

Cultures, Disciplines, and Differences: Author's Response to Commentators

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I. Introduction

A notable feature of the book *Cultural Difference on Trial: The Nature and Limits of Judicial Understanding*¹ is its cross-disciplinary ambition. It is a work of philosophy that is informed by the insights of legal theory, psychology, and anthropology. Its subject matter demands such scope. As a result, it is a work that is susceptible to engagement and critique on the part of practitioners across a range of academic disciplines. I am pleased that the three distinguished commentators on the book who participated in this symposium reflect some of that range of perspectives. Each of them embodies one of a number of distinct schools of thought which, historically, have maintained a deep interest in cultural difference, cross-cultural understanding, and the workings of the legal system. Their respective identities as continental philosopher, anthropologist, and socio-legal theorist not only lend a distinctive flavour to each of their papers but also work to generate a multifaceted yet mutually resonant set of insights into the issues raised by the book. I am grateful to each of them – Margaret, Katie, and Gary – for taking the time to read the book and articulate a view on it. Their comments will be of immense value to me in my ongoing thinking about cultural difference and the law.

In formulating a reply to their papers, it is just not feasible, of course, for me to address each and every one of their comments and concerns. What I propose to do here, then, is serially comment upon what I take to be a key concern of each of the papers. What struck me as central to Margaret Davies's paper is the question of the relationship between the analytic and continental traditions of philosophy. Katie Glaskin's paper raises a number of issues surrounding the nature of culture and its relationship to its conceptual base. In doing so, she too implicates questions of cross-disciplinary understanding. Finally, Gary Edmond's paper explores both the theoretical potential and the theoretical limitations generated by my concept-theoretic analysis of judicial understanding and institutional design.

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

In this pursuit, he picks up on similar concerns raised by both Davies and Glaskin.

II. Philosophical traditions and cultural differences

In the introduction to the book, I deliberately and quite strategically proclaim its philosophical pedigree to be that of the analytic, as distinct from the continental, tradition in contemporary Western philosophy.² No doubt, a long discussion could be had in regard to how we might define and distinguish the two schools.³ Further, we need to be careful about falling into too simplistic a dichotomy in regard to the state of contemporary philosophy – particularly given the developing rapprochement between the two traditions over the past few decades.⁴ Nonetheless, it remains, I think, a legitimate strategy – in certain theoretical contexts, at least – both to make a distinction between the two traditions and to choose to rely on the linguistic and conceptual resources of one of them over the other.

My choice in favour of analytic philosophy in dealing with a subject that has for a long while been the predominant preserve of its putative rival is motivated by what I perceive to be the capacity of an analytic approach to make sense of and inform a response to the issues under consideration in a way that is just not available to many lines of thought within the continental tradition. It is a core hypothesis of the book that contemporary analytic philosophy offers something distinctive and valuable to our understanding of these issues.⁵ As I say in the book, the source of this potential lies to a significant extent in the collaborative orientation of analytic philosophy (in

² Discussions of the history and nature of the two traditions and the so-called 'divide' between them may be found in Peter Hylton, *Russell, Idealism and the Emergence of Analytic Philosophy* (1990); Michael Friedman, *A Parting of the Ways: Carnap, Cassirer, and Heidegger* (2000); and Simon Glendinning, *The Idea of Continental Philosophy: A Philosophical Chronicle* (2006).

³ Some of that discussion is rehearsed in Friedman and Glendinning, above n 2. I intend to avoid a discussion of definitions and differences here and proceed on the assumption (I hope not too unreasonably) that readers know instances of the two schools when they see them, even if they can't readily define their differences.

⁴ Despite their disagreements, Habermas and Rorty are two notable mediators in this regard. More recently, see the recent collection of articles on this topic in (2012) 50 *The Southern Journal of Philosophy* – especially those by Sara Heinamaa and Iain Thomson.

⁵ This is not to say, of course, that certain strands of continental philosophy do not offer valuable insights of their own.

its dominant naturalistic mode) to important new lines of thinking about cognition and cultural difference within the contemporary sciences of cognitive and developmental psychology, linguistics, and sociology. A not unimportant consideration here has also been my sense that a study of the issues articulated in the vocabulary and style of analytic philosophy (with that tradition's explicitly pro-science orientation), is likely to be more effective in informing and influencing lawmakers, judges, and legal practitioners – key protagonists in the book and key targets for the book's reformist agenda.⁶

As I read her piece, Davies agrees with me about the existence of a valid distinction between the two traditions, as well as about the legitimacy of making a commitment to one or the other of them.⁷ Her choice has been for the continental side of the spectrum and I am grateful to have the benefit of a view from that side in this symposium. Rather than engage in a systematic critique of the analytic tradition I have chosen or of the argument elaborated in the book, Davies directs her attention to the important question of the very grounds of understanding and communication between representatives of the two traditions – in this case, she and I. In the context of commenting on a book about cross-cultural understanding her approach here is nicely ironic and, consequently, quite continental. More broadly than this, though, Davies raises the more general question of interdisciplinary communication and collaboration within the academy and beyond. In doing so, she implicates the relationship between philosophy and the social sciences raised by Glaskin's anthropologically informed critique of the book's theoretical presuppositions and methodology, as well as the relationship between law and science addressed in Edmond's discussion of the judicial understanding of scientific expert evidence.

Davies frames the difference between us and our respective schools of philosophy in terms of the maintenance of different languages, rather than different conceptual schemes.⁸ I am happy with this framing of things

⁶ On the relationship between science and legal practice, see, for example, Tai Golan, *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America* (2004).

⁷ Of course, neither of us thinks that one *has* to make a choice – only that making a choice is a legitimate theoretical practice. One could legitimately draw on compatible resources from both traditions – say, as someone like Habermas has done over the years. I must say that I am sympathetic to such a syncretic approach. Indeed, there is a growing body of opinion amongst philosophers that this may be the way of the future in philosophy. See above n 4

⁸ At p 2 of her paper she says, 'He speaks in the language of concepts and I speak in the language of language.'

because I am not convinced that there is that much *conceptual* difference between us and our schools – merely (substantially?) a difference in vocabulary.⁹ Indeed, it is the existence of a significant degree of conceptual proximity, I think, that underlies the rapprochement between our two schools which has been underway these past two decades or so. This does not mean that there are no challenges of interpretation at work here – there are. However, we (and our schools) are not enmeshed in a situation of disciplinary (cultural) incommensurability as I define it in the book. Rather, we maintain philosophical worldviews which differ to some degree in their operating vocabularies and underlying conceptual schemes but which are ultimately commensurable in the sense that any such difference can (with a degree of effort) be interpretively overcome - in some cases merely by a process of translation and in others by a more onerous process of conceptual supplementation.¹⁰

The fact that Davies is able to offer such a subtle and thoughtful analysis of the book is evidence enough of this. Her sensitivity to and sympathy with the central notion of ‘trajectory’ I use throughout the book demonstrates more than anything, I think, my claim about the extent of this common ground. Her paper’s poetic improvisation on the theme of a trajectory nicely enhances my rather staid (and for her, no doubt, stylistically quite analytic) presentation of the idea in the book. Though I don’t pick up the point in the book, I am quite happy with the idea of a judge actually forming her identity (or, at least, a significant part of it) as a result of her conceptual development case by case over the course of her judicial career. Further, I have no doubt that much of my analysis of this process could be – as she suggests – usefully reinterpreted in Heideggerian (or even Lyotardian) terms.¹¹ Despite its predilection for preciseness and certainty, analytic philosophy *at its best* does maintain a profound recognition of the chaotic, vast complexity of the mind and the world. There is, then, I think, more than ‘a lucky coincidence of expression’ in Davies’s and my conception of things here.

On this question, Davies’s concern that she and I seriously differ in relation to the very idea of a concept is, I think, misplaced. Davies believes

⁹ Of course, a substantially shared conceptual scheme does not entail a substantially shared set of beliefs. It is at the level of propositional claims about how things are that the differences between our two schools are most operative

¹⁰ I hold the same view in regard to the discursive relationship between analytic philosophy and Glaskin’s school of anthropology.

¹¹ The recent work of Jeff Malpas on Heidegger and Davidson comes to mind here. Jeff Malpas, *Heidegger and the Thinking of Place: Explorations in the Topology of Being* (2012).

that I hold that concepts are self-contained, stable, and determinate. I don't – nor do most contemporary analytic philosophers. In fact, my view appears to be quite consistent with the brief account of concepts she herself provides in her paper. Within current analytic philosophy of mind, as well as cognitive and developmental psychology, concepts are theorised as components of propositional states. These, in turn, subsist within the highly dynamic and open-ended context of an agent's cognitive and behavioural interaction with the world and internal mental activity (reasoning) – all of which is comprehended by a common-sense or folk theory of the agent, of human agency in general, and of the world at large. There is nothing particularly self-contained, stable, or determinate about concepts within such an ontological context.

In addition to this, though, our way as interpreters to the identification of the concepts possessed by an agent is through a complex and always incomplete theoretical reconstruction of that agent's past and present engagement with the world and of their reasoning (broadly construed).¹² What is available to us by such interpretation (if successful) is an understanding of the other that realises our contingent and highly situated interpretive and communicative ends, whatever they might be. We don't need Cartesian certainty about another's mental states in order to understand them. Interpretation has not been conceived of as *translation* (in this rigid sense) in the analytic tradition since Quine.¹³ To put it crudely, all successful interpretation demands on the analytic approach I subscribe to is that we be able to 'get by' in the array of communicative practices we engage in day by day. Such getting by is a pragmatic and highly contingent enterprise capable of failure and all the interpersonal and social consequences that go with failure. My sense is that all of this – drawn as it is from current mainstream analytic philosophy – is consistent with much of Davies's own account of concepts and that part of the continental background she draws on.

The extent to which I am right on this issue of shared ground may be evaluated with reference to any of a number of recent philosophical studies which have attempted to explore the degree of conceptual similarity and difference existing between representative thinkers and works across the two traditions. Two notable examples of this kind of work are Samuel Wheeler's essays on Derrida and Davidson on truth, language, and

¹² Henry M Wellman, *The Child's Theory of Mind* (1990); David K Henderson, *Interpretation and Explanation in the Human Sciences* (1993); Shaun Nichols and Stephen P Stich, *Mindreading: An Integrated Account of Pretence, Self-Awareness, and Understanding Other Minds* (2003).

¹³ Willard Van Ormond Quine, *Word and Object* (1960); Donald Davidson, *Inquiries into Truth and Interpretation* (1984).

meaning¹⁴ and Lee Braver's systematic exploration of the anti-realist commitments of virtually the whole of the Continental canon from Kant to Derrida – all through the lens of contemporary analytic metaphysics.¹⁵ In these works we see rehearsed an interpretive encounter between the two traditions involving the translation of the vocabulary of the one into that of the other and the glossing of the concepts utilised by the one in terms of the conceptual repertoire of the other – an encounter not unlike that engaged in by the interpretive judge of my book (or by Davies and I, for that matter, in this exchange).

III. Concepts and Culture

It is not surprising that Glaskin's concerns as an anthropologist focus on the notion of culture and the model of the understanding or interpretation of cultural phenomena which I elaborate in the book. These two issues are central to the anthropological endeavour. She is worried that I have failed to adequately capture the nature of these two things – at least, as they are seen from the anthropological perspective – by virtue of my taking an overly conceptual and cognitive approach to them. To the extent that my orientation towards these things arises out of my grounding in contemporary analytic and naturalistic philosophy her comments implicate the question of interdisciplinary differences raised more overtly by Davies. I won't address this aspect of Glaskin's paper to any significant extent here, though. Much of my reply to Davies could be relied upon in this regard. Whilst not indifferent to the findings of the discipline of anthropology in relation to its subject matter, the book is, at the end of the day, a work of applied analytic philosophy – not anthropology – and draws relatively rarely on anthropological theory.¹⁶ However, because both disciplines have been influenced by findings in cognitive and developmental psychology, a naturalistic philosophical approach to culture and its interpretation may be expected to be quite compatible with a great deal of the anthropological literature on these things – though, as with the continental tradition in philosophy itself, there may be a degree of terminological and even conceptual difference at work in the two discourses.¹⁷ Attending, then, to Glaskin's critique, let me briefly elaborate and defend the approach I take in the book to the fundamental questions of culture and interpretation.

¹⁴ Collected in Samuel C Wheeler, *Deconstruction as Analytic Philosophy* (2000).

¹⁵ Lee Braver, *A Thing of This World: A History of Continental Anti-Realism* (2007).

¹⁶ For the record, there is mention in the book of the work of the anthropologists Sapir, Geertz, and Clifford.

¹⁷ The various resonances Glaskin herself detects between our respective views speak to this, I think.

Glaskin's concern in relation to the notion of culture I operate with in the book largely flows from the concept-theoretic approach I take to it there. She worries that by construing cultural difference in terms of conceptual difference I render culture too cognitive, insufficiently experiential, and, as a result, 'strangely disembodied'.¹⁸ By her use of these terms, I take her to mean that on my account culture is too much a matter of what is *in the heads* of those who enact it and not enough a matter of their immersion in the concrete world – their *embodiment* in an (ultimately) physical body, set of behaviours, and a natural and social environment. Additionally, in my focus on the conceptual and its constitutive propositional and intentional context, she claims that my account of the mental aspect of culture fails to recognise the wider spectrum of mental states at play there – emotional states, for example.¹⁹ At base, she calls me to account for my failure to acknowledge the richness of culture and its transcendence of the 'merely' conceptual.

There is no doubt that I approach the question of culture, cultural difference and the interpretation of culture from a concept-theoretic perspective. My choice of this perspective is, in my view, though, entirely legitimate. It is a truism of any sound account of culture – anthropological or philosophical – that it is comprised most fundamentally by the thoughts, actions and artefacts of a group of people.²⁰ Even Glaskin acknowledges this. On such a construal, culture has a mental dimension together with a material dimension. In the context of an inquiry into the *understanding* of cultural phenomena (the subject matter of this book), it is the former of these dimensions that is of most importance. It is in the mental dimension of culture that the *object* of understanding or interpretation – namely, meaning

¹⁸ Glaskin says at p 3 of her paper, '...culture, as presented [in my book], has become "concept," and that regardless of the *intention* involved in rendering it thus, its *effect* is to render culture as largely cognitive, and as strangely disembodied.' Later at p 4, she reiterates this concern, saying that in my book, '[c]ulture and cultural difference are largely dealt with at a cognitive level, not a perceptual or experiential level: as comprised of "concepts" that can be broken down into *disembodied* sub-concepts.' (my emphasis) She holds (at p 1) that it is the book's 'emphasis on cognition in contrast to experience that appears to be responsible for an understanding of culture's *embodied dimensions* apparently vanishing here' (my emphasis).

¹⁹ Here her concerns intersect with her related critique of my theory-theory approach to the interpretation of culture and her implicit advocacy of what she sees as the more holistic and experiential simulation theory approach. I will have more to say on this below.

²⁰ My initial orientation towards the question of culture is by way of an action-theoretic approach.

– most prominently resides.²¹ It is, therefore, to the mental dimension of culture that any study into its interpretation must be oriented. If a judge were to look at an indigenous religious artefact and articulate her understanding of it solely (or even predominantly) in terms of its physical features ('It is red and round') or to look at an indigenous dance and articulate her understanding solely or predominantly in terms of the behavioural features of the participants or the physical features of the environment in which the dance takes place ('Four people are on a hill, waving their arms back and forth') we would not take her to have *understood* that artefact or practice in any proper sense. She would have failed to take something very important to understanding into account.

It is in the realm of the mental that the kind of meaning we are talking about here resides. And in the context of the kind of interpretive understanding a judge is involved in over the course of a legal proceeding, the most important part of the mental realm of the culturally different agents and testimonial witnesses she encounters is the *intentional* part. Intentional states together with their conceptual components are not only crucial to the actual *practice* of intercultural understanding – judicial or otherwise – they are fundamental in any credible *account* of that understanding and its cultural objects. As I argue in the book, where cultural difference obtains in such an encounter, that difference is best conceived of in terms of conceptual difference because it is this kind of difference – not difference merely in behaviour or even belief – that generates the incommensurabilist anxieties that preoccupy theorists and legal practitioners.²² Consequently, it is difficult to see how a concept-theoretic approach along the lines conducted in my book could be misguided as a methodological matter and how or why an alternative approach – specifically along the lines hinted at by Glaskin – would be preferable in this context.

In any event, whether methodologically justified on these grounds or not, my concept-theoretic approach does not render culture *disembodied* in any real sense. Part of the problem with Glaskin's analysis of my concept-theoretic approach is that she imputes to it a stark contrast between the conceptual on the one hand and the embodied on the other. That is, she thinks that concepts, as referred to within my book, are not embodied and that an approach which construes culture in terms of these will be an

²¹ It shouldn't be forgotten that on a functionalist account of the mental of the kind I adopt in the book, both behavioural and environmental aspects of cultural phenomena are ontologically and epistemically implicated.

²² In the context of an inquiry not merely into culture but cultural difference, I am led to derive a concept-theoretic approach from my initial action-theoretic approach.

approach that construes culture as disembodied.²³ She is, however, wrong to do so. First, as I make clear early on in the book, and as I elaborate to some length later on, concepts, as components of the intentional states within which they subsist, are real phenomena in the world. As real phenomena they are *physically realised*. They are given their ontological status in the world (as well as their theoretical status in my book) by virtue of being realised by physical, chemical, biological and other higher-order concrete phenomena. They are fundamentally embodied in this sense.

And from a functionalist perspective this is even more the case. Recall that on the physicalist and functionalist theory of mind I adopt in the book, intentional states and the concepts that comprise them are realised by brain states that meet certain conditions or fulfil a certain role or function defined by an appropriate (largely, folk) theory of mind. These ontologically relevant conditions have to do, amongst other things, with the environmental inputs and behavioural outputs experienced and enacted by each of the agents constituting the culture over the course of their lives.²⁴ Intentionality and *conceptuality* are, then, on my account, fundamentally embodied in the natural world, including the bodies, behaviours, and external environments of the culture-bearing agents in question. They ontologically implicate these things by their very nature as functional phenomena. In this light, my account of things seems quite compatible with the views of Hallowell that Glaskin endorses in her paper. She quotes Hallowell as holding that ‘...cultural difference might indeed be understood as having a physical basis. Our experiences, our perceptions of these experiences, our memory of these experiences and the learning that occurs through them rely on the fact that we have physical bodies – sensory perceptions, neural processing, and so on. We fundamentally experience the world and indeed our “selves” as a consequence of our physical embodiment.’ Exactly why Glaskin thinks I don’t hold to something like this view is not clear to me. Elsewhere in her paper, she appears willing to expressly acknowledge the credentials of my concept-theoretic model in

²³ Contrary to Glaskin’s take on this, it is precisely those incommensurabilists who consciously or unconsciously hold to a metaphysical dualism about mind and world that are committed to *disembodying* mind and meaning, as well as the cultural phenomena informed by these things. It is only if one believed that I held intentionality to be a non-physical and metaphysically distinct kind of thing – that is, it is only if one thought I was a mind-body dualist – that one might construe my intentionality-based and concept-theoretic model of culture as rendering culture disembodied. But as I make clear in the book, as a physicalist I utterly reject a metaphysical dualism of this kind.

²⁴ This is where the notion of ‘trajectory’ discussed in Davies comes into play.

this regard.²⁵ Again and consistent with my reply to Davies, I suspect that a more sustained effort of cross-disciplinary communication on both our parts would clarify things.

In addition to her concerns about my concept-theoretic view of culture, Glaskin is also sceptical about the theory-theory approach I take in the book to the understanding of culturally different phenomena. As with my account of culture, she appears to believe that my theory-theory of interpretation renders the process of cross-cultural understanding – and, indeed, enculturation, more generally – too cognitive. Again, she appears to use the term ‘cognitive’ here to connote a model of interpretation which is too much ‘in the head,’ in the sense of over-emphasising the theoretical identification by interpreter of the propositional states of the interpretee at the expense of the emotional and imaginary and embodied engagement of the one with the other.²⁶ That this is the nature of her concern is indicated, I think, in her alignment early in the paper with the key rival of theory-theory in analytic philosophy, the simulation theory of interpretation, which she takes as approximating her preferred experiential and (again) embodied model.

I don’t intend to justify here my preference for a theory-theory approach to interpretation over a simulation-based approach.²⁷ I refer the

²⁵ For example, she states on page 3 that ‘Connolly does argue, then, “for the existence of materially based minds, meanings and cultural differences” – it is the “immaterial” ones that do not exist – and this is a formulation which would appear to recognise the embodied dimensions of culture.’

²⁶ Glaskin says at p 1 that my ‘emphasis on the cognitive at the expense of the experiential has the effect of rendering culture and cultural difference as some kind of disembodied “thing” that can be acquired in abstract form.’

²⁷ Nor do I intend to explain in any detail the nature of and differences between the two approaches. Very simply, theory-theory conceives of the interpretation of the actions and utterances of others as involving a process of theoretical reasoning on the basis of a set of beliefs, including a folk psychological set of beliefs – all in a manner analogous to the way we come to know things in other epistemic contexts. Simulation theory downplays the role our folk psychology plays in interpretation and emphasises our practical capacity to simulate the experience of others – to imagine ourselves in the shoes of others – in order to explain or predict their actions. It is in this capacity for simulation or empathy that a role may be seen for those affective elements of mind Glaskin thinks important. See Martin Davies and Tony Stone, *Folk Psychology: The Theory of Mind Debate* (1995) for a useful collection of essays on this issue. See also Peter Carruthers and Peter K Smith, *Theories of Theories of Mind* (1996). Robert Gordon, Jane Heal, and Alvin Goldman are important advocates for the cause of simulation theory (see their essays in Davies and Stone (1995)).

reader to Chapter 5 of my book where I address this in some detail. Not only is simulation theory less compatible than theory-theory with the increasing body of empirical (psychological) evidence about interpersonal understanding amongst human beings,²⁸ it suffers from a number of independent and important theoretical defects compared to the theory-based model.²⁹ In addition to this though, a significant motivation for my adopting a theory-theory approach to interpretation is its compatibility with the physicalist methodology and its functionalist account of agency, action and intentionality which grounds the book as a whole.³⁰ The simulation theory of interpretation does not share this advantage to the same degree.

It is in light of the superiority of a theory-theory approach over a simulation theory approach that I pay relatively little attention to the role played in the process of interpretation by the non-cognitive dimensions of mind implicated in some versions of simulation theory. It is for the reasons just outlined that I don't agree with Glaskin's claim that I should have highlighted these things. Theory-theorists (including me) don't deny that emotions and the like may have a role to play in interpersonal interpretation. But I would want to see more evidence that, and how, this is the case before I was prepared to revisit my present view on this. I must also mention on this point that *even if* a simulation theory of interpretation were to be demonstrated to be correct, my sense is that only a part of my overall analysis of the judicial understanding of cultural difference would need revision. Much of the book's argument and analysis would stand

²⁸ See, for example, Wellman, above n 12; Peter Carruthers, 'Simulation and self-knowledge' in Carruthers and Smith, above n 27; Nichols and Stich, above n 12; and Susan Carey, *The Origins of Concepts* (2009).

²⁹ Botterill and Carruthers, for example, argue that 'theory theory not only furnishes us with a philosophical account of what conceptions of mental state types are: according to theory theory it is also the folk psychological theory which supplies the ordinary mindreader with those very conceptions. Simulationism, cannot very well just borrow this functionalist account, according to which such states as belief, desire, hope and fear are understood in terms of their general causal interactions with other mental states, characteristic stimuli, intentions and subsequent behaviour. Simulationism has to give up on the functionalist account of how we understand concepts in the vocabulary of propositional attitudes and intentional states – because such an account effectively involves implicit grasp of a theory. This looks like a serious gap unless the simulationist can come up with an equally plausible account of how we might conceptualise the propositional attitudes.' George Botterill and Peter Carruthers, *The Philosophy of Psychology* (1999) 81.

³⁰ I argue in Chapter 5 of the book that theory-theory is more consistent than simulation theory with the epistemic and methodological monism underlying physicalism.

relatively unaffected by this debate – most importantly, my conclusions in relation to the limits of difference and the possibility of and strategies for interpretive law reform.

Finally, a related concern Glaskin has here is that in outlining the role played in judicial understanding by concepts, conceptual development, and concept acquisition, I am excessively individualistic in my methodological orientation and fail to make room for the important role that socio-cultural structures play in our conceptual development and cognitive activity, more generally.³¹ Relying on Hallowell, she expresses concern about the way social structural phenomena feed into the developmental processes that I rely on in making sense of concept development and acquisition and about my failure to take adequate account of this. Implicated in this is her concern that I fail to address the way that culture is not only constituted by the actions and intentional states of its participants but that, in its more structural manifestations, it also informs those actions and intentional states in a complex feedback loop.³²

In response to this, I do not believe that my model of concept development ignores the role of pre-existing cultural and social structures on individual psychology. Though I will admit to an individualist orientation in my account of human concept development (without doubt, an artefact of my analytic philosophical tendencies), the findings of developmental and cognitive psychology, which I rely on so heavily throughout the book – particularly in the key chapter on this, Chapter 6 – demand that I attend to those pre-existing and socially situated sources of conceptual learning which act upon the developing mind. Indeed, Glaskin herself notes this when she concedes, ‘Connolly does speak of socialization, noting that “whilst there is an innate interpretive capacity whose developmental staging is the same across cultures, it is surrounded by a variable body of cultural accretions and concepts.”’ Other parts of the book speak too of the profoundly collective and social features of culture and understanding.³³ This is to say that I am not sure that Glaskin and I actually

³¹ For example, she states at p 3 that ‘it is important to also consider where culture sits within developmental processes’ and at p 4, claims ‘[j]ust how our socialization and enculturation really affects our perceptions and indeed accounts for the acquisition of “concepts,” is barely visible, though, in Connolly’s account.’

³² She speaks at p 4 of cultural differences reflecting ‘many of the basic orientations that culture provides the self.’

³³ Examples include the extensive discussion of the nature of culture-constituting collective and joint actions in Chapter 2, the collegial nature of much judicial reasoning and decision making in Chapter 3, and the institutional, social, and economic factors affecting judicial understanding in

disagree in any serious sense on the social dimensions of conceptual development and acculturation. Even so, I am sure that my account of these things could benefit from supplementation with some of the concepts and insights of anthropology – including those of Hallowell, D'Andrade, and Glaskin herself.

IV. The Limits of Interpretive Law Reform

Edmond comes to my book as (amongst other things) a theorist of the role and epistemic status of expert scientific evidence within the legal context. One of the important questions his paper raises is how the model of judicial understanding I develop in the book might be extended from situations involving alien cultures to those involving scientific phenomena and associated scientific discourse – what he terms 'other exogenous knowledges.' In asking this question, he raises a number of issues I have been concerned with of late. As both he and I recognise, his ongoing empirical and socio-legal inquiries into the nature and value of expert scientific evidence might usefully supplement (and might usefully be supplemented by) my nascent and more philosophically oriented study of the institutionalised interpretation of such evidence.

Though my concern in the book is with cross-cultural understanding and the judicial acquisition of culturally different concepts, in fact, the judiciary is called upon to acquire new concepts quite regularly. In a range of contexts the proper performance of the judicial role requires that judges learn new things and, as a result, conceptualise the world in a way which differs (admittedly only slightly in many cases) from the way they conceived of things before the hearing commenced. This is most notable in those contexts in which scientific phenomena (including medical and novel technological phenomena) are at stake. For example, over the course of a product liability case a judge may be required to gain a concept of the new or complex product alleged to have caused injury to the plaintiff in order to ascertain whether its manufacture involved an unreasonable risk of injury. Likewise, in a medical malpractice or other torts claim a judge may need to acquire for the first time a concept of the rare, newly discovered or otherwise unfamiliar illness or disability suffered by the plaintiff in order to determine whether its occurrence has been caused by the actions of the defendant.

In every situation in which a judge is required to reason about some phenomenon – an illness, a pharmaceutical, a technological device – say, to evaluate its comprehension by a legal definition or other standard or to infer as a matter of fact from its nature or structure to its causes or effects, the

judge must possess a concept of that phenomenon. She must have an idea of the thing. This is a necessary condition of reasoning about things. We reason with concepts. Where the phenomenon in question has not previously been encountered by the judge (whether directly through sensory experience or indirectly through the interpretation of texts or the testimony of others) and where, as a result, the judge does not possess a concept of the phenomenon at the commencement of the hearing in which it becomes an issue, the judge must *acquire* such a concept over the course of the hearing if she is to adequately perform her adjudicative role. For this to happen over the course of a hearing, the hearing process – its norms, its participants, its physical architecture, even – must realise or enable conditions conducive to such acquisition. It must provide an environment which facilitates this mode of judicial reasoning – the largely tacit, micro-reasoning of concept acquisition which occasionally informs the often more conscious macro-reasoning of deciding a case. Edmond and I both agree that the conditions under which judges think and act over the course of a hearing are not always as conducive to concept acquisition as they could or should be. By virtue of the kind of agent judges typically are and by virtue of the rules and other norms they are subject to and the physical environment they practice within over the course of a hearing, judges may be constrained in effectively acquiring the concepts they need to acquire in adjudicating matters before them. As a result, the quality of the justice they purport to provide those who come before them may be compromised.

In our respective work, both Edmond and I have sought to understand the nature of and reasons for this epistemic failure on the part of the legal system and identify those loci within the legal system where the risk of such failure is most acute. In my book I seek to provide a theoretical account of the nature of judicial concept acquisition, in general – to describe the cognitive and practical process by which new concepts are acquired by judges, to identify those aspects of the legal system which bear on the success or failure of that process, and to provide a framework for thinking about the reform of the legal system so as to better facilitate this important mode of judicial reasoning (subject, of course, to the demands of the other ends and values a legal system is also designed to serve). Where Edmond and I differ, though, it would appear, is in our sense of what the interpretive limits of a legal system such as ours might be – specifically, how much interpretive reform a legal system such as ours might be capable of. This is the second major issue in Edmond's paper – an issue also raised to some extent by Davies and Glaskin.

In my book, I am concerned with the possibility of judicial understanding as a *philosophical matter*. In addressing the once popular claim of a radical conceptual incommensurability existing within the law, I set out to explore just what degree of difference and interpretive incapacity

is necessitated or rendered possible in a legal system, given the truth of a philosophically naturalistic and scientifically informed theory of things. I am interested there in issues of theoretical possibility and necessity. As I have mentioned, what I conclude is that though a significant degree of conceptual difference between a judge and a culturally different agent or scientific expert is possible, it is not necessitated on this theory of things. The degree of difference which obtains in relation to a given judge and a given set of alien concepts at a given point in time depends, for the most part, on certain contingent facts to do with the judge's prior conceptual development.³⁴ Likewise, it is possible (but again, it is not necessarily the case) that a judge is not able to acquire an alien concept or set of concepts (cross-cultural or scientific) over the course of a legal hearing. Whether she can or not depends upon two contingent factors – the concepts already possessed by the judge at the commencement of the hearing and, what I term in the book, the epistemic conditions obtaining over the course of the hearing – things such as the sensory and cognitive capacities of the judge, the availability of evidence, rules of evidence, and so on.

Again, a local or widespread failure of judicial understanding is, on this account, entirely possible within the legal sphere. But, equally, a *successful* exercise in judicial understanding is possible, for any and all judges and for any and all culturally different actions. Everything here depends upon the content of the judge's conceptual scheme at the commencement of the hearing and upon the epistemic conditions which obtain for that judge (or for judges, generally) over the course of the hearing. In the book I argue that *theoretically, at least*, the epistemic conditions which obtain at a legal hearing may be conducive to a practically adequate degree of cross-cultural or scientific understanding. It is theoretically possible that the interpretive architecture of a given hearing or of all hearings (of the legal system, at large) may facilitate judicial understanding. But it is not necessarily the case that it will. A range of options are available within the limits of theoretical possibility I sketch in the book. Whether any of them are realised in any actual legal system is a contingent matter dependent upon the will and the resources of those responsible for the quality of judicial practice and legal institutional design within that system.

In his paper, Edmond discusses a number of reasons why, in fact, the kinds of interpretive reforms which he and I believe might be appropriate to a communicatively more effective legal system – whether in regard to the understanding of scientific phenomena or indigenous culture – are *not* likely to be realised in the Australian legal system. Edmond – rightly, I think – detects in my book an attitude towards the likelihood of the interpretive

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The nature and relevance of which I describe in Chapter 6 of the book.

reform of Australian law that is more sanguine than his. Though he never explicitly claims these impediments to understanding are necessitated in any strong sense, he clearly appears to believe them to be much more deeply rooted and less likely to be altered than I do. Which of us is more justified in our position here is a matter of evidence and argument and not something I address in any depth in the book. These are primarily questions of actual world likelihoods rather than theoretical possibilities.

Finally, one of the factors that Edmonds identifies in his paper as affecting a legal system's potential for interpretive reform is the political ideology and associated power relations that inform judicial practice and the legal system at large. In raising this issue, his comments intersect with comments made by both Davies and Glaskin concerning what they construe as a failure on my part to seriously address the role of ideology and political power within the legal system – particularly, in relation to the claims of indigenous and other marginalised peoples. I don't believe that such a construal is justified, however. Though I don't discuss the operation of ideology and power in the law in any great detail in the book, this should not be taken as evidence that these things are not taken seriously there as relevant to the quality of cross-cultural understanding and recognition. That ideological factors may play out – or actually do play out – in the practice and design of any given legal system is entirely provided for in my account. I make it very clear in Chapters 6 and 7, for example, that the worldview, as well as conceptual scheme, which a judge brings to the hearing is a key factor in the success of her interpretive endeavours. Such a worldview will necessarily be ideologically influenced – though, again, I admit I do not explore this to any significant degree. Likewise, a number of the categories of epistemic conditions affecting judicial understanding at trial implicate the operation of a judicial ideology.³⁵

Recall that the purpose of the book is to explore what is theoretically possible as far as interpretive reform is concerned – not what is likely or politically feasible. The book seeks to clear away certain philosophical obstacles – including exaggerated incommensurabilist views about law – in order to clarify the potential for law reform and, by virtue of that, contribute to a rationale for pursuing reform. In this sense, it is fundamentally informed by the same 'politics of recognition' that motivates the views of all three commentators. It is true that I do not describe the actual ideological constraints which contingently operate on law's communicative enterprise in any specific jurisdiction. But as I clearly say in the book, such is beyond my brief in writing it. I expressly leave the detailed consideration of the precise obstacles and constraints actually at work in any given legal system

³⁵ These include the processes of judicial selection and education which are described in some detail in Chapter 7.

– whether ideological or otherwise – to others, as well as to future inquiries on my part. Of course, all the interpretive reform in the world won't assist the legitimate claims of marginalised people if the very aims and objectives – the ideological orientation, if you like – of the legal system itself are ranged against them. Though understanding is a necessary condition of an appropriate mode of legal recognition of claimants, I state clearly in the book that it is not a *sufficient* condition. But necessary it is and well worth pursuing, both theoretically and practically. I am grateful to the participants in this symposium for providing me with insights which will assist me in my ongoing pursuit.