

BOOK REVIEW

KYLLIE CRIPPS*

**J Kimm, *A Fatal Conjunction: Two Laws Two Cultures*
(The Federation Press 2004) 212 pp**

Family violence is a cancerous disease that is destroying us, eating at the very heart of our culture, and our future as a people. Women are being maimed and killed, children's lives scarred, and our young men sentenced to prison and further cycles of abuse and self abuse ...

We're killing ourselves. If we don't do some thing NOW there won't be a future for us. It's not a women's problem. It isn't a men's problem either. It's a community problem and the whole community has to be involved, to be told what's happening ... [and to] take responsibility for finding solutions.¹

Some fifteen years ago Judy Atkinson, quoted above, an Australian Indigenous woman with many years of experience in this field, described the devastating consequences of violence upon Indigenous men, women and children. She also declared in explicit terms that Indigenous people were killing themselves. Unfortunately, in the considerable time that has since passed, nothing much has changed. The violence has escalated to epidemic proportions with 'very few Aboriginal families ... not struggling with the debilitating effects of trauma, despair and damage resulting from their experiences with violence.'² Neither Indigenous leaders nor the Australian government and its various agencies have been able to curb the violence. It is little wonder then that thirteen years on, this mounting problem continues to be described in tones and expressions similar to Atkinson's: 'we are killing our future ... we will, in the end, have destroyed ourselves if we do not put a stop to family violence now';³ 'violence is undermining our life's very essence, it is destroying us';⁴ and 'this is a national crisis'.⁵

In recognising that past actions to combat the problem have been ineffective, Indigenous leaders and the Australian government now acknowledge that Indigenous women and children have the right to be protected against persecution in the form of family violence and that Indigenous people need 'extreme actions' to combat an

* Dr Kyllie Cripps BA, BA(Hons) (UniSA), PhD (Mon) is a Post Doctoral Research Fellow in the Onemda VicHealth Koori Health Unit at the University of Melbourne.

¹ J Atkinson (ed), *Beyond Violence: Finding the Dream* (National Domestic Violence Education Program, Office of the Status of Women, Department of Prime Minister & Cabinet, 1990) 3, 17.

² M Dodson, 'Violence Dysfunction Aboriginality' (Paper presented at the National Press Club, Canberra, 11 June 2003) 2.

³ J Huggins, 'Our War on Terror at Home: Indigenous Family Violence' (Paper presented at the National Indigenous Domestic Violence Conference, Gold Coast, 22 October 2003) 4.

⁴ Dodson, above n 2, 2.

⁵ Noel Pearson, *Underlying Principles of a New Policy for the Restoration of Indigenous Social Order* (2003) Cape York Partnerships <<http://www.capeyorkpartnerships.com/noelpearson/pdf/np-restore-social-order-23-7-03.pdf>> at 5 August 2003.

'extreme situation'.⁶ Many of us are about the business of designing and implementing tangible, practical solutions to combat the problem. In many Indigenous communities, such initiatives would, however, appear to be a long way off, particularly as communities struggle to understand *why* this is happening. I had hoped Joan Kimm's recently released book *A Fatal Conjunction: Two Laws Two Cultures* would have helped us to develop a better understanding of the *why*, particularly as the synopsis of her work on the back cover states 'in this considered and carefully researched book, Joan Kimm discusses the extent and nature of the violence, its underlying causes, current policies that deal with it, and changes that might improve these policies.' The latter I felt had the potential to create a space for ongoing dialogue on the important question "where to from here?" amongst Indigenous and non Indigenous community workers, policy makers, the legal fraternity, politicians, researchers and those others trying to make a positive difference in the lives of those effected by violence - a dialogue that Indigenous communities are crying out for as we seek potential solutions to the endemic violence plaguing us. It was the one aspect of the book that I most looked forward to exploring.

Kimm's book seeks to analyse the effect on Aboriginal women of two patriarchies and two laws, Indigenous and non Indigenous, and how present violence is affected by a heritage of past violence within and between these two cultures. This is achieved through a qualitative examination of violence through the lens of the law, in a discussion of selected law cases dating from the 1950s in their historical and anthropological contexts. In particular, Kimm's work analyses the rights that judges have accorded to Aboriginal men as perpetrators of violence against Aboriginal women and to women as victims of that violence. Her examples illustrate that in the past, the scales of justice were not tipped in favour of women.⁷ Kimm's argument is based on two major themes: firstly, that Indigenous men claim that the violence they inflict on women is in accordance with their traditional cultural customs and secondly, that the judicial system has allowed the violence to occur with impunity because of 'distorted views of the respect which must be paid to Indigenous rights'.⁸ In combination she argues these factors explain why the scales of justice have not been tipped in favour of Indigenous women.

In responding to these themes I will begin by stating that as an Indigenous woman I am not in a position to challenge Indigenous men's assertions of traditional cultural customs as their experience is not within my frame of experience or understanding. Kimm takes the position that 'ritual or customary law violence is something quite other than family violence, although the former may well be a cultural heritage from classical society, which endorses and thus has contributed to the present violence of Aboriginal men to Aboriginal women'.⁹ How traditional violence was or was not meted out in classical times and in what contexts, is knowledge that as researchers we may never be able to prove or disprove. The anthropological foundation upon which this knowledge is largely founded, and which Kimm sources to substantiate her arguments, has been widely critiqued by Indigenous researchers as largely reflective of the power and control

⁶ Dodson, above n 2.

⁷ J Kimm, *A Fatal Conjunction: Two Laws Two Cultures* (The Federation Press, 2004) 137.

⁸ *Ibid* ix.

⁹ *Ibid* 45.

held by the dominant group.¹⁰ For some time now Indigenous people and others, have been speaking back and challenging the disciplines such as anthropology, critiquing and interrogating their works and asking different questions – ‘producing alternative and disruptive accounts that are useful for a fuller understanding [of subjects such as traditional violence]’.¹¹ In light of this *new* information I would argue that presenting an argument that often privileges the non Indigenous “outsider” over Indigenous experiences and knowledge in this area, as Kimm attempts to do in her argument that violence was and is a part of Indigenous culture, is far too simplistic and is guilty of myth-making. I would further contend in so doing she re-asserts her colonial privilege and disempowers the voice and insight of both Indigenous men and women. This does little to assist us in understanding why this violence occurs in the contemporary scene. I would agree with Kimm that ritual or customary law violence is something quite other than family violence and I would argue that the indiscriminate violence occurring in Indigenous communities today is far removed from the traditional context. Significant amounts of research have now been conducted in the field of Indigenous family violence and it indicates overwhelmingly that factors contributing to its occurrence are multiple and cumulative. Contrary to Kimm’s beliefs, the research¹² consistently argues that the most likely factors extend from colonial histories of dispossession and dislocation to the immediate experiences of unemployment, welfare dependency and

¹⁰ M Nakata, ‘Anthropological Texts and Indigenous Standpoints’ (1998) 2 *Journal of Aboriginal Studies* 3-15.

¹¹ M Nakata, *Indigenous Australian Studies & Higher Education* (2004) The Wentworth Lectures - Australian Institute of Aboriginal & Torres Strait Islander Studies <http://www.aiatsis.gov.au/lbry/dig_prm/wentworth/a352185_a.pdf> at 13 September 2005, 6. See also, I Anderson, ‘Black Bit, White Bit’ in M Grossman (ed) *Blacklines: Contemporary Critical Writing by Indigenous Australians* (Melbourne University Press, 2003); L Behrendt, *Achieving Social Justice: Indigenous Rights and Australia’s Future* (The Federation Press, 2003); T Birch, ‘Nothing has Changed:’ The Making and Unmaking of Koori Culture’ in M Grossman (ed) *Blacklines: Contemporary Critical Writing by Indigenous Australians* (Melbourne University Press, 2003); D Cronin, ‘Indigenous Disadvantage, Indigenous Governance and the Notion of a Treaty in Australia: An Indigenous Perspective’ in *Treaty: Let’s Get it Right*, (Aboriginal Studies Press, 2003); M Davis, ‘International Human Rights Law and the Domestic Treaty Process’ in *Treaty: Let’s Get it Right* (Aboriginal Studies Press, 2003); M Dodson, *The End in the Beginning Re(De)fining Aboriginality* (1994) Australian Institute of Aboriginal and Torres Strait Islander Studies <http://www.aiatsis.gov.au/lbry/dig_prm/wentworth/m0008523_a.rtf> at 20 November 2003; A Heiss, *Dhuuluu-Yala: To Talk Straight* (Aboriginal Studies Press, 2003); M Langton, *Aborigines and Policing: Aboriginal Solutions from Northern Territory Communities* (1992) Australian Institute of Aboriginal and Torres Strait Islander Studies <http://www.aiatsis.gov.au/lbry/dig_prm/wentworth/m0007677_a.rtf> at 20 November 2003; M Langton, *Burning Questions: Emerging Environmental Issue for Indigenous Peoples in Northern Australia* (Centre for Indigenous Natural and Cultural Resources Management, NTU, 1998); M Langton, ‘Aboriginal Art and Film: The Politics of Representation’ in M Grossman (ed) *Blacklines: Contemporary Critical Writing by Indigenous Australians* (Melbourne University Press, 2003); A Moreton-Robinson, ‘Tiddas Talking’ up to the White Woman: When Huggins et al Took on Bell’ in M Grossman (ed) *Blacklines: Contemporary Critical Writing by Indigenous Australians* (Melbourne University Press, 2003); P Morrissey, ‘Aboriginality and Corporatism’ in M Grossman (ed) *Blacklines: Contemporary Critical Writing by Indigenous Australians* (Melbourne University Press, 2003); R Quiggan and T Janke, ‘How do we Treat our Treasures? Indigenous Heritage Rights in a Treaty’ in *Treaty: Let’s Get it Right* (Aboriginal Studies Press, 2003).

¹² See eg, Atkinson, above n 1; Dodson, above n 2; S Gordon, *Putting the Picture Together: Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (State Law Publisher, 2002); Huggins, above n 3; B Robertson, *The Aboriginal and Torres Strait Islander Women’s Task Force on Violence Report* (Queensland Government, 1999).

addictions. It is my position that we must understand this broader context of the violence that occurs today so that efforts can then be channelled into finding the most appropriate ways of responding to it.

Kimm's second theme, regarding the role the justice system has played in allowing the violence in Indigenous communities to continue, is in my opinion where the strengths of this work could be potentially found. Kimm provides a litany of examples of Indigenous women's experiences within every arm of the judicial process - from the police, to the magistrates, to the appeals court. Her examples highlight and support Indigenous women's claims that the justice system in family violence related matters is ineffective and can often further exacerbate the trauma they have experienced. Not only that, her examples illustrate that despite significant attempts via cultural awareness training and the employment of Indigenous staff, the justice system continues to be affected by racism and misconceived notions of what Indigenous cultural lores and norms constitute. Kimm, in making this argument, states that the 'judiciary in the past have not treated the violence as seriously as they would if it had affected other Australian women. Court cases show that these patterns have been repeated in every criminal law jurisdiction'.¹³ My own research of Indigenous family violence and community responses to the problem found that this was the case not only in cases involving Indigenous offenders but also in those involving *non Indigenous* offenders. Judgements relating to Indigenous women, and children, as victims of violence have in some cases been extremely offensive. Take for example the statement made by Judge Forster when he handed down a 12 month suspended sentence in a Northern Territory case where a non Indigenous defendant pleaded guilty to sexual intercourse with a 10 year old Aboriginal girl:

Sexual promiscuity in young Aboriginal girls is sufficiently common for me to have the difficulty in believing she had no previous experience and that you may not have been the only one to enjoy her favours. However, this is a serious offence, young girls like this one must be protected against themselves. Nevertheless I do not regard this offence as seriously as I would if both parties were white.¹⁴

In this case and many others that have been heard in Australian courts, Indigenous women and children receive a very clear message that the legal system is not a place where equality between the sexes or races exists; nor can the kind of justice Indigenous people are seeking be served. To the contrary, it condones the violence and relegates Indigenous women and children to the periphery of society. It is therefore not surprising that Aboriginal women are choosing not to use the system in their battle against family violence.

Kimm also acknowledges that when the offender is Indigenous, Aboriginal women face the real possibility that if they make a complaint via the justice system, imprisonment of the perpetrator is likely, as criminal charges are laid and convictions in particular are recorded in a much higher proportion of cases involving Aboriginal offenders than in those involving Europeans in domestic assault cases.¹⁵ Kimm explains that the higher proportion of Indigenous men incarcerated can be attributed to 'the fact that Aboriginal women suffer significantly more serious injuries than do European women. Extensive

¹³ Kimm, above n 7, 13.

¹⁴ Cited in C Eatock, *Speak Quiet, Speak Strong* (Cudjuria Films, 1995).

¹⁵ Kimm, above n 7, 16.

medical treatment is usually necessary. Therefore it is almost mandatory for charges to be laid'.¹⁶ I would argue that the reasons for Indigenous men's over-representation in the justice system is much more nuanced than in Kimm's account. It is widely understood that the particularly poor relations between police forces and Indigenous communities is one important aspect of this over-representation. The nature of policing in Indigenous communities is imbedded in a historical context as police were the vehicle by which many government policies were enforced, including the removal of children from their families. It is this historical legacy in part that continues to impact not only on the disproportionate numbers of Indigenous men incarcerated, often as a result of "over" policing, but also contributes to Indigenous women actively choosing not to use the system through fear of its consequences upon their families.¹⁷ Indigenous women instead have lobbied for quite some time for approaches that will stop the violence and involve their men in a process of healing. They argue that the justice system breeds yet more violence by jailing men without effective intervention to stop their violent behaviour either before or after their release, thus effectively keeping the cycle of violence in motion. Indigenous men and women across the country are currently working together to trial and implement new initiatives that will support men to break the cycle of their abusive behaviours. Such efforts, whilst being relatively new, have however gone largely unrecognised by the popular media and academia including in the work of Kimm.

Kimm's discussions relating to the use by Aboriginal men of the traditional violence defence, in court cases in which they have been charged with serious assaults and homicides, caused me some concern. She argues that Indigenous men's superiority over Indigenous women and their role as the enforcers of traditional law in classical times have supposedly transcended into the contemporary realm where they have been successfully used in the justice system to legitimise their abuse of Indigenous women. She provides many examples from the 1950s to the early 1990s to illustrate the use of customary law defences and how the judiciary, particularly in the 1950s and 1960s, accepted such defences primarily because:

Native trials are always difficult. Some of you gentlemen ... have had a good deal of experience with natives... some of you have had little experience... I have only had... five years of such experience. At the end of my fifth year I feel less qualified to express an opinion about natives than at the end of my first year. The older I get the less I know about them. However nothing can be done about that – you must decide this case as best you can.¹⁸

She admits that during the past 50 years as the strict legalism of classical Aboriginal society as we "know" it in the post contact era (as it must be noted that we may never truly "know" what Aboriginal society was like pre contact) has increasingly broken down, the context of customary law defences and judicial attitudes towards them have changed. This is not to say that such defences do not continue to be used, but that judges since the 1970s have been aware that traditional violence is often being distorted by alcohol,¹⁹ and they are thus less inclined to allow perpetrators to escape punishment for their crimes.

¹⁶ Ibid.

¹⁷ C Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Aboriginal Studies Press, 2001).

¹⁸ *Nelson (Aboriginal)* [1956] NTJ 327, 92 (Kriewaldt J).

¹⁹ Kimm, above n 7, 97.

Other aspects of Kimm's book that I found to be particularly problematic include its title and its methodological and theoretical approach to the subject matter. If one begins with the title of the book *A Fatal Conjunction: Two Laws Two Cultures*, the Oxford Dictionary²⁰ defines "fatal" as 'producing or resulting in death, destruction, or irreversible ruin, material or immaterial; deadly, destructive, ruinous' and conjunction as 'the action of conjoining; the fact or condition of being conjoined; union, connexion, combination.' Thus the title points to the "fatal" or destructive consequences that have resulted from the meeting of two laws and two cultures. Let me begin by stating the obvious - two laws do not exist in this country - in the present context only one system of law takes overwhelming primacy. However, limited acknowledgement of the prior existence of Indigenous customary law and its potential influence in the lives of *some* Indigenous people today is recognised by the courts – thus the meeting of 'two laws' I would think has not been "fatal". 'Two cultures' is also highly misleading; setting a dichotomy between Indigenous and non Indigenous with the suggestion that there is also a fatal conjunction of the two. This argument is flawed on a number of levels. First, there is more than one culture in both the Indigenous and non Indigenous contexts, neither group is homogenous. Second, I would argue that the use of such a phrase in this context, and as it unfolds in the book itself, perpetuates the dichotomy of difference that is based on a colonial legacy of power and force and the privileging of one group of people over another. The third point I would make is that in the spirit of reconciliation and in the desperate circumstances we face with current levels of Indigenous family violence, it is counterproductive to refer to two separate but "fatally" interacting entities. There has to be a dialogue and commonality between the groups concerned at a number of levels, on a number of issues, if we are to begin a process of healing in addition to reconnecting and valuing families.

As an Indigenous researcher in this field, what concerned me most about this book was Kimm's lack of critical reflection on her subject position firstly, as a white woman, and secondly as an academic²¹ and a solicitor endorsed to speak as an authoritative voice on this issue. I am not suggesting that non Indigenous women or for that matter men should not write about this issue but that they should acknowledge in their text that as socially situated subjects they speak out of different cultures, knowledges, experiences, histories and material conditions which are sometimes in stark contrast and separate to our politics and our analyses on topics such as intra-cultural violence.²² Furthermore, a balanced review of this topic, which I do not believe Kimm has provided, requires input from Indigenous communities, in particular from the women and children who suffer its dire consequences. Are they not the "true" authorities on this topic? Do they agree with Kimm's analyses? Is that their lived experiences? To focus one's entire research primarily on legal case studies and use anthropological and historical "evidence" to support particular arguments, as Kimm has done, seriously limits the reader from grasping the bigger picture of Indigenous family violence as it operates across Australia. For example, it is widely understood that the majority of family violence cases do not appear before the courts. In the non Indigenous setting as little as 20 percent are reported to the appropriate authorities and the percentage would no doubt be even

²⁰ Oxford English Dictionary Online (2004) Oxford University Press <<http://dictionary.oed.com>> at 24 November 2004.

²¹ This work was originally submitted in fulfilment of the requirements for the degree of Masters of Laws at Monash University in 1999.

²² Moreton-Robinson, above n 11, 77.

smaller in the Indigenous setting.²³ Kimm's approach therefore does not do justice to the historical or cultural contexts of Indigenous family violence and is in danger of over-simplifying and distorting the lived realities of Indigenous communities enduring this problem. I would recommend that readers wanting a more thorough engagement with Indigenous family violence read the texts written by Atkinson, Dodson, Gordon, Huggins and Robertson referred to earlier in this review.

In many ways Kimm's work also provides a space in which people, particularly the general public, can fall back on dangerous stereotypes about Indigenous people and the choices we have made and continue to make for ourselves. These stereotypes can often "blame the victim" – 'violence is normal for them it is part of their culture' – which effectively inhibits any action on the part of Indigenous and non Indigenous people and governments to be part of the solution. Neill²⁴ has argued that it has been all too easy for the Australian society and its institutions to dismiss the escalating violence in Indigenous communities as "the Aboriginal way" or to portray it as "black fellas business"; best resolved internally. Indigenous women and more recently men have reported the inappropriateness of such an approach and have spoken of their frustrations in the refusal of institutions, governments and the judiciary to confront the problem. They have insisted that, now more than ever before, an ongoing dialogue needs to occur to build effective partnerships with Indigenous people and communities to address the problem of family violence.

The overwhelming message I received from reading Kimm's book was that she blames Indigenous culture for the circumstances Indigenous communities find themselves in today and, because of the way the dominant western legal system operates, she provides little hope that things can be changed. Such an approach, as I have argued throughout this review, helps nobody and serves only to ensure that this problem remains in the "too hard basket". Kimm's approach fails to adequately recognise that whilst this is indeed a hard problem to deal with, Indigenous and non Indigenous people are doing something about it and have been for some time. I would argue that with continued support and commitment from our fellow Australians working in partnership with us, including those from the legal profession - *we* can beat this – there is hope.

²³ *Crime and Justice Special Article – Violence Against Women* (2002) Australian Bureau of Statistics <http://www.abs.gov.au/Ausstats/abs@.nsf/Lookup/0B565C403B0A0356CA2569DE0025631C> at 23 November 2004, 5.

²⁴ R Neill, *White Out: How Politics is Killing Black Australia* (Allen & Unwin, 2002).