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Introduction : Culture in the Domains of Law

David Howes *

In their introduction to *Law in the Domains of Culture*,¹ Austin Sarat and Thomas Kearns write: “[l]aw and legal studies are relative latecomers to cultural studies. To examine [law in the domains of culture] has been, until recently, a kind of scholarly transgression.”² The same could be said in reverse: cultural studies (including anthropology) are a relative latecomer to law and legal studies, but in the last few decades there has been a striking irruption of cultural discourse in the domain of law.

It is as if the acquisition of some degree of “cultural competence” has become a duty in legal circles. Not only are there seminars and courses in “cultural sensitivity” for judges, lawyers, and law enforcement officers, but “the culture concept” now informs many judicial decisions regarding Aboriginal rights,³ and “the cultural defense” (while hotly contested by some, and still lacking official approbation) has become a feature of numerous criminal trials involving immigrants.⁴ Interestingly, the *Canadian Charter of Rights and Freedoms*⁵ refers to “the multicultural heritage of

* I wish to acknowledge the inspiration I have received from conversations on the topic of this special issue with, among others: Constance Classen, Mikhael Elbaz, Nicholas Kasirer, Rod Macdonald, Ruth Murbach, and Ron Niezen, as well as the participants in my “Law and Society” class at Concordia and my “Law and Social Diversity” class at McGill.

¹ Austin Sarat & Thomas R. Kearns, eds., *Law in the Domains of Culture* (Ann Arbor: University of Michigan Press, 1998).

² Austin Sarat & Thomas R. Kearns, “The Cultural Lives of Law” (Ann Arbor: University of Michigan Press, 1998) at 5. The authors continue: “[i]n the last fifteen years, (...) first with the development of critical legal studies, and then with the growth of the law and literature movement, and finally with the growing attention to legal consciousness and legal ideology in sociolegal studies, legal scholars have come regularly to attend to the cultural lives of law and the ways law lives in the domains of culture.” *ibid.* This development may be said to have culminated in Richard Sherwin’s book: *When Law Goes Pop: The Vanishing Line between Law and Popular Culture* (Chicago: University of Chicago Press, 2000).

³ See Ronald Niezen, “Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada” (2003) 18:2 Can. J.L. & Soc. 1 [Niezen]; Michael Asch, “The Judicial Conceptualization of Culture after Delgamuukw and Van der Peet” (2000) 5:2 Rev. Const. Stud. 119.

⁴ See Charmaine M. Wong, “Good Intentions, Troublesome Applications: The Cultural Defence and Other Uses of Cultural Evidence in Canada” (1999) 42 Crim. L.Q. 367; Alison Dundes Renteln, *The Cultural Defense* (New York: Oxford, 2004) [Renteln].

⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

Canadians”,⁶ and makes the preservation and enhancement of this heritage a condition of its own interpretation.⁷

Thus, the concept of culture has become increasingly standard fare for courts. But how is culture faring in the courts? What has become of culture in the process of being legalized? Do anthropologists still recognize their brainchild?⁸ What does it matter if they don't, as long as judges are being “culturally sensitive”? Conversely, have courts become too sensitive to diversity, such that the “social control” function of the law risks coming undone, given the deconstruction of the “objective reasonable person” standard into a multiplicity of culturally-specific sensibilities?

This special issue of *The Canadian Journal of Law and Society* is concerned with exploring the judicialization of culture. In addition to sampling the diverse ways in which cultural evidence is now being entertained by courts, this volume is concerned with examining the merits of a model for cross-cultural jurisprudence that involves “culturally-reflexive legal reasoning.” Thus, contributors were invited to consider the following position statement when drafting their essays:

Culturally-reflexive legal reasoning is increasingly necessary to the meaningful adjudication of disputes in today's increasingly multicultural society. It involves recognizing the interdependence of culture and law (i.e., law is not above culture but part of it). Judges ought to acknowledge and give effect to cultural difference, rather than override it. Deciding cases solely on the basis of some abstract conception of individuals as interchangeable rights-bearing units would have the effect of undermining our humanity. It is our cultural differences from each other that actually make us human. However, in extending judicial recognition to such difference, judges must be careful to take cognizance of their personal culture, and not just that of “the other.” Reflexivity, not mere sensitivity, is the essence of cross-cultural jurisprudence.

⁶ *Ibid.* s. 27.

⁷ See also the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*Covenant*]. Art. 27 of the *Covenant*, requires governments to ensure that persons belonging to ethnic, religious, or linguistic minorities within their borders “(...) not be denied the right, in community with the other members of their group, to enjoy their own culture.” The “right to culture” contemplated in the *Covenant* was brought home in *Ominayak and the Lubicon Lake Band v. Canada*, Supp. No. 40, UN Doc. A/45/40 (1990) at 1.

⁸ See E.B. Tylor, *Primitive Culture* (New York: Harper Torch Books, 1958) at 1, where the first Professor of Anthropology at Oxford University defined 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.” For a more contemporary definition, see James A. Boon, *Other Tribes, Other Scribes* (Cambridge: Cambridge University Press, 1982) at 52 [Boon]: “(...) social facts [traditions, practices, etc.] represent selections from larger sets of possibilities of which societies keep symbolic track, whether consciously or unconsciously, explicitly or covertly. Societies conceptualize themselves as select (in both senses) arrangements, valued against contrary arrangements that are in some way ‘objectified.’” Thus, the culture concept no longer possesses the same unity it once did. Cultures have come to be seen as partial, rather than as wholes, and as conjunctural, rather than essential.

The ideal of a jurisprudence that crosses cultures, instead of pretending to treat litigants in a “culturally-neutral” fashion (which is not the reverse of discrimination, but rather discrimination in reverse) is a noble one.⁹ In seeking to work out its implications, the contributors to this volume have had to grapple with many complex situations, occasioned by the fact that the moral and legal issues stemming from cultural diversity that once arose mainly between societies, now often arise within them. As Clifford Geertz observes in his article “The Uses of Diversity”:¹⁰

Social and cultural boundaries coincide less and less closely—there are Japanese in Brazil, Turks on the Main, and West Indian meets East in the streets of Birmingham—a shuffling process which has of course been going on for quite some time (...) but which is, now, approaching extreme and near universal proportions (...). *Les milieux* are all *mixte*. They don't make *Umwelte* like they used to.¹¹

What *is* the appropriate stance for national courts to take in the face of the legal frictions thrown up by the increasing mixity of cultures brought on by transnational migration¹² and the rising tide of “identity politics” in the contemporary state?¹³ Before turning to consider the specific studies of cultural conflict in the courtroom presented by the contributors, I would like to cast our gaze backwards in time to examine some examples of “imperial justice,” as it were. The Judicial Committee of the Queen's Privy Council constituted the final court of appeal for the member states of the British Commonwealth until well into the twentieth century. Its jurisdiction may therefore be characterized as multicultural, and it is instructive to consider how the Law Lords framed the legal issues they were called upon to resolve in cases that originated in such far-flung regions as India, Rhodesia or Canada, by way of setting the stage for the ensuing discussion.

Lording it Over Other Cultures

In Hindu tradition, religion, law and morals are inextricably intertwined. (The term *dharma*, which could be glossed over as “duty,” refers essentially to the divinely ordained role which each person, depending on their *varna*

⁹ Cross-cultural jurisprudence is essentially an exercise in hybridization – in *crossing* cultures – and there is nothing “trans-cendent” about either its methods or its results. It involves seeing (and hearing) the law of any given jurisdiction from both sides, from within and without, from the standpoint of the majority and that of the minority, and seeking solutions that resonate across the divide. In the terms employed by Nicholas Kasirer, it involves stepping out of “Law's empire” (if only temporarily) and attempting to find some footing in “Law's cosmos”. See Nicholas Kasirer, “Bijuralism in Law's Empire and in Law's Cosmos” (2002) 52 J. Legal Educ. 29.

¹⁰ C. Geertz, “The Uses of Diversity” in *Available Light* (Princeton: Princeton University Press, 2000) 68 [Geertz].

¹¹ *Ibid.* at 79, 86. See further John Comaroff & Jean Comaroff, “Policing Culture, Cultural Policing: Law and Social Order in Postcolonial South Africa” (2004) 29 Law & Soc. Inquiry 513 at 545.

¹² On transnational migration see L. Basch, N. Glick Schiller & C. Szanton Blanc, *Nations Unbound: Transnational Projects, Postcolonial Predicaments, and Deterritorialized Nation-States* (Amsterdam: Gordon & Breach, 1994).

¹³ On identity politics see Charles Taylor, “The Politics of Recognition” in *Multiculturalism and “The Politics of Recognition”* (Princeton: Princeton University Press, 1992) 25.

(or caste), must fulfill, not only in their relations with other persons, but in the maintenance of the cosmic balance). This mix posed a challenge for the British legal mind. As the Privy Council observed in the 1898 decision of *Rao Balwant Singh v. Rant Kishori*:¹⁴ “[a]ll those old [Hindu] text-books and commentaries are apt to mingle religious and moral considerations, not being laws, with rules intended for positive laws.”¹⁵ The court decided, in its wisdom, to enforce only rules of positive law and not religious or moral precepts. But how could the court distinguish between the legal, and the religious or moral, given their mingling?

In *Bal Gangadhar Tilak v. Shrinivas Pandit*,¹⁶ the Privy Council was asked to decide whether an adoption could be valid in the absence of the performance of a particular ritual (called *dattahoma*), which the *dharmasastras* (treatises on *dharma*) clearly require. The court reasoned:

In certain circumstances the point might be the subject of a prolonged and very conflicting argument, as the authorities, ancient and modern, are not in accord on the point as to whether there is a legal as well as a religious requisite. There is danger, on the one hand, of not paying due respect to those religious rites which are observed and followed among large classes of [Hindu people], while, on the other, the danger must also be avoided of carrying these, except when the law is clear, into the legal sphere, so as to affect or impair personal or patrimonial rights.¹⁷

As a result, the court held that the legal act of adoption could be separated from the religious act (*dattahoma*), and held the former to be valid without the latter.

In *Kenchava v. Girimallappa Channappa*,¹⁸ the Privy Council was called upon to decide whether a murderer can claim the estate of his victim. Here, it would appear that failure on the part of the British law lords to abide by their own first principles (such as the separation of law and morals) played a decisive role. The court stated:

Before this Board it has been contended that the matter is governed by Hindu Law, and that the Hindu Law makes no provision disqualifying a murderer from succeeding to the estate of his victim, and therefore it must be taken that according to this law he can succeed.¹⁹

The text commonly known as the “Laws of Manu” has the following enumeration of those who are, according to the *dharmashastra*, “incompetent to receive a share” (i.e., disqualified from succeeding to an estate): “[e]unuchs and outcasts, [persons] born blind or deaf, the insane, idiots and the dumb, as well as those deficient in any organ (of action or sensation), receive no

¹⁴ *Rao Balwant Singh v. Rant Kishori* (1898), 25 I.A. 54 (P.C.).

¹⁵ *Ibid.* at 69.

¹⁶ *Bal Gangadhar Tilak v. Shrinivas Pandit* (1915), 42 I.A. 113 (P.C.).

¹⁷ *Ibid.* at 136.

¹⁸ *Kenchava v. Girimallappa Channappa* (1924), 51 I.A. 368 (P.C.) [*Kenchava*].

¹⁹ *Ibid.* at 372-73.

share.”²⁰ The rationale for this legal incapacity is that none of the individuals listed is able either to administer the property or to perform the necessary funeral rites for the deceased. There is, however, no mention of murderers in this enumeration. As a result, the Privy Council decided to overrule Hindu law: “[t]he alternative is between the Hindu law being as above stated or being for this purpose non-existent, and in that case the High Court have rightly decided that the principle of equity, justice and good conscience exclude the murderer.”²¹ The court thus injected its own sense of morality under pretence of declaring the law.

However, it is hardly the case that Hindu law treats murder lightly. Murder is regarded as a transgression of *dharma* which contains a “criminal element” requiring corporal punishment by a king (e.g., branding), a “social element” requiring exclusion from fellowship, a “moral element” requiring expiation by performing penances, and a “religious element” having to do with the fate of the murderer’s soul after his own death. For example, the fate of a Brahmin-killer in the next incarnation is described as follows: “[t]he slayer of a Brahmana enters the womb of a dog, a pig, an ass, a camel, a cow, a goat, a sheep, a deer, a bird, a Candala and a Pukkasa.”²² It should be noted that Hindu law also went into extraordinary detail over how each of these requirements must be tailored to the caste position, both of the victim and of the slayer.

There is one case where the Privy Council does appear to have done justice to Hindu religious sensibilities, though only at great cost to the logical consistency of Anglo-Indian caselaw, for the case in question involved the attribution of agency to a thing. It is the case of *Pramatha Nath Mullick v. Pradyumna Kumar Mullick*,²³ which involved a dispute over a family idol. At issue was the question of whether the idol was merely movable property, and therefore subject to displacement by the *shebait* (priest), whose turn it was to care for its worship, or something/someone else. Dismissing the argument as to property, the Board held that:

(...) the will of the idol as to its location must be respected, and that accordingly the suit should be remitted in order that the idol might appear by a disinterested next friend to be appointed by the Court; that the female members of the family, having the right to participate in the worship, should be joined; and that a scheme for regulating the worship [of the idol as between the three brothers who were embroiled in this dispute] should be framed.²⁴

One could read this case as an example of the Board creating “a legal fiction” which is no different in principle from treating a corporation as a “juristic entity” or “person” for purposes of the law. But we are talking

²⁰ Cited in Ludo Rocher, “Hindu Conceptions of Law” in Ved Nanda & Surya Prakash Sinha, eds., *Hindu Law and Legal Theory* (New York: New York University Press, 1996) 3 at 9 [Rocher].

²¹ *Kenchava*, *supra* note 18 at 373.

²² Rocher, *supra* note 20 at 7.

²³ *Pramatha Nath Mullick v. Pradyumna Kumar Mullick* (1925), 52 I.A. 245 (P.C.).

²⁴ *Ibid.* at 246.

about an object here. A corporation can express a collective will through the resolutions of its directors, or other representatives. It defies logic to suggest that a thing can do the same. Or does it? Bear in mind that according to Hindu tradition, “(...) each of us is God or Brahman, Brahman wearing our particular mask, and all beings *and things* are equally infused with this supreme form of being (...). And since Brahman is common to all things, never dividing them, Brahman has to exist in non-dual or, we would say today, non-binary form.”²⁵ Perhaps the decision was not so deficient in logic after all. Perhaps things can be subjects, not mere objects.

Whatever the case may be, the breach of conventional Western (Cartesian) logic the Board created by ruling that things can be “juristic entities” (e.g., “persons”), has since come back to haunt and unsettle property relations in the metropolis. In 1982, a Canadian collector purchased a bronze Hindu icon of Shiva as Lord of the Dance from a London art dealer for roughly \$500,000. In 1988, the Indian Government brought an action for the recovery of the icon, Shiva Nataraja, in Britain’s High Court of Justice. It claimed (and it was found), that the icon had been unlawfully removed by an Indian labourer from a ruined temple site in Tamil Nadu, and that there was a party with a title to the icon that was superior to that of the Canadian collector (however good the latter’s faith). That party, according to the brief submitted by the Indian government, was none other than “(...) the god Shiva himself, as he was ‘localized’ in the Shiva Lingam”²⁶ – that is, in the stone symbolizing Shiva’s potency that once constituted the focus of the temple’s worship.

In its reasons for judgment, the High Court noted that the temple had been founded in the twelfth century, and that it bore the name of the donor of the suite of Shiva figures that included the Nataraja:

Assuming this donor’s intent was pious, then the temple’s central focus – the Shiva Lingam – could be treated as the continuing and still present embodiment of that intent. Under Hindu law, the lingam could also be considered a juristic entity, capable of holding property, of suing and being sued. It no more strained credulity (...) that an idol could own property in India than that a corporation – also a legal fiction – could do so in England. Thus, the god Shiva himself, as manifest in the lingam, could be treated as the rightful owner of the Nataraja.²⁷

²⁵ H.P. Glenn, *Legal Traditions of the World* (New York: Oxford University Press, 2000) at 267 [emphasis added]. See further Joanne Waghorne, Norman Cutler & Vasudha Narayanan, eds., *Gods of Flesh/Gods of Stone: The Embodiment of Divinity in India* (Chambersburg, Penn.: Anima, 1985).

²⁶ Stephen E. Weil, *Rethinking the Museum* (Washington: Smithsonian Institution Press, 1990) at 158 [Weil]. Various lesser parties were also asserted to have a superior title to the Canadian purchaser, including the Indian government, and the temple itself, or (given its ruined state) some official appointed to look after its affairs.

²⁷ *Ibid.* See *Union of India and others v. Bumper Development Corporation* (17 February 1988) (Lexis). See further *Bumper Development Corp v. Commissioner of Police of the Metropolis and others (Union of India and others, claimants)* [1991] 4 All. E.R. 638, [1991] 1 W.L.R. 1362.

As a result, the Nataraja was restored to the temple (not to Shiva – but does the distinction really matter from a Hindu perspective?), and the Canadian collector received no compensation.

This decision set off alarm bells in the great auction houses and the great museums of the world, for how many other “objects” in their collections might suddenly acquire wills and no longer wish to remain imprisoned in glass cases but rather return to their homelands?²⁸ Stephen Weil, speaking for the museums and other collectors, branded the decision “unsettling.” The “great Western collections”, he noted:

(...) hold the products of a variety of cultures, each with its own cosmology, customs, and law. In determining how public funds can be spent and what may be properly acquired and displayed, could any museum curator or collector master the multitude of legal nuances that lurk beneath this diversity? Far better [than leaving such matters to be decided in a piecemeal fashion by the courts] would be strengthened, more predictable, and more encompassing international mechanisms to deal with such claims.²⁹

Weil pointed to the recovery provisions under the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*³⁰ as providing a possible model for such a mechanism. This would be a neat transcultural solution to the problem, but not, in my opinion, a cross-cultural one. A properly cross-cultural approach would involve exploring the space between Western and non-Western representations of the legal life of things (including their personification, as in Hindu tradition), and elaborating a scheme which resonates across the divide of representations, so as to generate dividends for all of the parties joined by the action for repatriation.³¹

Hearing (and Seeing) the Law from Both Sides

One of the most interesting things about doing historical cross-cultural jurisprudence is to trace the permutations in the culture concept itself. In 1919, the Judicial Committee of the Privy Council was called upon to decide whether an indigenous African kingdom could assert continuing property rights and interests in the aftermath of conquest by the British South Africa

²⁸ See Constance Classen & David Howes, “The Museum as Sensescape: Western Sensibilities and Indigenous Artifacts” in Elizabeth Edwards, Chris Gosden & Ruth Phillips, eds., *Sensible Objects* (Oxford: Berg) [forthcoming in 2006].

²⁹ Weil, *supra* note 26 at 159.

³⁰ 14 November 1970, 823 U.N.T.S. 231.

³¹ Repatriation does not necessarily mean repossession. See for example, Andrea Laforet, “Relationships between First Nations and the Canadian Museum of Civilization” (Haida Repatriation Extravaganza, Masset, British Columbia, 22 May 2004) [unpublished], where Laforet explains that under its Sacred Materials Programme, the Canadian Museum of Civilization has “(...) an agreement with the Hudenosaunee to provide corn meal mush and burn tobacco for the false face masks and other sacred objects from the Six Nations Confederacy in the museum, and representatives come to the museum twice a year at the museum’s expense to do so.”

Company. The Board articulated a broadly unilinear scale of social and legal development to serve as a framework for its decision. This scale was in keeping with the evolutionist cultural theory of the day, which (not surprisingly) placed contemporary British society at the pinnacle of “civilization” and assigned other societies to various lesser stages of development. In “estimating” the rights of the African kingdom, the Privy Council observed that:

Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. (...) On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the native of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit.³²

The idea of cultures as distributed along a scale of increasing complexity and sophistication (moral, legal, institutional, technological, and so forth) entered into Canadian law with the *St. Catherine Milling and Lumber Co.*³³ case, and echoed down through a long line of decisions concerning Aboriginal rights and title to land,³⁴ which culminated in the 1991 *Delgamuukw*³⁵ decision of the Supreme Court of British Columbia. In that case, the hereditary chiefs of the Gitskan and Witsuwit'en First Nations claimed “ownership and jurisdiction” over 58,000 square kilometres of the interior of British Columbia. They supported their claim with expert as well as direct testimony of their connection to the land as evidenced by their sacred oral tradition (the *kungax*, or spiritual songs and stories that formed the basis of the chiefs’ authority over specific territories) and the institution of the feast hall (which provided an elaborate mechanism for the verification and resolution of disputes concerning the boundaries of clan territories since pre-contact times).³⁶ In the final judgment, all of their cultural testimony fell

³² *In re: Southern Rhodesia* (1919), A.C. 210 (P.C.) at 233-34, n. 4.

³³ *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.).

³⁴ See *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 at 577-78. The same decision also found that the Inuit did not have “(...) very elaborate institutions (...)” and “(...) about all they could do (...)” was “(...) hunt and fish and survive (...)” (*ibid.* at 559).

³⁵ *Delgamuukw v. British Columbia*, (1991) 79 D.L.R. (4th) 185, [1991] 3 W.W.R. 97.

³⁶ See Antonia Mills, *Eagle Down Is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994) [Mills]. Mills records that the traditional penalty for trespass was death, which suggests that the Witsuwit'en were very mindful of property rights. One could compare the institution of the feast hall to a notary office: its records are just as accurate, and always up-to-date, only they are stored in people's memories instead of being written down, and there is a performative, dramatic dimension to the assertion or

on deaf ears. Chief Justice McEachern questioned the partiality of the anthropological and ethno-historical expert witnesses, and also discounted the direct testimony of the Gitskan-Witsuwit'en elders, on account of the oral (read: indeterminate and putatively self-serving) nature of such testimony. In a blatant example of the chirocentrism – that is, scriptocentrism – of the legal profession (and the conventional Western understanding of history as written record, excluding oral memory), the Chief Justice concluded that "(...) much of the plaintiffs historical evidence is not literally true," and the Gitskan-Witsuwit'en had "(...) some minimal levels of social organization, but the primitive condition of the natives described by early observers is not impressive."³⁷ By admitting cultural evidence, but then privileging the written record over Gitskan-Witsuwit'en oral tradition, the court (effectively) heard only one side of the case, and went on to dismiss the claim. McEachern found that the Gitskan-Witsuwit'en did not use the territories (except in the vicinity of their villages, which were already identified as reserved lands) sufficiently intensively or uninterruptedly to establish any more than use rights to the broader territory, and certainly not the proprietary rights that were claimed.

The *Delgamuukw* decision was set aside on appeal to the Supreme Court of Canada, and a new trial ordered, partly on the ground that: "[t]he laws of evidence must be adapted in order that this type of evidence [i.e., Aboriginal oral testimony] can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents."³⁸ In addition to opening the law's ears to other voices, the court opened the law's eyes to cultural difference, rather than cultural sameness (as in the *Rhodesia* reference), as a source of distinct rights. Specifically,

(...) the court held that Aboriginal title is a communally held right in land and, as such, comprehends more than the right to engage in specific activities [*e.g.*, hunting, fishing] which may themselves constitute Aboriginal rights. Based on the fact of prior occupancy, Aboriginal title confers the right to exclusive use and occupation of land for a variety of activities, not all of which need be aspects of

transfer of title in the feast hall that is missing from the notarial office. On orality and legality see Bernard J. Hibbitts, "Coming to Our Senses: Communication and Legal Expression in Performance Cultures" (1992) 41 *Emory L.J.* 873.

³⁷ Quoted and discussed in Mills, *ibid.* at 17. Chief Justice McEachern's uncritical acceptance of early historical accounts as unbiased (when they were, in fact, laced with racist slurs), and his rejection of Gitskan-Witsuwit'en oral tradition as "hearsay" or not "literally true" (because the traditions contained elements of myth) together reflect a profoundly chirocentric (or scriptocentric) worldview—that is, a worldview which privileges writing over all other modes of communication. For a good critique of this view see Ruth Finnegan, *Communicating: The Multiple Modes of Human Interconnection* (London: Routledge, 2002). For a good rebuttal to McEachern's dismissal of anthropological testimony, and penetrating critique of his ethnocentrism (or inability to "listen to testimony across cultural boundaries") see Mills, *ibid.* at 18-31.

³⁸ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1069.

practices, customs or traditions integral to the distinctive cultures of Aboriginal societies.³⁹

The Supreme Court of Canada decision in the *Delgamuukw* affair ushered in a highly creative and volatile period in Canadian jurisprudence regarding the legal definition of Aboriginal cultural practice and title – a period in which orality became the new medium and “distinctness” the new bar.⁴⁰ In the 1999 *Marshall*⁴¹ decision, for example, which concerned the proper construction to be placed on the terms of a 1760-61 treaty between the Mi’kmaq and the British, it was held that treaty arrangements “(...) must be interpreted in a manner which gives meaning and substance to the oral promises made by the Crown during the treaty negotiations,”⁴² and that what the Mi’kmaq heard in 1760-61 and passed on, could trump what the British negotiators wrote down.⁴³ As a result, the court found that the Mi’kmaq had a constitutionally protected treaty right to fish for commercial purposes, as opposed to mere subsistence. In another leading case concerning the transformation of “traditional” into commercial (but nonetheless cultural) practice, this time involving salmon-fishing in British Columbia, it was held that “(...) to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right at the time of contact.”⁴⁴ Interestingly, the court added that: “[i]t does not require an unbroken chain between current practices, customs and traditions and those existing prior to contact (...)” for an activity to be transmuted into a right – that is, a cultural practice need not be identical to those of the pre-contact past but may be “(...) an exercise in modern form of pre-contact practice.”⁴⁵ In the final judgment, the majority of the court in *Van der Peet* found that while salmon-fishing was “integral” and “distinctive” to Musqueam culture, the commercial sale or exchange of salmon was not. In other words, while a practice can be resumed after an interruption, and may undergo some modification in response to changing historical circumstances, it must have existed in the pre-contact period in order to receive constitutional protection under section 35 of the *Constitution Act, 1982*.⁴⁶

The judicial definition of Aboriginal culture that emerges from these cases comes close to certain contemporary anthropological definitions of culture(s) as, in the words of James Boon, “(...) equally significant, integrated systems of differences.”⁴⁷ This represents a significant advance

³⁹ Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 90 [Macklem].

⁴⁰ See *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 554 [*Van der Peet*]: “[t]o recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the Court must look in identifying aboriginal rights.”

⁴¹ *R. v. Marshall (No. 2)*, [1999] 3 S.C.R. 533 [*Marshall (No.2)*].

⁴² *Ibid.* at 537.

⁴³ *Ibid.* at 537. See further *R. v. Marshall (No. 1)*, [1999] 3 S.C.R. 456.

⁴⁴ *Van der Peet*, supra note 40 at 549.

⁴⁵ *Ibid.* at 557.

⁴⁶ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

⁴⁷ Boon, supra note 8 at ix.

over the hierarchical, evolutionary model of culture in the *Rhodesia* reference, and in the B.C. Supreme Court decision in *Delgamuukw*. Distinctness from, rather than “advancement” towards, the institutions of the dominant society has become the new bar. Nevertheless, the emergent definition of culture has been criticized for its very emphasis on distinctness, and its “frozen-in-time” approach to the assessment of such distinctness. As anthropologist Ronald Niezen observes in “Culture and the Judiciary”:⁴⁸

This approach minimizes, overlooks or excludes the fact that all human societies innovate and adapt practices from others (including dominant societies), while retaining their essential distinctiveness. Making rights conditional upon basic continuity with pre-contact practices is an onerous requirement inconsistent with the rapid pace of change experienced today by all societies.⁴⁹

In other words, innovation and adaptation are themselves integral to tradition. It is the mix of cultural practices that matters to cultural survival, not the specific content of those practices. Niezen’s processual definition of culture goes far beyond the notion of cultural practices as subject to interruption and resumption with some modification, which currently holds sway in the Court’s insistence, for example, that the precise scope of Aboriginal rights be determined on a species-by-species basis, and always with reference to the pre-contact context, as in *Van der Peet*.⁵⁰ The effect of that insistence is that the new bar has been transformed into a new barrier to cultural survival on account of its selectivity, and, as Niezen goes on to point out, its separation of cultural rights to some subsistence practices from “the right to manage that subsistence” (e.g., Aboriginal control over resources).⁵¹

Niezen’s article on “Culture and the Judiciary” is an exemplary piece of cross-cultural jurisprudence on account of its emphasis on cultures as interactive, rather than distinctive *tout court*. It is also noteworthy for its reflexivity – specifically, for the way in which it traces how the emergent regime of cultural rights represents a “(...) remarkable accommodation and synthesis [on the part of the judiciary] of popular prejudices.”⁵² The new regime contains something for everyone in the dominant society, both proponents and opponents of Aboriginal self-determination, resource conservation (or exploitation), and so forth. For example:

Those who wish to see unadulterated Paleolithic wisdom in the way contemporary aboriginal hunters and fishermen practice their harvest

⁴⁸ *Supra* note 3.

⁴⁹ *Ibid.* at 10.

⁵⁰ See further *R. v. Gladstone*, [1996] 2 S.C.R. 723, where the same species-by-species approach was enforced. I would question whether *Van der Peet* or *Gladstone* are really in line with the Supreme Court of Canada decision in *Delgamuukw*, for the latter case entertained the possibility of emergent cultural practices (which are not synonymous with those of the pre-contact period) receiving constitutional protection. One case that is in line with *Delgamuukw*, and is of particular interest for its unhinging of cultural rights and interests from territorial rights and interests, is *R v. Adams*, [1996] 3 S.C.R. 101. See the discussion of this case in Macklem, *supra* note 39 at 100-101.

⁵¹ Niezen, *supra* note 3 at 22.

⁵² *Ibid.* at 23.

could well be gratified that the Court looks back to the supposedly simple, unhurried, environmentally balanced hunting and gathering ways of life of prehistoric peoples for examples of the rights to be enjoyed by their descendants. For those who, on the contrary, see aboriginal peoples as environmental cardsharpers, restricted only in their control over resources, there is comfort to be taken in the Court's tight focus on specific rights to particular species handed down from an explicitly defined time in the past or derived from unambiguous treaty provisions.⁵³

The implication to be drawn from Niezen's analysis is that sensitivity to the distinctness of Aboriginal cultures needs to be supplemented by reflexivity concerning how the appearance of such distinctness is generated from within the dominant culture out of the interplay of stereotypes, economic interests, political agendas, and so forth. A new bar must be set, which entails the judiciary taking cognizance of the interactivity of cultures in the process of selecting those aspects of Aboriginal cultural practice which warrant constitutional protection, and declining to recognize those which don't. As Clifford Geertz observes in "The Uses of Diversity": "[i]f we wish to be able capaciously to judge, as of course we must, we need to make ourselves able capaciously to see,"⁵⁴ and to see capaciously means overcoming the all too common "(...) failure to grasp, on either side [of some cultural divide], what it [is] to be on the other, and thus what it [is] to be on one's own."⁵⁵ Doing cross-cultural justice involves suspending judgment for as long as it takes to achieve a double take on the genesis and representation of the "facts" at issue in any given case.

What are the prospects for the Court allowing its judgment to hover in such a way that "the facts" are grasped from both sides, in all their situatedness, before any decision is rendered? This issue came to a head in the *Marshall* decision, as appears from the following excerpt from Justice Binnie's opinion, which prefaced his assessment of the expert testimony presented by the professional historians:

The courts have attracted a certain amount of criticism from professional historians for what these historians see as an occasional tendency on the part of judges to assemble a "cut and paste" version of history(...)

While the tone of some of this criticism strikes the non-professional historian as intemperate, the basic objection, as I understand it, is that the judicial selection of facts and quotations is not always up to the standard demanded of the professional historian, which is said to be more nuanced. Experts, it is argued, are trained to read the various historical records together with the benefit of a protracted study of the period, and an appreciation of the frailties of the various sources. The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of

⁵³ *Ibid.*

⁵⁴ Geertz, *supra* note 10 at 87.

⁵⁵ *Ibid.*

course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can.⁵⁶

Justice Binnie's point is that the courts are not in a position to suspend judgment indefinitely in the expectation that some academic consensus can be reached, due to the institutional constraints of the judicial process. However, this point only underlines the need for there to be more dialogue, more rapprochement, between history (or anthropology) and law, and more reflexivity on the part of judges in the exercise of their function, in order that the institutional constraints not be perceived as immutable, but themselves a product of history. The law is not above history, but part of it, and just as the practice of history has been transformed in the crucible of Maritime treaty litigation,⁵⁷ so must the practice of law. What the law needs now, more acutely than ever, is to reflect on "some conditions for culturally diverse deliberation," and to institutionalize them (on which more below).

In Defense of Culture

The lead essay in this volume is by American political scientist Alison Dundes Renteln, author of *The Cultural Defense*.⁵⁸ The latter work is a groundbreaking contribution to cross-cultural jurisprudence, and warrants serious consideration in its own right by way of introduction to the essay included here.

Renteln's primary aim in *The Cultural Defense*, is to flag the growing number of cases in which "cultural claims" are advanced by members of immigrant or minority cultures now resident in the United States (and other predominantly First World jurisdictions) and to classify them. Her typology of culture conflict in the courtroom includes homicide and assault cases, such as when a defendant is charged with murder for committing an "honour killing" in response to a verbal insult, or when a traditional healing or puberty ritual (ostensibly performed to benefit the child) results in bodily injuries in the eyes of the medical establishment and child welfare authorities. It also includes drug use and smuggling cases, as when substances classified as licit and even essential to social camaraderie or spiritual enlightenment in the defendant's culture of origin (e.g., khat in Yemeni culture, or peyote in Huichol culture) are classified as dangerous and prohibited in the culture of destination. While most of the extant literature focuses on criminal cases of this sort, Renteln points out that cultural conflicts also arise in all sorts of civil cases, such as employment discrimination suits, as when the dress code of a minority culture clashes

⁵⁶ *Marshall* (No. 2), *supra* note 41 at 488.

⁵⁷ As legal historian David Bell notes: "(...) the stimulus of Maritime treaty litigation, culminating in the expert evidence of [professional historians] at the Marshall trial, has revolutionized scholarly understanding of relations between Amerindians and Europeans in the 18th century." Cited in Douglas C. Harris, "Historians and Courts: *R. v. Marshall* and Mi'kmaq Treaties on Trial" (2003) 18:2 C.J.L.S. 123 at 129.

⁵⁸ *Supra* note 4.

with the hygiene or safety codes of the dominant society (or the “image” which a given corporation wishes to project), or over the age and eligibility requirements for marriage. Her typology also extends to cases involving (mis)treatment of the dead, as when state-mandated autopsies are performed irrespective of the religious objections of the deceased’s next of kin, and the (mis)treatment of animals, as when dietary codes differ such that animals classified as pets in one culture, are ritually slaughtered and/or consumed as food in another. Renteln’s typology remains incomplete, and its categories could also be refined further, but it nevertheless constitutes a landmark in the field of cross-cultural jurisprudence, particularly when one considers that: “[s]tandard tools for legal research did not index cases of this kind in any systematic way. Moreover, there were no obviously key words: searching for ‘culture’ on computer databases often led to cases on art or mold.”⁵⁹

In addition to providing a typology, Renteln aims to provide a normative framework for the analysis and resolution of the legal frictions generated by the mingling of cultures in the polyethnic state. Her position is that governments and the courts should cleave to a principle of “maximum accommodation” of cultural differences so that individuals may pursue their own “life plans” (subject to certain provisos, as will be discussed below) in place of the “presumption of assimilation” or “monocultural paradigm” which currently holds sway. The latter paradigm assumes that individuals from “other” cultures should conform to a single national standard, with the result that judges feel no compunction to factor evidence of the cultural background of the litigants into their handling of a case, and simply dismiss such evidence when it is proffered as “irrelevant”.⁶⁰ This attitude has the effect of alienating rather than incorporating minorities into the dominant society, and denies them their “right to culture”,⁶¹ in addition to interfering with other fundamental rights, such as equal protection, freedom of association, or freedom of religion. Renteln therefore calls for the establishment of a “formal cultural defense” which would obligate the judiciary to at least consider cultural evidence in all cases involving cross-cultural conflict, while leaving the question of how much weight to attach to such evidence, and whether or not it should excuse the conduct at issue (wholly, partially, or not at all), to be decided on a case-by-case basis.

Culture matters for justice, Renteln argues, because “enculturation” (i.e., cultural conditioning) predisposes individuals to act in certain ways, consciously or subconsciously, and “acculturation” (i.e., assimilation to the

⁵⁹ *Ibid.* at 7.

⁶⁰ Equally problematic, according to Renteln, is the surreptitious admission of cultural evidence, which is then sometimes upheld and sometimes overturned (as an “abuse of discretion”) on appeal. “There is no uniformity in the way culture is handled by the courts, and this variation leads to dissimilar outcomes, sometimes for similar offenses” (*ibid.* at 185). Hence the need for “(...) statutory authorization of the admissibility of cultural evidence in the courtroom” (*ibid.* at 206).

⁶¹ Renteln points to art. 27 of the *International Covenant on Civil and Political Rights* (*supra* note 7), as one source of the “right to culture,” but decries its relatively restricted use to date (*ibid.* at 213).

culture of destination) is far less prevalent or uniform than is commonly thought.

In pluralistic societies, it is especially vital that judges acknowledge variation in motives to better understand the behavior of individuals who come before them. In general, justice requires looking at the context of individuals' actions; otherwise, it is not possible for judges to understand what has transpired (...) [or] to determine the appropriate level of culpability and corresponding punishment.⁶²

With particular reference to criminal prosecutions, Renteln proposes that when a defendant's conduct can be shown to have been "culturally motivated" then this should be considered a mitigating circumstance and constitute a "partial excuse" to the charge, with the result that the accused should be convicted of a lesser included offence and accorded a proportionately lighter sentence. Take the case of *People v. Romero*,⁶³ which involved a street fight that ended in the death of one of the assailants. The California Court of Appeal held that the trial court properly excluded evidence concerning the role of street fighters in Hispanic culture. "The expert would have testified that the Hispanic culture is based on honor, and for a street fighter in the Hispanic culture, there is no retreat;"⁶⁴ the court held that "(...) the question of defendant's honor was irrelevant to whether defendant was in actual fear of death or great bodily injury, and whether his fear was objectively reasonable (...)"⁶⁵ as required by the defense of self-defense. It could be argued that the defendant's response was reasonable, necessary and proportional by the standards of Hispanic culture, and this should have been comprehended as a partial justification for his conduct by the trial court. In the result, the "objective reasonable person" test operated to exclude cultural information relevant to the defendant's cognizance of the situation and motivation to behave the way he did. In Renteln's opinion, it violates the principle of the equal protection of the law when defenses such as self-defense, "(...) which are theoretically available equally to all defendants, in fact cannot be used by people who come from other cultures."⁶⁶ The "objective reasonable person" test is, in fact, rooted in cultural bias: "(...) the reality is that this 'objective' being is simply the persona of the dominant culture,"⁶⁷ by reference to which all other viewpoints are adjudged "subjective" (read: irrational).

In her drive to expose the double standard by which many minority cultural practices are judged, Renteln frequently gives expression to viewpoints which force a double take on the assumed naturalness or "reasonableness" of the practices of the dominant society. For example, in

⁶² *Ibid.* at 6, 23.

⁶³ *People v. Romero*, 69 Cal. App. 4th 846 (1999).

⁶⁴ Cited in Renteln, *supra* note 4 at 38.

⁶⁵ *Ibid.* Other defenses affected by this limitation include: provocation, duress, and mistake-of-fact—all of which come in for the same criticism as the defense of self-defense at different places in Renteln's argument.

⁶⁶ *Ibid.* at 36.

⁶⁷ *Ibid.* at 32.

response to the presumption that arranged marriages violate the rule of informed consent, it is observed that “you marry the one you love” whereas “we love the one we marry.”⁶⁸ Similarly, while the ritual sacrifice of animals, particularly dogs and eagles, or the tripping of horses in the Mexican charreada, are judged to be “cruel and unnecessary,” the wholesale secular slaughter of chickens for food, or the roping of calves in Western rodeos, does not attract the same opprobrium. Renteln sums up the many strands of her argument by stating that:

(...) the dominant culture often perceives unfamiliar cultural traditions as ominous. The threat is often illusory, as with kirpans in school [which are religious symbols, not weapons], the use of coining in folk medicine [which may result in temporary bruises at worst], affectionate touching in families [which is not supposed to be sexually motivated in the culture of origin], and the cornrows hairstyle [which is often perceived as a sign of black militancy when it may represent no more than a stylistic option]. The beliefs and traditions are not dangerous, and the misperceptions surrounding them stem from cross-cultural misunderstanding and even xenophobia.⁶⁹

In line with her principle of “maximum accommodation,” Renteln argues that “culturally motivated” acts should be allowed in all cases where the “threat” they pose is “illusory” (as defined above), and only disallowed in the event they would result in “irreparable harm to others.” She cites cultural practices leading to death or permanent disfigurement (e.g., tribal scarification, female genital cutting) as instances of the latter class of acts, and would also exclude “(...) the use of cultural arguments to defend wife beating, many types of corporal punishment of children, and other practices using violence.”⁷⁰ It might be objected that the “irreparable harm” standard is not free of cultural bias, since as Renteln herself acknowledges “(...) [it] is a matter of one’s cultural background whether a tradition is interpreted as involving harm,”⁷¹ but physical integrity must nevertheless take precedence over cultural identity, in her estimation.

In the essay included here, Renteln moves on to tackle the complex issue of how cultural evidence should be handled in the courtroom to guard against misuse of the cultural defense. She proposes a three-prong test for assessing the veracity of a “cultural claim” which includes asking whether the litigant is a bona fide member of the cultural community to which he or she purports to belong; whether the community actually practices the tradition in question, and whether the litigant was “influenced” by the

⁶⁸ *Ibid.* at 115.

⁶⁹ *Ibid.* at 218. All of the information in square brackets in this quotation is derived from discussions of cases elsewhere in *The Cultural Defense*. The opinions are those of Renteln.

⁷⁰ *Ibid.* at 217, 203.

⁷¹ *Ibid.* at 217. I think Renteln’s take on “harm” needs to be doubled. Heather Douglas’ contribution to this special issue forces such a double take on the cultural level, and on the subcultural level see Terry Hoople, “Conflicting Visions: SM, Feminism, and the Law. A Problem of Representation” (1996) 11:1 C.J.L.S. 177.

tradition when he or she acted. In her ensuing discussion she surveys a range of cases involving fraudulent identity claims, contested or discontinued or invented traditions, and practices which are motivated by economic necessity or greed rather than “authentic” cultural imperatives. Of particular note is her insistence on the importance of judges taking cognizance of the diversity *internal* to a culture and avoiding “generalizations,” so that vulnerable groups (women and children) do not have their already marginal position and human rights further undermined by the operation of the cultural defense, and it is not the whole culture that is put on trial when a “cultural claim” is advanced, but only the tradition or practice that is at the origin of the dispute.

The next essay, by Dalhousie law Professor Robert Currie, also concerns the use and abuse of cultural evidence in the courtroom – specifically, expert opinion concerning racism. Race is a cultural issue because it has to do with the social construction of supposedly physical or “natural” distinctions.⁷² Currie’s focus is on a civil suit for defamation brought by a Halifax police officer against two public interest lawyers who made statements at a press conference suggesting that the officer’s actions in the context of an illegal search that targeted two black girls had been motivated by race and socio-economic status. The key issue in *Campbell v. Jones and Derrick*⁷³ centred on the admissibility of the expert reports and opinions of a sociologist and social anthropologist (commissioned by the defense) regarding the facts that gave rise to the case and the existence of systemic racism in Canadian society. Currie presents a lucid analysis of the law of evidence concerning the scope and admissibility of expert testimony in civil jury as distinct from appellate trials. He goes on to show how this body of law intersects with the (un)reliability of the “generalizations of social science” in the opinion of the judge who sat on *Campbell*. In addition to exposing how the issue of “individual motivation” is understood by the courts,⁷⁴ Currie’s essay is of interest for what it reveals about the judicial construction of the disciplines of sociology and anthropology. This turns out to be informed by some egregious assumptions, as when the judge in *Campbell* notes that these fields

⁷² One of the points which Justice Moir emphasized in his commentary on the anthropologist Dr. Frances Henry’s report was that “(...) the report, taken as a whole, suggests for the jurors to reason as Dr. Henry has done; that is, to allow generalizations about police and generalizations about members of the Black community to determine specific issues of fact” (see Currie, this issue). It could be objected that there is no legitimate way to reason about race other than the way in which Dr. Henry did, since to hold otherwise would be to treat race as an objective category rather than the social construct it is. See Gerald Berreman, “Race, Caste and Other Invidious Distinctions in Social Stratification” (1972) 13 *Race* 500.

⁷³ As discussed in Currie, this issue.

⁷⁴ It is instructive to read Renteln’s account (in the article in this issue as well as in chapter 2 of *The Cultural Defense*) of how culture “influences” individual behaviour in light of Currie’s analysis of how the Courts construe the issue of “individual motivation.” Renteln’s broadly anthropological perspective and that of the courts are clearly at loggerheads. This results in anthropologists and judges engaging in cross-fire over which discipline commits the grosser “generalizations” with regard to the interpretation of human motivations (an issue which forms a subtext to Renteln and Currie’s contributions). Plainly, there is a need for more dialogue (in place of crossfire) on this score.

“(...) lack the precision and specificity which characterizes a science like chemistry or an area of technical expertise like engineering.”⁷⁵ Such a construction is based on misplaced comparison, and stands in need of correction for the way in which it misrepresents the multiplicity of theoretical and methodological approaches within the social sciences themselves, never mind those between the human sciences and the physical sciences.

The fulcrum point in this special issue is occupied by an essay entitled “Some Conditions for Culturally Diverse Deliberation” by Australian sociologist and law professor Richard Mohr. This essay offers a brilliant way out of the impasse that was remarked upon at the end of the last section when the prospect of any further dialogue between Aboriginal peoples and the state, or practitioners of history (or anthropology) and those of law, appeared to be arrested by Justice Binnie’s statement to the effect that: “[t]he judicial process must do as best it can.”⁷⁶ Mohr is alive to the fact that it is “(...) characteristic of law that it involves not just endless communication or argument, but that it must proceed to a decision.”⁷⁷ He nevertheless argues that the judicial process could do better by first, recognizing that interpretation is an “active process”; second, pluralizing the notion of the audience (or “public”) with which the judiciary imagines itself to be in conversation when rendering a decision; third, reflecting critically on the ideal of impartiality by factoring consciousness of the corporeality and specific life experiences of all of the parties to a case (including the judiciary) into the deliberative process; and fourth, broadening the court’s repertoire of “ways of deliberating” so that decisions can proceed from arguments addressed to “the whole person” instead of some abstract public (conceived as a collection of autonomous, interchangeable rights-bearing subjects). In specifying the conditions for culturally diverse deliberative action, Mohr lays the groundwork for an “architecture of institutions” that restores humanity to the judicial process.

The next essay, by legal translator and recent McGill law graduate Vera Roy, presents a harrowing analysis of the denial of humanity perpetrated by the prevailing ideology of legal liberalism. Entitled “The Erasure of Ms. G.,” Roy’s essay focuses on what could be considered a classic case of the clash between maternal and fetal rights, were it not for the fact that the defendant was an Aboriginal woman and the behaviour which precipitated the whole sorry affair involved substance abuse. As Roy brings out, the cultural specificity of substance abuse in Aboriginal communities, not to mention Ms. G.’s own identity, were systematically elided at each level of the court

⁷⁵ See Currie, this issue.

⁷⁶ See Mohr, this issue.

⁷⁷ *Ibid.* Two other essays which examine the conditions for culturally diverse deliberation in what I would consider to be an exemplary fashion include: J. Webber, “Multiculturalism and the Limits to Toleration” in Lapierre, Smart and Savard, eds., *Language, Culture and Values in Canada at the Dawn of the 21st Century* (Ottawa: International Council for Canadian Studies and Carleton University Press, 1996); Bonaventura De Sousa Santos, “Vers une conception multiculturelle des droits de l’homme” (1997) 35 Dr. soc. 79.

system—from the initial hearing of the motion to commit “the mother” to a residential treatment centre to prevent damage to the fetus, all the way up to the Supreme Court of Canada – in a flagrant example of what the author (with a nod to the work of Clifford Geertz) calls “adjudication without imagination.” By framing the issue exclusively in terms of a conflict of rights, the courts gave short shrift to the clash of cultures that formed the subtext of the case.⁷⁸ As such, the courts passed when they should have seized on the opportunity “(...) to recognize that the laws and the bodies responsible for enforcing them [had], in very profound and significant ways, played a hand in creating the very situation Ms. G. found herself in.”⁷⁹ Of course, to allow such culturally-relevant information in would have implicated the courts themselves in the genesis of Ms. G.’s situation, but this level of reflexivity was precluded by the “analytic tools” (namely, rights discourse) which the courts repeatedly insisted were all they had at their disposal.

The concluding essay in this volume, by another Australian legal scholar, Heather Douglas, speaks in an illuminating way to the position statement, and to all the essays which have gone before by dealing head-on with the issues of violence, substance abuse, social context, evidence of customary law, and the interactivity of cultures. Douglas describes the species of “weak legal pluralism” which has evolved in the jurisprudence of Australia’s Northern Territory in the face of the anomic conditions of contemporary Aboriginal communities, perceived as spaces of “social devastation.” Her essay reveals how Northern Territory judges are creating an opening for community members to inflict physical harm on offenders (e.g., spearing in the thigh in accordance with Aboriginal customary law), and reducing formal sentences proportionately, without for all that officially condoning such violence, but sensing its necessity in the interests of enabling Aboriginal peoples to regain some semblance of “cultural control” over their situation. Such concessions fly in the face of legal liberalism, with its doctrine of the integrity of the person, yet as Douglas shows, in the extreme cases contemplated here some such measure may be necessary for purposes of “settling down” the community and restoring peace. Troubling questions remain, such as whether what Douglas calls “the equation of Aboriginality, alcohol and social devastation” does not objectify the social problems of Aboriginal communities and distance them from those of the mainstream. Douglas also draws attention to the issues of governmentality that are raised by this seemingly enlightened approach to sentence determination in the section of her essay on “the expanding arsenal of penalty.” For example, insofar as the defendant remains under the watch of government officers,

⁷⁸ Roy’s analysis delves deeply into all the historical and socio-legal determinants of Ms. G.’s situation—that is, all of the social issues that the courts glazed over. In so doing her essay nicely illustrates Richard Mohr’s point to the effect that: “[t]he act of interpretation is not a simple mechanistic application of the law to objective facts: the facts [and, I would add, the laws] themselves must be interpreted within a legal *and social* context. The judge is a participant in—and indeed a part of—that context.” (See Mohr, this issue).

⁷⁹ See Roy, this issue.

and members of the community are expected to inform state officials about how and when the promised punishment (or “payback”) occurs, then “(...) the defendant’s community becomes a disciplinary space [i.e., an extension of prison] and members of the community become connected to the white legal system through a kind of self-surveillance.”⁸⁰ At the same time, the articulation of formal and customary law in regard to punishment remains imperfect, leading to “(...) a complex situation where Aboriginal people are both supervised and supervisor and the state is both in and out of control.”⁸¹ In other words, justice emerges out of the interstices of cultures.

Limitations of space prevented me from including all of the essays which the many respondents to the call for papers for this special issue proposed to write, and some papers which were promised never did materialize, perhaps due to the complexity of the theme. Culturally-reflexive legal reasoning is not easy. It involves cultivating the capacity to be of two minds about even the most (apparently) singular or “objective” facts, and hearing both sides of the law—not just the lawyers for both parties to the dispute. (Take a second look at any of the works by Willie Cole or Ron Noganosh reproduced in this volume, and you will see what I mean).

In addition to those papers which never did materialize, there are a number of topics which could and should have been addressed in this issue, but no papers were forthcoming. For example, I would have liked to include an essay on how the cultural defense has been or might be used by American or European subjects who run afoul of the law in non-Western jurisdictions for smuggling drugs or alcohol, violating local dress codes, or participating in treasonous activities. To reverse the tables again, it would have been interesting to have an essay on how, say, the Canadian Government’s claim to ownership and jurisdiction over the interior of British Columbia would have been received in the Gitskan-Witsuwit’en feast hall. Another topic which ought to have been addressed is the culture of the courtroom or “aesthetics of law”—that is, how the iconography of justice (blindfold, scales, sword), the architecture of the courthouse, the dress codes and body language of lawyers and judges, and so forth, impact on the judicial process itself.⁸² For all its gaps, it is hoped that this special issue, by reversing the gaze of Sarat and Kearns’s *Law in the Domains of Culture*, and focussing on culture in the domain of law, has helped to establish cross-cultural

⁸⁰ See Douglas, this issue.

⁸¹ *Ibid.*

⁸² This area of the aesthetics of law has nevertheless received significant treatment elsewhere. On the iconography and architecture of law see, for example: Martin Jay, “Must Justice Be Blind? The Challenge of Images to the Law” in C. Douzinas & L. Nead, eds., *Law and the Image: The Authority of Art and the Aesthetics of Law* (Chicago: University of Chicago Press, 1999); Richard Mohr, “Enduring Signs and Obscure Meanings: Contested Coats of Arms in Australian Jurisdictions” in A. Wagner, T. Summerfield & F.S. Benavides, eds., *Contemporary Issues of the Semiotics of Law* (Oxford: Hart, 2005); Robert Jacob, “The Historical Development of Courthouse Architecture / La formazione storica dell’architettura giudiziaria” (1995-96) 14:30 *Zodiac* 43. See further Desmond Manderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice* (Berkeley: University of California Press, 2000).

jurisprudence as a vital new domain for academic inquiry and judicial notice.

On the Works of Willie Cole and Ron Noganosh as Models for Thinking about Cross-cultural Jurisprudence

While researching this issue, my attention was drawn to a recent exhibition at the Musée nationale des Beaux-arts du Québec (MNBQ) entitled *Double Play: Identity and Culture*. This exhibition nicely illustrated Geertz's point concerning the extent to which we now live in the midst of an enormous cultural collage, and how many legal and ethical issues which used to arise mainly between societies, now increasingly arise within them. The exhibition was curated by Jocelyne Lupien and Jean-Philippe Uzel, both of the Département d'Histoire de l'Art at the Université du Québec à Montréal (with the assistance of MNBQ exhibitions curator Paul Bourassa), and grew out of the work of the multidisciplinary research group, *Le Soi et l'Autre*. The *Double Play* exhibition centred on the works of three contemporary artists, including African-American Willie Cole, and Ojibwa Canadian Ron Noganosh. Cole and Noganosh kindly consented to the inclusion of a series of illustrations of their work in this special issue, and we are also fortunate to have been permitted to reprint some excerpts from the *Double Play* exhibition catalogue (authored by Lupien), which help spell out the significance of these thought-provoking representations of the forging of cultural identities in contemporary North American society.

I regard Cole and Noganosh as aesthetic anthropologists who arrange everyday objects from the North American urban landscape (e.g., hairdryers, hubcaps) in novel configurations inspired by the forms of their cultures of reference (e.g., African masks, Amerindian warrior shields). These configurations, with what Lupien calls their "two levels of representation" or "murky duality," precipitate a profound destabilization of our conventional habits of perception, and by so doing encourage us to reflect critically on the contingency of any and all identity formations. The double vision enshrined in Cole and Noganosh's work embodies the essence of what I call cross-cultural aesthetics, and I offer it (along with Lupien's commentary) as a model for "culturally diverse deliberation."⁸³ The reader is invited to contemplate the cross-cultural aesthetic constructions of Cole and Noganosh as a counterpoint to the essays by the other contributors to this special issue, and – by tacking back and forth between them – arrive at a fuller appreciation of what Vera Roy calls "adjudication *with* imagination."

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⁸³ See Mohr, this issue.