strategies or solutions for the 'Aboriginal problem.'² Instead I will explore some of the thinking on what the 'problem'-the 'Aboriginal problem,'-is and in particular the interpretations of the Australian judiciary, the Federal government, the public and the Australian media. What do they perceive the problem is? In doing this I hope to outline the possibility for the existence of an alternative space or point of view from which future investigations into the "Aboriginal problem" might be commenced. We often begin with the assumption that the 'problem' is known, that it is, for example a problem of difference, identity and recognition of culture. But what is never examined is the context, or the framework, or the point of reference or the centre at which these investigations or inquiries begin. The possibility of centering our inquiries in an Aboriginal framework or in an Aboriginal world view is never considered a valid or legitimate point to begin from. Why not? It is because the assumption is that there is only

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² Most recently the 'Aboriginal problem' was identified by the high levels of violence in Aboriginal communities. This prompted the Howard government on the 21st June 2007 to announce its intention to use Commonwealth powers to impose a number of emergency measures; this response followed the Northern Territory Government, *Broad Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007) <http://www.nt.gov.au/dcm/inquirysaac/pdf/bipacsa_final_report.pdf> at 30 June 2007, and an announcement by Noel Pearson Cape York Institute Principal on the 19th June about plans to impose measures in Cape York (Qld) which would withhold welfare payments in situations where children were not attending school and where also there were notifications of child abuse.

one framework which applies, and it is deemed to be a single frame or size that fits all. How can we truly explore questions of difference, identity and the possibilities of recognition and justice when those who are deemed the 'subject' of the Aboriginal problem fall outside the 'one size fits all'? How then might we consider a range of sizes, shapes and colours or a range of Aboriginal world views, which hold a legitimate space beyond that of fitting in or squeezing into spaces that not only don't fit them but are unable to accommodate an Aboriginal world view? Is it a possibility? That is to allow for Aboriginality to find a space to co-exist and survive the current regime, which is still the one and only option, presented and that is to assimilate.

In this paper I don't have space to review the past 30 years of rigorous Aboriginal interventions on the question of Aboriginal recognition, beyond simply stating that there is wide spectrum of Aboriginal world views which inhabit the Australian landscape and that the opportunity for those views to hold space is limited. The views which 'fit' or assimilate take up most of the space and are currently the Aboriginal 'representative' voices tolerated by the Australian government, and these are heard and appear to influence the direction of Aboriginal futures in Australia. But I would argue these are voices which only appear to influence a position that is already predetermined, that is the assimilation of Aboriginal peoples. So what capacity if any does Aboriginal Australia have to express a view falling outside an assimilationist fit? What hearing if any has been given to those different opinions and could they even be heard within a framework which fails to recognize an Aboriginal horizon or an Aboriginal view of the world? If our answer is that there is no possibility, then what is going on really in those spaces which purport a recognition of Aboriginality; what is being recognized? The right to assimilate? Assimilation is no right at all, rather a charted course to

the annihilation of the Aborigine. This was what was planned more than a hundred years ago, and it continues its course.

Whose culture is it anyway, when we speak of violence against women?

If the centre has come to be held through the force and processes of colonialism, to what extent is the Aboriginal problem, particularly violence against women and children infected by that centre? When we interrogate the 'Aboriginal problem' what possibility is there to look at it through Aboriginal eyes, particularly when the power to speak from an Aboriginal horizon/world view is shut down and we are urged to fit in and assimilate.

The history of a violent colonial frontier is given almost no airing in the contemporary analysis of violence in Aboriginal communities, even though the evidence of a violent colonial history is well known to us. We hear of it in our oral histories and some of those stories have also survived in the records of early colonialists. Katrina Schlunke³ invokes the historical writings of the missionary Threlkeld who writes about the rape of young Aboriginal children in the aftermath of a violent massacre by the same white settler who perpetrated the Myall Creek massacre of 1838;

After killing the majority of the bark gathering party, the men, to quote the missionary Threlkeld, reserved two little girls who were 'dreadfully injured'. Elsewhere he describes what was done to them as 'inhumanly cut for lascivious purposes' and elsewhere again 'because they were too small for them they cut them with knives.' These two girls, 'about seven years old' were then given as wives to two young Aboriginal men who were with the party, Davey and Billy. The two girls stayed with Davey and Billy, for months later Threlkeld's son sees with his own

³ Katrina Schlunke, 'Dumb Places' (2004) 6 *Balayi: Culture Law and Colonialism* 72-80.

eyes the 'miserable plight' of the girls. It is from Davey that we learn of the second incident, although there had been rumours. This was the final murder carried out by the group in this place. Threlkeld again: 'The last that was murdered, was an elderly women whose throat they cut as she stood, and then let her run away, that the blood spurted out, and when she fell they took her up while yet alive and cast her into the triangular log fire, and her infant child they threw alive without any previous injury into the flames.'⁴

These and many other historical acts of violence passed without interrogation let alone penalty. What traces might they have left in Aboriginal communities of the past, growing in the present and threatening the future? Where does this violence belong or owe its origins and whose culture might own it? Who holds the power to disown the traces of its past? Who holds the power to construct what 'Aboriginal culture' is and make out its assumed inherent violence?⁵

⁴ Cited in Schlunke, Niel Gunson, (ed) *Australian Reminiscences and Papers of L.E. Threlkeld; Missionary to the Aborigines, 1824-1859*, (1974) 273, I had initially cited this reference in Irene Watson 'Aboriginal Women's Laws and Lives: How Might We Keep Growing the Law?' *Australian Feminist Law Journal* 26 (2007) 95.

⁵ Anthropology has constructed an Aboriginality from within a colonial era and claimed a legitimate space to declare what is or isn't Aboriginal culture. This practice continues; see for example the works of Peter Sutton, 'The Politics of Suffering: Indigenous Policy in Australia Since the 1970's' (2001) 11 (2) *Anthropological Forum* 127, and has also been carried through to considering what are 'accurate' recordings of Aboriginal colonial history in the work of Keith Windschuttle, *The Fabrication of Aboriginal History: Volume One Van Diemen's Land 1803-1847* (2002). In revealing mis-representation and for a description of Aboriginal law protecting Aboriginal Women, see Jayne Lloyd and Nannette Rogers, 'Crossing the Last Frontier: Problems Facing Aboriginal Women Victims of Rape in Central Australia' in Patricia Weiser Eastel (ed) *Australian Institute of Criminology Conference Proceedings No 20 Without Consent: Confronting Adult Sexual Violence* (1993) 150, 151 <<http://www.aic.gov.au/publications/proceedings/20/lloyd.pdf>> for a discussion on the impact of substance abuse in violence against women 152, 161; improper interpretations of Aboriginal law by the legal system 155, 158; the failure of the courts to include Aboriginal women's voices 159; the need to empower Aboriginal women in their customary roles 162. Rogers, the co-author in this article, is the Crown Prosecutor who appeared on the May 2006 ABC Lateline program. In between then and now there appears to have been a shift from her earlier position when she argued Aboriginal law was not the basis for violence against women. Her current position to her support for Aboriginal women's law, other than comments that the law of men in this region is very powerful, is not clear.

The courts constructions and interpretations of culture:

The following discussion is an introduction to research work in progress, a snapshot and sample of my attempt to map judicial 'recognition' of the cultural background of indigenous offenders, where I include a mix of early and more recent decisions. In that process the following questions have arisen:

How were we named by the public and positioned by the courts?

R v Muddarubba [1956] NTJ 317.

Justice Kriewaldt, [at 320 and 322] "...and brought in another native, Nigger, who had knowledge..." and while "The rules relating to provocation have given me some worry in native trials. After much thought I have when summing up to a Jury in a case where a native is on trial perhaps departed somewhat from the strict rules applied in trials of white persons."

What is the source of Aboriginal violence and how have the courts determined that Aboriginal culture is inherently violent?

R v Lee SCC No. 221 (Unreported, Northern Territory Supreme Court, Foster J, 19 November 1974)

Justice Foster at [13]: "...I am satisfied this man acted, in obedience to tribal custom...I accept...that Ruby had been misbehaving herself in some way...[M]y understanding of the custom of most of the Top End tribes is that a husband in those circumstances is not only encouraged, he is almost required to punish..."

R v Scott SCC No. 83 (Unreported, Northern Territory Supreme Court, Foster J, 24 November 1977)

Foster J at [12-13] “I take into account that you are a relatively unsophisticated three-quarter caste Aboriginal native accustomed to living in the bush and unaccustomed to relationships with women or, indeed, with any people at all outside the bush environment. According to the old ways you were entitled if not required to give your de-facto wife a beating. You may have thought in a muddled sort of way that a beating with fists was more merciful to her than beating with a stick which was prescribed by custom. But, of course, you went a good deal further than this and you inflicted injuries which would have been thought excessive by Aboriginal society just as they are by white society.”

R v Gorey SCC No. 107 (Unreported, Northern Territory Supreme Court, Gallop J, 20 June 1978)

Gallop J, “It was common, indeed expected within Aboriginal society for husbands to beat their wives if they misbehaved.”

In previous writings I have argued that violence against Aboriginal women has been constructed and mis-represented throughout Australia’s colonial legal history as being inherent in Aboriginal culture and law.⁶ The proposal of the previous federal Howard government in the *(Cth) Crimes Amendment (Bail and Sentencing) Bill 2006*,⁷ to remove the courts’ discretion to giving

⁶ Watson above note 4.

⁷ Prior to the amendments to the *Crimes Act, 1914 (Cth)*, s16A, allowed the court to consider any ‘relevant’ matter, the amendment *Crimes Act (Cth) 1914*, new section 15AB(1)(b) directs that "In determining whether to grant bail to a person charged with, or convicted of, an offence against a law of the Commonwealth, or in determining conditions to which bail granted to such a person should be subject, a bail authority: (b) must not take into consideration any form of customary law or cultural practice as a reason for:(i) excusing, justifying, authorising, requiring or lessening the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates; or (ii) aggravating the seriousness of the alleged criminal behaviour to which the alleged offence

consideration to Aboriginal law and culture when making sentencing determinations, was an indication of the contemporary thinking, that Aboriginal law condones violence against Aboriginal women and children.⁸ At the time of the debate on the Bill the federal Attorney-General's Department was asked to identify cases in which the consideration of customary law had resulted in a more lenient sentence the department 'failed to provide a single case to the Senate committee.'⁹

While Australian courts appear to have shown 'sensitivity' towards Aboriginal men in matters of rape and where the cultural background of the offender has been considered by the court, Sherene Razack suggests that at these moments consideration 'is often about the culturalization of rape: how cultural and historical specificities explain and excuse the violence men direct at women.'¹⁰ In taking what is perceived to be Aboriginal law into consideration, the courts contribute to making invisible the harm that is done to Aboriginal women while at the same time constructing or deeming Aboriginal men as being inherently violent.¹¹ Benhabib suggests that the court's use of the 'cultural defence' '...imprisons the individual in a cage of univocal cultural interpretations and psychological motivations' producing stereotypes of race and culture.¹² The paradox is that Aboriginal culture is viewed as being unaffected by colonialism, frozen in pre-colonial time as though the colonial frontier violence left no trace. In the following Northern Territory Supreme Court decision *The Queen v GJ (2005)*, Chief Justice Martin stated:

I appreciate that it is a very difficult thing for men who have been brought up in

relates, or the criminal behaviour to which the offence relates. The (Cth) *Crimes Act, 1914* (Cth) is unlikely to apply to the majority of crime in Aboriginal communities.

⁸ See the Commonwealth. Parliamentary Debates House of Representatives, 28 November 2006, in particular at p 27, (Michael Keenan MP)

⁹ Ibid comment by Nicola Rixon MP at p 25.

¹⁰ Sherene Razack, 'What is to be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence', (1994) 19(4) *Signs* 899.

¹¹ Ibid 899-900.

¹² Benhabib Seyla *The Claims of Culture: Equality and Diversity in the Global Era* (2002) 89.

traditional ways which permit physical violence and sexual intercourse with promised wives, even if they are not consenting, to adjust their ways. But it must be done.¹³

The assumption CJ Martin is making is that ‘traditional culture’ sanctioned violence, a view which relied upon ‘expert’ anthropological evidence, while the views of the anthropologist’s subjects remain absent from the courts considerations.

While Violence within ‘traditional culture’ is examined from inside a colonial context, the violence of colonialism and its effect upon Aboriginal peoples doesn’t enter the frame when courts consider and construct ‘traditional culture.’ And neither the process of how an Aboriginal representation of culture and law is translated from Aboriginal to non-Aboriginal contexts is considered nor is it analysed for the accuracy of the cultural translation. Douzinas suggests that looking too simplistically at questions of culture and for example seeing culture as inherent is unhelpful and risks negating how history might impact upon constructions of culture.¹⁴ The injustice of colonial violence and its creation of inequality, displaced sovereignty and the dispossession of Aboriginal peoples should be examined for its impact upon the construction and translation of Aboriginal traditional culture and law into contemporary contexts and in particular the law of sentencing. There is no space in Australia where Aboriginal culture is unaffected by colonialism, and attempts by the state to accommodate Aboriginal law and culture are done in ways which fail to accommodate its core principles. What is accommodated are those aspects which can be assimilated into the one-size-fits all space. In this legal political landscape the possibility for the reception of Aboriginal frameworks is negated. Under the state paradigm, for example, Aboriginal

¹³ *The Queen v GJ* (2005) SCC 20418849.

¹⁴ Costas Douzinas *The End of Human Rights: Critical Legal Thought At the Turn of the Century*, (2000) 137.

relationships and obligations to country are not easily assimilated. They are easily extinguished (as we have found with native title law) and ‘washed away.’ But it appears that the laws which impact upon women are less vulnerable to erasure by the law, for they are construed to assimilate into a male centric system of laws.

This is difficult terrain to navigate because it has the potential to open the floodgates to a culling of Aboriginal law, and the privatization of Aboriginal lands. This we have been observing with regard to the (Cth) NT Intervention laws. But culling and privatisation is not what I am suggesting, neither am I suggesting that women remain subject to a colonial Australian misogyny. (One that Australians deny exists or don’t know how to think about, or fear). But to not think through this terrain raises questions: what future is there for Aboriginality ?

Australian law assumes the power to extinguish Aboriginal laws and has most recently done so regarding native title.¹⁵ And so the question arises:

Is there an end point to the relevance of Aboriginal culture and law?

R v Turner SCC No. 281 (Unreported Northern Territory Supreme Court, Gallop J, 28 November 1979)

¹⁵ There are extensive writings on the failure of the High Court in *Mabo No 2* to examine the colonial foundations of Australia beyond the simple rejection of *terra nullius*, on this question see the following works by Irene Watson, ‘Naked People’s Rules and Regulations’ *Law Text and Culture* 4 (1998) 1, Irene Watson ‘Buried Alive’ *Law and Critique* 13 (2002) (3) pp 253-269, Irene Watson ‘Nungas in the Nineties’ in Greta Bird, Gary Martin, Jennifer Nielsen, (eds), *Majah: Indigenous Peoples and the Law* 1996.

Per Gallop J at [26-27]: “I take account of the fact that no pay-back is contemplated, given the facts of this case, because the people he mixes with are too de-tribalised and therefore pay-back is not a consideration for me...”

R v Fuller-Cust (2002) VSCA 168, Supreme Court of Victoria, Court of Appeal, 24 October 2002.

Eames J (minority) ‘That to not consider the appellant’s stolen generations background, would be to sentence the appellant as ‘someone other than himself’.¹⁶

Richard Edney suggests that in the majority judgments use:

“...of the tribal/urban framework is an example of the placement of non-Indigenous analytical framework upon Indigenous communities, in the mistaken belief that such non-Indigenous understandings are properly able to categorise Indigenous communities. It is also a demonstration of a cultural arrogance that is associated with the colonizers in their attempt to frame and understand the experiences of persons they have oppressed.”¹⁷

What possibilities are there for the survival of Aboriginality? Assimilation doesn’t end in equality: different standards continue to apply, resulting in discriminatory treatment.

To what extent have the courts enabled the representation of Aboriginal women’s views?

R v Mangukala SCC No 313 (Unreported, Northern Territory Supreme Court, Foster J, 18 April 1975)

Foster J at [16]: “[T]his is a serious offence and young girls like this one must be protected against themselves. Nevertheless, I do not regard this offence as seriously as I would if both participants

¹⁶ *R v Fuller-Cust (2002) VSCA 168, (79) per Eames J.*

¹⁷ Edney Richard, ‘The Stolen Generation and the Sentencing of Indigenous Offenders’ (2003)5(23) *Indigenous Law Bulletin* 10.

were white. This is of course not to say that the virtue of Aboriginal girls is of any less value than that of white girls, but simply that social customs appear to be different.”

R v Lane, Hunt and Smith SCC Nos. 16-17, 18-19 and 20-21 (Unreported Northern Territory Supreme Court, Gallop J 29 May 1980)

Gallop J “...My function, as I see it...is not only to punish the prisoners but to encourage acceptance of the criminal law by them and by the Aboriginal Community as a step towards a more orderly and unified society. It would be inimical to this end if I imposed a harsher sentence because the prisoners are blacks...There is evidence before me, which I accept, that rape is not considered as seriously in Aboriginal Communities as it is in the white community...and indeed the chastity of women is not as importantly regarded as in white communities. Apparently the violation of an Aboriginal Woman's integrity is not nearly as significant as it is in a white community.”

R v Anglitchi & Ors SCC Nos. 316-322 (Unreported, Northern Territory Supreme Court, Muirhead J, 1 December 1980)

Muirhead J: “This court makes allowance for what, in this case, has loosely been called tribal law, but the only law we apply must be careful to ensure that such old customs or laws are not falsely applied or utilised in exploitation of other people. I am confident that you all must have known that what you planned was quite indefensible and unlawful not only by the law that this court applies, but by the true standards of the traditional Aboriginal. True it is as I have said that there is evidence before me that an Aboriginal woman who offended, may in the past, traditionally have been required to repay sacred coitus referred to by Professor Stanner in one of his essays on mass rape...”

The Queen v Moreen (2001) SCC 20012617

Martin CJ “During the course of interview with police, you indicated that the victim had done the wrong thing in speaking to your wife as she did. That proposition was advanced before His Worship and before this court and Mr Dumoo has been called on your behalf to support it. However, his evidence does not assist. He said that in the Aboriginal way, the victim could not talk to you at all and could not talk to your wife about what you may have been doing with that other woman. He says that in Aboriginal culture if a man found out about such a thing being said about him, he would feel ashamed and the woman in the position of your victim would suffer punishment at the hands of older people. Prevalence of Aboriginal men beating their wives or other women is well-known.”

Aboriginal women’s law is given less recognition than is accorded the laws of Aboriginal men and I have argued in other writings that this is due to the male-centricity of Australian law.¹⁸ Similar arguments have been made in other colonial encounters throughout the world where the position of Aboriginal women is de-centered as a result of colonization. Rayna Green records: ‘...male-centred and inept interpretation(s) of Native American women’s lives’¹⁹ that ultimately take over and result in an unbalanced representation of indigenous law. These interpretations then become that which is ‘known’ as Aboriginal law and culture.²⁰ The public know very little of the complexities of Aboriginal law, perceiving it as being responsible for violence against women and

¹⁸ Watson above note 4, see also Deborah Bird Rose, ‘Land Rights and Deep Colonising: the Erasure of Women’, (1996) 85(3) *Aboriginal Law Bulletin* 6 at 8.

¹⁹ Rayna Green, ‘Native American Women’ (1980) 6(2) *Signs* 250, at 256.

²⁰ This phenomena of mis-representation of Aboriginal law has also been identified in the work of Gloria Valencia-Weber and Christine P Zuni in reference to the situation in North America, ‘Domestic Violence and Tribal Protection of Indigenous Women in the United States’, (1995) 69 *St Johns Law Review*, 70.

children, rather than as a potential tool for community development.²¹ Aboriginal women are portrayed as victims in need of rescue from violent bashing black males. Here I want to make it clear that I am not in denial of the contemporary position of Aboriginal women and children, and that it is in many communities critical. What I am suggesting is that the actions of individuals who are physically and sexually abusive towards women are taken as being representative of a culturally approved norm in which Aboriginal law allows for violence against women.

Significantly, the courts taking what is perceived to be Aboriginal law into consideration, they contribute to making invisible the harm that is done to Aboriginal women, and while deeming Aboriginal men inherently violent they confirm the ‘superiority of white men.’ The picture of a ‘pathologically violent’ race of people emerges, one that absents other narratives and images portraying a fuller range of Aboriginal experiences.²² The exclusion of other narratives works to silence alternative possibilities, one being the role of Aboriginal women in law and culture. When we focus solely on male power we exclude the possibility of an inherent power held by women and as Crenshaw suggests while racism may deny ‘men of color the power and privilege that dominant men enjoy’ it also denies power and privilege that was held prior to colonisation by Aboriginal women.

²¹ Catherine Wohlan, *Aboriginal Women’s Interests in Customary Law Recognition*, (2005) 1- 10 discusses the high levels of violence in Aboriginal communities, is not a problem that is sourced in Aboriginal law, but instead suggests at 1 that Aboriginal law ‘has the potential to be a useful tool in addressing community justice’.

²² Kimberle Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’ (1991) 43 *Stanford Law Review* 1255.

Blaming culture as though culture is fixed and able to determine all there is to know about an individual ‘is itself a racist proposition’²³ Comparatively, Angela Davis argues the United States deployment of culture to explain the tortures at Abu Ghraib is based on the assumption of an inferior ‘Islamic culture’. But these situations of torture say more about US strategies than they do about the cultural response of the torture victims. Likewise the violence in Aboriginal communities is more a comment on the Australian government’s management of the colonial project, than it is about the culture of the perpetrators of violence. As Aboriginal communities across Australia continue to decline, the gaze turns away from the poverty and dispossession of Aboriginal Australia to cultural profiling of the other as barbarian. And we return to the same old racist discourse we know so well, the one which provides the ideological basis of the colonial foundations of the Australian state. And this, of course, is gratefully received by the mainstream émigré culture.

There is a lack of resources to assist the judiciary in reaching a determination, particularly in the area of translation and rehabilitation services. What does this have to do with culture (and not the socio political economic context) of Aboriginal life in Australia?

R v Iginiwuni SCC No. 6 (Unreported, Northern Territory Supreme Court, Muirhead J, 12 March 1975)

“If you were European or an educated person I would have suggested that you should be psychiatrically and perhaps physically examined and I would certainly have called for a pre-sentence report to ascertain whether there were any underlying causes, disturbances or experiences which I should take into account in deciding what to do with you. But because of the difficulties

²³ Angela Davis, *Abolition Democracy Beyond Empire, Prisons, and Torture*, (2005) 58-59. Here Davis is referring to culture being used to frame an understanding of the torture of Muslim men, she asks the question why do we think a Muslim man would act differently, suggesting assumptions about culture are themselves racist.

inherent in your lack of so-called sophistication and language and because of the most limited facilities at present available in Darwin, I cannot avail myself of this help nor perhaps can you avail yourself of its possible advantages. I suspect there is probably some deep seated cause or factor other than drink which motivated this extraordinary act and that of course concerns me.”

Public debate and media representation

At the opening of the 21st century we were taken to revisit early colonial history a number of historians including Keith Windshuttle. The outcome of this re-visitation led to the public debate known as the history wars, in which the validity of writings documenting a violent colonial history of massacres, cultural genocide and generally a portrait of a violent colonial frontier were refuted.²⁴ Aboriginal peoples were advised as part of this debate to move on, to give up the ‘blame game’, to quit blaming Australia for the “Aboriginal problem”. Instead of engaging in conversations on how to achieve the possibility of social justice, Aboriginal peoples were expected to simply move on with our lives. We should forget the expectation that the state should take responsibility for the provision of essential services and resources or the return of our traditional land base.

But throughout this debate Aboriginal voices remained marginal and unreported. The dominant view asserted ‘a white washed view of history’ for the purpose of validating a foundational colonial violence. The dominant conversation never engaged the view of inter-generational trauma and its source - colonialism, so while the conversation is stuck in this space which excludes minority positions, the complexity of Aboriginal traumas will also stay stuck in the colonial paradigm of blaming the “backward native” for our “failure to adapt to modernity”.

²⁴ Keith Windschuttle, *The Fabrication of Aboriginal History: Volume One Van Diemen’s Land 1803-1847* (2002).

What's culture got to do with it?

Is there a possibility that Aboriginal views of the world will survive and become more central to our lives? If indeed that possibility even exists, then it is a long road to travel. So what's culture got to do with Aboriginal survival? Perhaps it has everything, and nothing to do with it. Douzinas argues that the tension between a universalist and cultural relativist position is difficult to reconcile, particularly when both sides are convinced of the truth of their own position and committed to both a fear of and a demonisation of the others' position.²⁵ These tensions may be advanced by what Benhabib describes as the insiders' cultural space around which the boundaries of culture are '...securely guarded, their narratives purified, their rituals carefully monitored.'²⁶ Benhabib further points out, 'Struggles for recognition among individuals and groups are really efforts to negate the status of 'otherness', insofar as otherness is taken to entail disrespect, domination, and inequality.'²⁷ However Aboriginality is concerned with more than the negation of otherness, it is also concerned with questions of capacity and the Aboriginal struggle to re-engage as sovereign peoples.

In conclusion I ask: is it possible to relax the guarded borders of culture so as to navigate a peaceful settlement, where the principles of co-existence are given a more powerful presence? I am not convinced there can be a peaceful settlement when we are locked into protecting positions and where the positions being protected are compromised by fear, ignorance and misrepresentation. We need to critically examine who is locking whom into position and also to consider the extent to which Aboriginal peoples have a voice in the representation of our own cultures.

²⁵ Douzinas above note 14 at 139.

²⁶ Benhabib above note 12 at 7.

²⁷ Ibid 8.

