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Indigenous Lawyers in Canada: Identity, Professionalization, Law

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Sonia Lawrence*
Signa Daum Shanks**

Indigenous Lawyers in Canada:
Identity, Professionalization, Law

For Indigenous communities and individuals in Canada, “Canadian” law has been a mechanism of assimilation, colonial governance and dispossession, a basis for the assertion of rights, and a method of resistance. How do Indigenous lawyers in Canada make sense of these contradictory threads and their roles and responsibilities? This paper urges attention to the lives and experiences of Indigenous lawyers, noting that the number of self-identified Indigenous lawyers has been rapidly growing since the 1990s. At the same time, Indigenous scholars are focusing on the work of revitalizing Indigenous law and legal orders. Under these conditions, Indigenous lawyers occupy a complicated space. This article considers scholarship about other outsider groups in the profession, including women and African Americans, and the existing literature about Indigenous lawyers, developing three themes: community and belonging after professionalization; expectations and discrimination; and the difference that Indigenous lawyers may make. The article concludes by addressing ethical questions raised by the proposal for a qualitative, interview based approach to studying the experiences and ethics of Canada’s Indigenous lawyers.

Au Canada, pour les communautés autochtones et leurs membres, le droit « canadien » a été un mécanisme d’assimilation, de gouvernance coloniale et de dépossession, une base sur laquelle asseoir l’affirmation de leurs droits et un mode de résistance. Comment, au Canada, les avocats autochtones arrivent-ils à concilier ces fils conducteurs contradictoires avec leurs rôles et responsabilités? Les auteures attirent l’attention sur les vies et les expériences des avocats autochtones, soulignant que le nombre d’avocats qui se déclarent autochtones augmente rapidement depuis les années 1990. En même temps, les universitaires autochtones s’efforcent de revitaliser le droit et les ordonnances autochtones. C’est donc dire que les avocats autochtones occupent une sphère complexe. L’article traite des bourses d’études accordées à d’autres groupes de personnes qui n’exercent pas traditionnellement cette profession, notamment les femmes et les Afro-américains, ainsi que la documentation existante sur les avocats autochtones, et se développe autour de trois thèmes : la communauté et le sentiment d’appartenance après la professionnalisation, les attentes et la discrimination, ainsi que la différence que peuvent apporter les avocats autochtones. En conclusion, les auteures abordent des questions relatives à l’éthique soulevées par la proposition d’approche qualitative fondée sur des entrevues pour étudier les expériences et l’éthique des avocats autochtones au Canada.

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*"We are the road-people that negotiate the boundaries between freedom and imprisonment of our peoples."*¹

Introduction

For Indigenous communities and individuals in Canada, "Canadian" law has been a mechanism of assimilation, colonial governance and dispossession, a basis for the assertion of rights, and a method of resistance. Indigenous people were effectively excluded from legal education and the profession for decades, but the number of Indigenous lawyers doubled at some point in the mid-1990s. New rights and zones of struggle created by the 1982 inclusion of Aboriginal rights under section 35 of the Constitution are now under critique by Indigenous scholars urging Indigenous people to reject these colonizing tools, and focus instead on the work of rebuilding Indigenous law and legal traditions.² Under these conditions, Indigenous

1. James (Sákéj) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 *Indigenous LJ* 1 at 15.

2. John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19 *Wash UJL & Pol'y* 167; Val Napoleon & Hadley Friedland, "The Inside Job: Engaging With Indigenous Legal Traditions Through Stories" in José Antonio Lucero & Dale Turner, eds, *Oxford Handbook on Indigenous Peoples' Politics* (Oxford: Oxford University Press) [forthcoming]; Henderson, *ibid*; Law Commission of Canada, *Justice Within: Indigenous Legal Traditions* (Ottawa: Law Commission of Canada, 2006); Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

lawyers occupy a complicated space, with some asserting that “the Indian lawyer is in fundamental contradiction” working within a colonial legal system.³ How do Indigenous lawyers negotiate the relationships between their identities, their performance of those identities, law and legal institutions, and their roles as Indigenous community members and legal professionals? How do they navigate the tensions?

This paper reviews the available scholarly literature about Indigenous lawyers in a variety of jurisdictions, exploring questions and conclusions about the formation and expression or performance of the identity of “Indigenous lawyer.” Part I offers a review of scholarship on outsider groups in the profession and, in particular, scholarship on Indigenous lawyers. Part II identifies three areas in which that literature notes relationships between identity, law and lawyering, and indigeneity: (1) belonging and exclusion: community after professionalization; (2) imposition and expectations: performing identities; and (3) (how) will Indigenous lawyers make a difference? The last part proposes a qualitative research project about Indigenous lawyers, and considers the theoretical frameworks and necessary ethical grounding for such a study.

I. Indigenous identity and the legal profession

This paper proposes to consider the intersection of two groups—the legal profession and the Indigenous community—through those individuals who consider themselves part of both. Each group has been subjected to considerable academic study and theorizing under a variety of frameworks.⁴ In this section, we briefly note the scope of the academic literature on Indigenous identities before turning to work about the legal profession and “outsiders” generally. We then consider studies specifically focused on Indigenous⁵ lawyers.

There is a very crowded field of thought about the definitions, formation and meaning of “identity,” about indigeneity and about race and culture. Our observations here complement without directly addressing scholarship which considers whether and when indigeneity should be treated as race, ethnicity, or a political community.⁶ Rather than adopting

3. Matthew LM Fletcher, “Dibakonigowin: Indian Lawyer as Abductee” (2006) 31:2 Okla City UL Rev 209 at 211.

4. We use “community” broadly here, accepting both that there are a number of Indigenous communities and that the scope and significance of the larger concept will be contested.

5. “Indigenous” is our preferred term. Where appropriate, we have included work that uses other terms (“Indian,” “Aboriginal,” “Aborigine,” “Native”) under this rubric.

6. Sebastien Grammond, “Disentangling Race and Indigenous Status: The Role of Ethnicity” (2007) 33:2 Queen’s LJ 487; Val Napoleon, “Extinction by Number: Colonialism Made Easy” (2001) 16:1 CJLS 113; Taiaiake Alfred & Jeff Corntassel, “Being Indigenous: Resurgences against Contemporary

or formulating a definition of identity from this scholarship, this review is interested in how Indigenous lawyers discuss, conceptualize, or experience ideas like community, home, peers, geographies, and any of the many other ways in which identity is defined in their own words. Identity encompasses ideas and experiences of belonging and exclusion such that the self-generation is informed by the actions of other individuals and of groups and how these are experienced as welcoming or excluding. This also suggests that we will all try to condition these responses of others, to act so that they correctly welcome us or correctly recognize what we want them to recognize as our identity. We may try to forestall exclusion or invite it and we may engage in all of this behaviour because of or in spite of a personal vision of our identity that is complicated and significantly contingent and fluid.

Indigenous people describe their sense of their Indigenous identity in a variety of ways—layered, fluid, static. As Jean-Paul Restoule notes, arguing for a notion of “identifying” rather than “identity,”

[i]dentifying is a process of being and becoming what one is in the moment....Identifying is situational and historical, whereas identity is thought to transcend history and social situations.⁷

Understanding how identifying works requires that scholars understand the way that individuals see their identity and are open to the potential for fluid, interlocking, and even contradictory self-identities. This might include understanding a person’s experiences being “identified” by others and how they experienced and responded to those moments (for instance, Mary Ellen Turpel describes being treated as smarter both inside and outside her family because of her lighter skin⁸). Many scholars consider the question of how Indigenous people generate, shift between, and display their identities.⁹ Restoule’s approach is sensitive to the “reality of living in a

Colonialism” (2005) 40:4 *Government & Opposition* 597.

7. Jean-Paul Restoule, “Aboriginal Identity: The Need for Historical and Contextual Perspectives” (2000) 24:2 *Can J Native Education* 102 at 103.

8. Jack Aubrey, “Native Prodigy Soars to Top: Mary Ellen Turpel Finds Glory at the End of a Hard Road,” *Ottawa Citizen* (16 April 1995), reproduced in Saskatchewan Education, *Canadian Studies 30: Native Studies Resource Guide* (Regina: Saskatchewan Education, 1997) at 21, online: <https://www.edonline.sk.ca/bbcswebdav/library/Curriculum%20Website/Social%20Studies/Resources_old/Core/canadian_studies_30_native_studies_resource_guide.pdf>; see also Patricia A Monture, “Now That the Door Is Open: First Nations and the Law School Experience” (1990) 15:2 *Queen’s LJ* 179; Tracey Lindberg, “What Do You Call an Indian Woman with a Law Degree: Nine Aboriginal Women at the University of Saskatchewan College of Law Speak Out” (1997) 9:2 *CJWL* 301.

9. Avril Bell, *Relating Indigenous and Settler Identities: Beyond Domination* (New York: Palgrave Macmillan, 2014); Eva Marie Garroutte, *Real Indians: Identity and the Survival of Native America* (Berkeley: University of California Press, 2003) [Garroutte, *Real Indians*]; Stephanie Lawson, “The Politics of Indigenous Identity: An Introductory Commentary” (2014) 20:1 *Nationalism & Ethnic*

dispersed culture where there have been generations of increased pressure not to exhibit these cultural knowledges.”¹⁰ This can produce particular kinds of claims to belonging or not belonging, and almost certainly means that Indigenous people will be “identified” by others in ways that fail to reflect any of the visions they have of themselves. Restoule also points out that identifying (along a particular vector of difference) as a process is more redundant in communities which are homogeneous (along that vector), but takes on particular salience in communities which are understood to be heterogeneous.¹¹ Identifying with one worldview or community of people is done against other possibilities—settler identities, other Indigenous identities.

Contemporary scholarship about identity, following Stuart Hall, suggests that identity shifts and changes, is fluid, not the “stable core of the self, unfolding from beginning to end through all the vicissitudes of history.”¹² Instead, as Harris, Carlson, and Poata-Smith claim, “human actors deliberately and intentionally act out their identities in ever-changing ways as a consequence of the social relations and settings in which they find themselves.”¹³ The potential for fluidity, combined with high stakes (access to or exclusion from status, resources, connections, lands, communities) also leads to the intense political contestation over identification issues.¹⁴ Under these conditions, there are a number of different contextual features of identity claims which will always matter: (1) Who is claiming, ascribing, denying the identity? Is it a self-identification? An inclusion or exclusion by an Indigenous community? An inclusion or exclusion by the State?¹⁵ (2) In what kind of space/time—or in relation to what space/time—is the identity being claimed or ascribed?¹⁶ (3) What projects are served by the inclusion or exclusion effected?¹⁷

Politics 1.

10. Restoule, *supra* note 7 at 105.

11. *Ibid*; Bell, *supra* note 9; Hilary N Weaver, “Indigenous Identity: What Is It, and Who Really Has It?” (2001) 25:2 *American Indian Q* 240.

12. Stuart Hall, “Introduction: Who Needs ‘Identity’?” in Stuart Hall & Paul du Gay, eds, *Questions of Identity* (Thousand Oaks, CA: SAGE, 1996) 1 at 3.

13. Michelle Harris, Bronwyn Carlson & Evan Poata-Smith, “Indigenous Identities and the Politics of Authenticity” in Michelle Harris, Martin Nakata & Bronwyn Carlson, eds, *The Politics of Identity: Emerging Indigeneity* (Sydney: University of Technology Sydney E-Press, 2013) 1 at 4.

14. Lawson, *supra* note 9; Napoleon, *supra* note 6.

15. Weaver, *supra* note 11; Lawson, *supra* note 9; Harris, Carlson & Poata-Smith, *supra* note 13.

16. Nancy M Lucero, “‘It’s Not about Place, It’s about What’s Inside’: American Indian Women Negotiating Cultural Connectedness and Identity in Urban Spaces” (2014) 42 *Women’s Studies Intl Forum* 9; Evelyn J Peters, “Emerging Themes in Academic Research in Urban Aboriginal Identities in Canada, 1996–2010” (2011) 1:1 *Aboriginal Policy Studies* 78.

17. Garrouette, *Real Indians*, *supra* note 9.

(4) What are the bases for claiming or ascribing identity? Culture? Kinship? Location? Law?¹⁸

With respect to Indigenous identities, there are at least three interconnected ways in which the term “Indigenous” and the idea of “Indigenous identity” are deeply complicated. We note these here, but they are complications considered by some, but not all, of the scholarly literature we are exploring. The first is the generality of the term “Indigenous” versus the specific identification of cultural groups or nations (for instance, Haudenosaunee or Haida, Metis or Maliseet). “Indigenous” became a meaningful category only after contact with Europeans.¹⁹ Alfred and Corntassel find the use of general terms like “Aboriginal” as reflecting a fundamentally political-legal approach, oriented to the settler state, rather than social-cultural approaches oriented to an Indigenous nation.²⁰ For the purposes of this essay, we use the term Indigenous both in this “political-legal” manner, and as a place holder for specific Indigenous identities claimed and denied.

The second complication is the way that defining who does and does not belong to the category “Indigenous” or to a particular nation or band has been used by both the (post) colonial state and many other groups and individuals to pursue a variety of projects and aims. As Eva Marie Garroutte has written, “the ‘Indians’ and ‘non-Indians’ who emerge from the rigors of the [legal] definitional process do not always resemble what one might expect.”²¹ Many authors recognize or describe the centrality of law/legality to the relationship of Indigenous nations and the colonial state, including the very composition of those nations.²² At the same time, as Harris, Carlson, and Poata-Smith describe, there are individuals who challenge state or community standards for access to a particular identity, and those “creating new ways of ‘being’ Indigenous.”²³ In the Canadian context, changing or reversing state policies about access to “Indian status,” an increasing state recognition of Aboriginal rights, and the end of explicit assimilationist policies has resulted in a much larger group of

18. Alfred & Corntassel, *supra* note 6; Taiiaki Alfred, *First Nation Perspectives on Political Identity*, First Nation Citizenship Research & Policy Series: Building Towards Change (Assembly of First Nations, 2009); Napoleon, *supra* note 6.

19. Weaver, *supra* note 11 at 242; Alfred & Corntassel, *supra* note 6 at 597.

20. Alfred & Corntassel, *supra* note 6 at 597.

21. Eva Marie Garroutte, “The Racial Formation of American Indians: Negotiating Legitimate Identities within Tribal and Federal Law” (2001) 25:2 *American Indian Q* 224 at 224 [Garroutte, “Racial Formation”].

22. Garroutte, *Real Indians*, *supra* note 9; Alfred & Corntassel, *supra* note 6 at 603.

23. Harris, Carlson & Poata-Smith, *supra* note 13 at 2.

people self-identifying as Indigenous.²⁴ The third and final complication we identify is the relationship between indigeneity, race, and racism. Indigeneity should not be conflated with other racializations. But, the ubiquity of racism directed at Indigenous people and the extent to which this figures in personal narratives mean that the treatment of Indigenous peoples and nations by colonial and imperial projects cannot be entirely separated from racial projects more generally.

With this brief discussion of the issues raised by the idea of Indigenous identity, we turn to research about lawyers and the legal profession. In particular, we consider the results of demands for access to professional training and status from groups formerly *de jure* and *de facto* excluded.

1. *Outsider groups in the legal profession*

Scholars of the legal profession have created a broad base of work about professionalization in the law. These include works which focus on the experiences of traditionally excluded groups (including women, racial minorities, and “out” sexual minorities). Scholars, in both historical and contemporary contexts, have revealed the ways in which the profession has jealously guarded the gateways of the profession and resisted change. The majority of this literature concentrates on women or African-American²⁵ lawyers and has been heavily influenced, respectively, by feminist legal theory and critical race theory (and, to some extent, critical race feminism). Historical and contemporary scholarship, especially in Canada

24. Peters, *supra* note 16; Garrouette, “Racial Formation,” *supra* note 21.

25. Kenneth Walter Mack, “A Social History of Everyday Practice: Sadie TM Alexander and the Incorporation of Black Women into the American Legal Profession, 1925–1960” (2002) 87:6 *Cornell L Rev* 1405 [Mack, “Social History”]; Anthony V Alfieri & Angela Onwuachi-Willig, “Next-Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance” (2012) 122:6 *Yale LJ* 1484; Devon W Carbado & Mitu Gulati, “Race to the Top of the Corporate Ladder: What Minorities Do When They Get There” (2004) 61:4 *Wash & Lee L Rev* 1646 [Carbado & Gulati, “Race to the Top”]; David B Wilkins, “Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers” (1992) 45:6 *Stan L Rev* 1981 [Wilkins, “Two Paths”]; David B Wilkins, “Redefining the ‘Professional’ in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism” (1995) 58:3-4 *Law & Contemp Probs* 241; David B Wilkins & G Mitu Gulati, “Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis” (1996) 84:3 *Cal L Rev* 493; David B Wilkins, “Identities and Roles: Race, Recognition, and Professional Responsibility” (1998) 57:4 *Md L Rev* 1502 [Wilkins, “Identities and Roles”]; David B Wilkins, “Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers” (2004) 41:1 *Hous L Rev* 1; David B Wilkins, “The New Social Engineers in the Age of Obama: Black Corporate Lawyers and the Making of the First Black President” (2010) 53:3 *How LJ* 557; Margaret M Russell, “Beyond ‘Sellouts’ and ‘Race Cards’: Black Attorneys and the Straitjacket of Legal Practice” (1997) 95:4 *Mich L Rev* 766; Geneva Brown, “The Wind Cries Mary—The Intersectionality of Race, Gender, and Reentry: Challenges for African-American Women” (2010) 24:4 *St John’s J Leg Comment* 625; Monica R Hargrove, “The Evolution of Black Lawyers in Corporate America: From the Road Less Traveled to Managing the Major Highways” (2010) 53:3 *How LJ* 749.

as compared with the U.S., has extensively considered the experience of female (mainly white, with some notable exceptions²⁶) lawyers and law students.²⁷ Historical treatments include a newer set of works looking at native-born (non-British) lawyers in colonial era states which make efforts, Mitra Sharafi has written, to avoid the “dichotomy between villainous collaborators or agency-wielding heroes” that is otherwise evident.²⁸ Another subset of the literature that considers similar issues describes the closed nature of the legal profession, including a consideration of the existence and operation of racism in the profession.²⁹

While openly discriminatory rules are largely a thing of the past in the profession, systemic factors including differential access to higher education, competition to enter law school, and the rapidly rising costs of law school continue to mean that the legal profession is not broadly representative of the Canadian public. Professional norms continue this stratification in the profession. Scholarship which considers the past and present experience of groups previously left out of the profession asks about the ways in which these norms work on—and are worked on by—the introduction of new groups to the profession.³⁰

26. Rachel K. Bailie, “Minority of One: Violet King’s Entry to the Legal Profession” (2012) 24:2 CJWL 301; Mary Jane Mossman, “Cornelia Sorabji: A ‘Woman in Law’ in India in the 1890s” (2004) 16:1 CJWL 54; Mack, “Social History,” *supra* note 25.

27. Mary Jane Mossman, *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions* (Oxford: Hart, 2006) [Mossman, *First Women Lawyers*]; Catherine Weiss & Louise Melling, “The Legal Education of Twenty Women” (1988) 40:5 Stan L Rev 1299; Ulrike Schultz & Gisela Shaw, eds, *Women in the World’s Legal Professions* (Oxford: Hart, 2003); Jean McKenzie Leiper, *Bar Codes: Women in the Legal Profession* (Vancouver: UBC Press, 2006); Joan Brockman, Denise Evans & Kerri Reid, “Feminist Perspectives for the Study of Gender Bias in the Legal Profession” (1992) 5:1 CJWL 37; Mary Jane Mossman, “The First Women Lawyers: ‘Piecemeal Progress and Circumscribed Success’” (2007) 45:2 Osgoode Hall LJ 379; Elizabeth Sheehy & Sheila McIntyre, *Calling for Change: Women, Law, and the Legal Profession* (Ottawa: University of Ottawa Press, 2006); Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Melbourne: Oxford University Press, 1996); Bailie, *supra* note 26; Joan Brockman, “Aspirations and Appointments to the Judiciary” (2003) 15:1 CJWL 138; Mack, “Social History,” *supra* note 25.

28. Mitra Sharafi, “A New History of Colonial Lawyering: Likhovski and Legal Identities in the British Empire” (2007) 32:4 Law & Soc Inquiry 1059 at 1064.

29. Donald J. Purich, “Affirmative Action in Canadian Law Schools: The Native Student in Law School” (1986) 51:1 Sask L Rev 79; Joan Brockman, “Racism and Legal Culture: Is There Room for Diversity in the Legal Profession?” (2008) 45:5 Alta L Rev 75; Lindberg, *supra* note 8; Richard F. Devlin, “Towards an/other Legal Education: Some Critical and Tentative Proposals to Confront the Racism of Modern Legal Education” (1989) 38 UNBLJ 89; Charles C. Smith, “Who is Afraid of the Big Bad Social Constructionists? Or Shedding Light on the Unpardonable Whiteness of the Canadian Legal Profession” (2008) 45:5 Alta L Rev 55.

30. Carrie Menkel-Meadow, “Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law” (1987) 42:1 U Miami L Rev 29 at 29.

2. *Empirical research about Indigenous lawyers*

There is a limited literature that takes an empirical and qualitative approach to Indigenous lawyers in the U.S., Canada, and Australia. The broadest recent surveys have been carried out by provincial law societies. The Law Society of Upper Canada conducted an extensive survey of “Aboriginal” lawyers in Ontario including a number of face-to-face interviews and written surveys, during the period 2005–2008.³¹ Slightly earlier, the Law Society of British Columbia undertook a major project involving focus groups and a survey which started in the mid-1990s and concluded with the publication of the third report in 2000.³² However, these reports were largely aimed at identifying “barriers” to education and retention and developing resources to address those barriers.³³

In the U.S., the broadest assessment appears to be contained in Carpenter and Wald’s 2013 paper, “Lawyering for Groups: The Case of American Indian Tribal Attorneys.” However, the authors are considering only lawyers who represent tribal groups and so exclude many self-identified Indigenous attorneys and some include non-Indigenous lawyers.³⁴ There is also work that attempts to survey the situation of Indigenous women lawyers, although like many similar reports, the American Bar Association noted difficulties in obtaining a reasonable response rate, creating particular challenges in this context since the number of possible respondents/interviewees is already low.³⁵ More nuanced studies involve a smaller group of participants, for instance, Tracey Lindberg’s late-1990s qualitative look at the experiences of nine Aboriginal women in law school, based on a written survey.³⁶ There is far more work that does not involve surveys or interviews, including those that consider Indigenous participation in legal education in settler colonial states.³⁷

31. Law Society of Upper Canada, Equity Initiative Department, “Final Report: Aboriginal Bar Consultation” (Toronto: LSUC, 29 January 2009), online: <www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147487118> [LSUC, “Aboriginal Bar Consultation”].

32. Fiona Lam, *Report on the Survey of Aboriginal Law Graduates in British Columbia* (Vancouver: Law Society of British Columbia, 1996); Kuan Foo, Paul Winn & Georgina Swan, *Summary of the Discussion of the Aboriginal Law Graduates Focus Groups* (Vancouver: Law Society of British Columbia, 1998); Gerry Ferguson & Kuan Foo, *Addressing Discriminatory Barriers Facing Aboriginal Law Students and Lawyers* (Vancouver: Law Society of British Columbia, 2000).

33. LSUC, “Aboriginal Bar Consultation,” *supra* note 31; Ferguson & Foo, *supra* note 32.

34. Kristen A Carpenter & Eli Wald, “Lawyering for Groups: The Case of American Indian Tribal Attorneys” (2013) 81:6 *Fordham L Rev* 3085.

35. Multicultural Women Attorneys Network, *The Burdens of Both, the Privileges of Neither: A Report on the Experiences of Native American Women Lawyers* (American Bar Association, 1998).

36. Lindberg, *supra* note 8 at 303.

37. Carol Aylward, “Adding Colour—A Critique of: ‘An Essay on Institutional Responsibility: The Indigenous Blacks and Micmac Programme at Dalhousie Law School!’” (1995) 8:2 *CJWL* 470; Kelly Gallagher-Mackay, “Affirmative Action and Aboriginal Government: The Case for Legal Education

Our review of the available literature on outsider groups generally and on Indigenous lawyers specifically generates three thematic areas of inquiry, described in Part II below.

II. *Belonging, exclusion, imposition, and lawyering*

We propose three areas of inquiry to organize the words and experiences of Indigenous lawyers, based on the existing literature: (1) Belonging and exclusion: community after professionalization; (2) Imposition and expectations: performing identities; and (3) (How) will Indigenous lawyers make a difference?

There are two questions which cut across these three areas. The first is that of difference and what that word means to different individuals and groups. Identity categories in common usage can be useful tools but may also occlude important internal differences. Alfieri and Onwuachi-Willig identify “the heightened visibility and voices of previously marginalized intersectional groups like black women and black gays and lesbians.”³⁸ Relatedly, the project we describe in part III will determine whether the growth of access to legal education changes the experience and sense of obligation among lawyers entering the profession. Kenneth Mack’s work on American civil rights lawyers finds a generational rift appearing in the 1930s, with those who felt effective advocacy depended on cross racial camaraderie and professionalism challenged by a younger generation who saw such stances as capitulation.³⁹ As Mary Jane Mossman’s work on the first group of women lawyers suggests, there were no role models for these women, who often remained extremely isolated in their professional lives. They had to “create new scripts for their lives.”⁴⁰ The question of time and change over time is a significant one as both the number of Indigenous lawyers grows, as parts of the substantive law change, and as the legal profession also shifts in some aspects. Next, this part describes these areas of inquiry based on the existing literature.

in Nunavut” (1999) 14:2 CJLS 21; Gloria Valencia-Weber, “Law School Training of American Indians as Legal-Warriors” (1995) 20:1 Am Indian L Rev 5; Purich, *supra* note 29; LSUC “Aboriginal Bar Consultation,” *supra* note 31; Hugh MacAulay, “Improving Access to Legal Education for Native People in Canada: Dalhousie Law School’s IBM Program in Context” (1991) 14:1 Dal LJ 133; Heather Douglas, “Indigenous Australians and Legal Education: Looking to the Future” (1996) 7:2 Leg Education Rev 225; Marianne O Nielsen, “Indigenous-Run Legal Services in Australia and Canada: Comparative Developmental Issues” (2006) 16:3 Intl Criminal Justice Rev 157; Foo, Winn & Swan, *supra* note 32; Monture, *supra* note 8; Lam, *supra* note 32; Lindberg, *supra* note 8; Heather Douglas, “‘This is Not Just about Me’: Indigenous Students’ Insights about Law School Study” (1998) 20:2 Adel L Rev 315.

38. Alfieri & Onwuachi-Willig, *supra* note 25 at 1491.

39. Kenneth W Mack, *Representing the Race: The Creation of the Civil Rights Lawyer* (Cambridge, MA: Harvard University Press, 2012).

40. Mossman, *First Women Lawyers*, *supra* note 27 at 23.

1. *Theme one: Belonging & exclusion: Community after professionalization*

Given the centrality of the Canadian legal system in the ongoing oppression of Indigenous Canadians, efforts to use Canadian law to mitigate harm and change the relationship between the Canadian state and Indigenous peoples, and the resurgence of mainstream interest in Indigenous legal traditions, it may be that many Indigenous lawyers will have experienced these conflicts and developed ethical stances about their relationship with Canadian law that make efforts to resolve or address these potential contradictions. The writings of Indigenous lawyers describe the ways that the substance and form of teaching are actively hostile to Indigenous perspectives and ideas.⁴¹ The flip side of the coin is the suggestion from inside Indigenous communities that Indigenous lawyers are “neo-colonizers”⁴² and quickly become “tool[s] for this system.”⁴³ Historians have begun to excavate the role of “native” lawyers in colonial systems in ways which expose the role of these lawyers in normalizing colonial rule.⁴⁴ A similar dynamic can be found in the accounts of Black lawyers in the U.S., describing divisions based on education, skin tone, and economic status between lawyers and clients.⁴⁵ As voices demanding a larger role for Indigenous legal systems become stronger, the call to reject the Canadian system may also become stronger.⁴⁶ A key part of this theme is the way that law’s very specific content and form may serve to complicate the position of the Indigenous student.

Law school itself is an important part of this discussion, both because it is often understood as the first step on a professional journey and because of what we already know from Indigenous lawyers—for many, law school is a full scale assault on their sense of justice. As Patricia Monture-Angus writes, “Canadian law is about the oppression of Aboriginal people. My years in law school were so painful because oppression, even if only in study, is a painful experience.”⁴⁷ This experience is echoed in the accounts of many Indigenous lawyers. But it is not the only problem. There are few other Indigenous students. There are few or no Indigenous faculty

41. Christine Zuni, “Strengthening What Remains” (1997) 7:1 Kan JL & Pub Pol’y 17; Lindberg, *supra* note 8; Henderson, *supra* note 1; Monture, *supra* note 8; Ferguson & Foo, *supra* note 32.

42. Fletcher, *supra* note 3 at 214.

43. Lindberg, *supra* note 8 at 321.

44. Sharafi, *supra* note 28.

45. Alfieri & Onwuachi-Willig, *supra* note 25 at 1529.

46. Zuni, *supra* note 42; Lindberg, *supra* note 8; Monture, *supra* note 8; LSUC, “Aboriginal Bar Consultation,” *supra* note 31; Ferguson & Foo, *supra* note 32.

47. Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood, 1995) at 59.

members. Accounts of the more overtly racist perception and assertion that Indigenous people lack academic ability and have been unfairly promoted over others abound.⁴⁸ The language of cultural difference is used to describe the source of disconnection between an Indigenous person and law school. Cultural difference is certainly not incompatible with the notion of oppressive laws. But while the idea that laws are oppressive is a normative proposition, cultural difference is a relative issue that depends on the cultural spaces in which the Indigenous student has been living and learning. The cultural divide that law school represents will be deeper and wider for some.

The Program of Legal Studies for Native People at the University of Saskatchewan's Native Law Centre is at least in part dedicated to preparing students for these experiences and trying to mitigate the impact of the *environment* of the law school for Indigenous students.⁴⁹ Law school, for many Indigenous lawyers, is a powerful experience of exclusion and oppression. This experience may serve to heighten a sense of Indigenous identity, but may also lead to a desire to leave the study of law. One question which arises is whether and how the kinds of changes that some law schools are making or are trying to make are producing new stories about Indigenous experiences in law schools.⁵⁰

The question of belonging and community beyond law school is taken up in David B. Wilkins' work on African American lawyers where he developed his provocative "Obligation Thesis." The thesis posits that all African American lawyers have a responsibility to work for community betterment in some way.⁵¹ Is this idea useful in the Indigenous context? What does an attempt to consider the possibility reveal? How many see their legal training as something they will or should put at the service of the Indigenous community, however defined?⁵² It does seem that a combination of small numbers of Indigenous lawyers and opportunities in Indigenous, provincial,

48. See, e.g., Lindberg, *supra* note 8; Monture-Angus, *supra* note 47 at 66-67, writes, "I continue to try to find individual ways to protect (some might say hide) my difference. I am also aware that many of my colleagues have never had to consider many or any of these things."

49. University of Saskatchewan, "Program of Legal Studies for Native People," online: <www.usask.ca/plsnp/>.

50. See, e.g., the institution of the Kawaskimhon National Aboriginal Moot, described in Signa Daum Shanks, "Who's the Best Aboriginal?: An 'Overlap' and Canadian Constitutionalism" in Law Commission of Canada, ed., *The "Place" of Justice* (Black Point, NS: Fernwood, 2006) 148 at 169-171.

51. Wilkins, "Two Paths," *supra* note 25; Wilkins, "Identities and Roles," *supra* note 25. Our choice to use African American rather than Black here corresponds with Wilkins' usage choice, although not his preference (see *ibid* at 1506, n 18).

52. *Ibid.*

and federal governments, as well as a variety of large corporate entities engaged in mining or banking, and of course smaller practices focused on family or criminal law, more opportunities exist for Indigenous lawyers to work directly with Indigenous issues and people in their practice lives. This is not in any way meant to diminish the seriousness of exclusion from the profession or the extent to which Indigenous law school graduates and lawyers have difficulty finding paid work.⁵³ Rather it is meant to illustrate a range of possible paid opportunities available to some Indigenous students and also to suggest that Indigenous identity impacts choice of paid work in a different way than Wilkins describes for African American lawyers. Lindberg writes that going to law school means “the beautifully onerous task of sharing our knowledge and education with other members of our community” and the voices of Indigenous people in her article—students still in law school—all articulated a sense “that their connection to their communities of interest was central in goal determination and occupational choice.”⁵⁴ However, Christine Zuni Cruz notes the particular complications that may arise for lawyers working for their own tribes where the lawyer is part of the client community, outlining her own strategy of thinking beyond the individual, to the community, when lawyering.⁵⁵ These highly particularized experiences are often overlooked in generalized accounts of Indigenous people practicing law. Attention to the variety of experiences of Indigenous lawyers avoids “the danger of a single story,” a story which reduces outsiders to objects of curiosity, examples of suffering and pain.⁵⁶ Indigenous lawyers are a group who have similar historical experiences of oppression, a group including people from different nations and traditions, and a group also divided by other familiar fault lines—income, age, location, gender, disability, family status—and some less familiar to others in Canada—those who identify as traditional, urban, on/off reserve, status/non status.

2. *Theme two: Imposition and expectations: Performing identities*

Studies based in sociological theories have illustrated how (and why) people try to shape how they are perceived and understood in complex

53. See Aylward, *supra* note 37.

54. Lindberg, *supra* note 8 at 321-322.

55. Christine Zuni Cruz, “[On the] Road Back in: Community Lawyering in Indigenous Communities” (1998) 5:2 *Clinical L Rev* 557 at 575, 588; Kimberlé Williams Crenshaw, “Toward a Race-Conscious Pedagogy in Legal Education” (1988) 11:1 *Nat’l Black LJ* 1; Carbadó & Gulati, “Race to the Top,” *supra* note 25; Valencia-Weber, *supra* note 37; Henderson, *supra* note 1.

56. TED, “Chimamanda Ngozi Adichie: The Danger of a Single Story” (October 2009), online: TED <www.ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story>.

ways.⁵⁷ Under this theme, the research project we discuss in part III will identify the ways in which our subjects understand race, culture and community as aspects of indigeneity and the way in which they see these concepts deployed to categorize and/or discipline their behavior. Techniques of identity management could neutralize the negative impact on them of their “outsider” Indigenous identity in professional settings, and of their professional status inside Indigenous communities.⁵⁸

In these spaces, Indigenous lawyers experience a variety of demands. Do they try (and are they allowed) to be Indigenous in their own way, must they conform to other visions of Indigeneity, or do they have to become “bleached out” professionals?⁵⁹ In “Reflecting on Flint Woman,” Patricia Monture-Angus writes about the ways she is perceived by white people: “angry”⁶⁰ and not objective.⁶¹ She is clear about what produces these assertions—racist ideas in the head of the person who asserts them—but that does not mean that they have no impact on her. And so sometimes people try to avoid the most negative consequences by acting in ways they hope will preclude those labels. Or, we embrace the labels. Lindberg’s respondents described the significance of the perceptions of others: “I am able to be perceived as an Aboriginal person. The affects me in two very major ways: I cannot be a member of the very real boys club; I am to be an expert on all Aboriginal groups and all Aboriginal concerns.”⁶²

3. *Theme three: (How) will Indigenous lawyers make a difference?*

Bringing the question of belonging or identity into direct conversation with the substantive law might include asking whether and how Indigenous

57. See, e.g., Devon W Carbado & Mitu Gulati, “Working Identity” (1999) 85 Cornell L Rev 1259 [Carbado & Gulati, “Working Identity”]; Devon W Carbado & Mitu Gulati, *Acting White?: Rethinking Race in “Post-Racial” America* (Oxford: Oxford University Press, 2013); Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (New York: Random House Trade Paperbacks, 2007); Annalise E Acorn, “Discrimination in Academia and the Cultural Production of Intellectual Cachet” (2000) 10:2 UCLA Women’s LJ 359; Martha Chamallas, “The Shadow of Professor Kingsfield: Contemporary Dilemmas Facing Women Law Professors” (2005) 11:2 Wm & Mary J Women & L 195; Hilary Sommerlad, “‘What Are You Doing Here? You Should Be Working in a Hair Salon or Something’: Outsider Status and Professional Socialization in the Solicitors’ Profession” [2008] 2 Web JCLI, online: <www.bailii.org/uk/other/journals/WebJCLI/2008/issue2/sommerlad2.html>; Hilary Sommerlad, “Minorities, Merit, and Misrecognition in the Globalized Profession” (2012) 80:6 Fordham L Rev 2481; Hilary Sommerlad, “Researching and Theorizing the Processes of Professional Identity Formation” (2007) 34:2 JL & Soc’y 190.

58. Harris, Carlson & Poata-Smith, *supra* note 13; Carbado & Gulati, “Working Identity,” *supra* note 57; Jane Bailey & Katharine Neufeld, “Gender, Identity and Professionalism: A Review of *The First Women Lawyers* by Mary Jane Mossman” (2007) 86:2 Can Bar Rev 355; Alfieri & Onwuachi-Willig, *supra* note 25; Dean Spade, “Be Professional!” (2010) 33:1 Harv JL & Gender 78.

59. Wilkins, “Identities and Roles,” *supra* note 25.

60. Monture-Angus, *supra* note 47 at 35.

61. *Ibid* at 37.

62. Lindberg, *supra* note 8 at 307.

legal professionals will make, or have made, changes in law and the legal profession.⁶³ Does their presence change legal spaces? Do they bring new approaches to legal doctrine, new attention to community needs, new ethical considerations, and new or differently theorized approaches to Canadian law? Do they believe they offer more justice to their Indigenous clients? Is it enough that they complete a law degree and provide more diverse faces to a mainstream system?

Some of the issues are straightforward questions of representation—about Indigenous people finally occupying spaces and roles they had been kept out of. Lindberg’s respondents, for instance, have very high hopes for what a single Indigenous professor might be able to accomplish in a College of Law.⁶⁴ Other questions may turn on issues of critical mass or solidarity—can Indigenous lawyers make change by presenting a united front within the profession or in schools? Finally, there are questions about the theoretical and ideological knowledge and commitments of Indigenous lawyers. What larger goals are they pursuing through their work? What tools will they use to get there? How they will engage with Indigenous legal orders and sources or Indigenous clients? In 1989, Ron Peigan, a young articling student from Pasqua Reserve then working in Saskatoon, told the *Saskatchewan Indian* newspaper:

Professionally, I believe a native lawyer plays a critical role in the future direction of native issues. The native lawyer’s familiarity with the legal system, ensures that the Federal government can no longer unilaterally impose detrimental hard-ship on our people...we now have the ability to utilize our knowledge to the benefit of our people in a system that has to abide by the rules we’ve learned.⁶⁵

This model of the role of the Indigenous lawyer (using Western legal rules to protect Indigenous people and lands) may have shifted somewhat over the years. In 2014, Jodie-Lynn Waddilove, the first recipient of the Indigenous Bar Association’s scholarship in memory of Ron Peigan,

63. See, e.g., Carbado & Gulati, “Race to the Top,” *supra* note 25.

64. Lindberg, *supra* note 8 at 315; see also Carbado & Gulati, “Race to the Top,” *supra* note 25 at 1666-1668; Monture-Angus, *supra* note 47 at 58, described her dream of teaching law as one that “reflected [her] desire to change the experience of law school for others as well as a recognition that change can be accomplished by being on the inside of a powerful institution.”

65. “Profile: Ron Peigan,” *Saskatchewan Indian* (September 1989) 5, online: <www.sicc.sk.ca/archive/saskindian/a89sep05.htm>. A scholarship in memory of Ronald Peigan was created in 2002 by the Indigenous Bar Association, to be awarded to a student who “has demonstrated an interest in serving the Indigenous community and the Creator with honour and integrity” (“Indigenous Bar Association Law Student Scholarship Created,” *Indigenous Bar Association Newsletter* (Fall 2002) 1). The scholarship continues to be offered.

described two systems of thought (though she said she was able to use only one in her legal practice):

My personal experiences have shaped what I believe law and justice should be. My formal education has taught me what law and justice is in the Canadian mainstream society. My ability to distinguish the two, tells me there is a big difference between what it is for the people in my First Nation versus what I learned in law school. Culturally, I have a different concept of what law is and what justice means. This is not reflected in the law that I practice, but is an understanding I received from traditional teachings and the cultural practices of my Nation.⁶⁶

Indigenous lawyers have described ways in which they see themselves as using cultural and experiential knowledge in their professional work.⁶⁷ How that practice might engage with the transformative, decolonizing change, as suggested by Henderson's postcolonial legal consciousness for instance, is less clear. How are Indigenous lawyers engaging with—or not engaging with—Indigenous legal orders? Are they able to bring any engagement with those systems into their work with the formal state legal system? On the other side of the coin, historical work illustrates that “native” lawyers in colonial regimes have “more often than not bolstered despotic regimes through their day-to-day work.”⁶⁸ To what extent are they conscious of this risk and how do they guard against it? How do the legal consciousness and strategic approaches of Indigenous lawyers help narrow the gap between long-term goals (such as decolonization) and short term goals (such as acquittal) for Indigenous peoples and particular clients?⁶⁹ Indigenous lawyers who have developed a critical or postcolonial Indigenous consciousness may also have a very broad sense of the arena in which they work, including inside Indigenous communities, in courts, in boardrooms, and with governments.⁷⁰ Finally, as we consider differences across generations of Indigenous lawyers, we can ask whether the presence of self-identified Indigenous people as “insiders” prompts

66. “Jodie-Lynn Waddilove: Indigenous Journey Story” (3 February 2014), online: Simon Fraser University <www.sfu.ca/olc/indigenous/indigenous-career-journey-stories/jodie-lynn-waddilove-indigenous-journey-story>.

67. Zuni Cruz, *supra* note 55 at 567, 573.

68. Sharafi, *supra* note 28 at 1063.

69. Henderson, *supra* note 1 at 14-15, writes:

Additionally, beyond our cognitive prison, stands physical prisons, penitentiaries or correctional institutions that contain many of our people. This new representation of Indigenous peoples reveals the extent of systemic discrimination in Canada and other British colonies. These actualities form the menacing backdrop to, and serve as symbols for, all our legal efforts and thoughts. We are the road-people that negotiate the boundaries between freedom and imprisonment of our peoples.

70. Alfieri & Onwuachi-Willig, *supra* note 25 at 1533.

different responses from settler dominated institutions, even when strategy and tactics do not change.

III. *Listening*

In this part, we look towards the possibility of listening to the voices of Indigenous lawyers though an empirical, qualitative, research project, we revisit the question of appropriate theoretical lenses, and we discuss the critically important question of research ethics. If this literature review reveals anything clearly, it is the paucity of information about Indigenous lawyers in Canada and the ongoing significance of law and legality in every aspect of the relationship between Indigenous peoples and the Canadian state. Putting these two together leads to the conclusion that listening to the voices of Indigenous lawyers will open up thinking not only about the (changing) positions and roles of those occupying this particular dual identity, but also about the possible approaches to ethics and obligations of legal practice in a (post) colonial context. By our very starting points, we want to posit that the lack of listening has previously been significantly problematic. Listening accepts what has not happened in the past and moves towards Indigenous methods of learning and participating.⁷¹ Below we describe the theoretical lenses and ethical considerations we think such a project would require.

1. *Theoretical lenses & identity*

The multiple theoretical lenses that best inform this kind of project are, at all levels, significantly shaped by critical theory as it has developed in the context of the legal academy across three areas: post-colonial theory, critical race theory, and feminist theory. The results of this study will speak to a variety of questions about (post) colonial societies, about identity and the management of identity, about racialization, and about intersectional experiences.

Although “post” colonial may not be completely appropriate in the context of Canada’s First Nations, we rely on post-colonial theory because of how it speaks to the role of law in the structure and sustenance of empire and its legacy. Rule of law, in particular, has been taken up by many post-colonialists as a way of Western thought that shapes understandings of the world.⁷² Authors in this tradition have also engaged deeply with the way that the beliefs and understandings which subordinate are internalized

71. See, e.g., Norman K Denzin & Yvonna S Lincoln, “Introduction: Critical Methodologies and Indigenous Inquiry” in Norman K Denzin, Yvonna S Lincoln & Linda Tuhiwai Smith, eds, *Handbook of Critical and Indigenous Methodologies* (Thousand Oaks, CA: SAGE, 2008) 1.

72. Monture-Angus, *supra* note 47 at 49, 140.

by the subordinated through a variety of processes including education, affecting whole communities and individuals. They also write about the potential and process of decolonization.⁷³

Critical race theory notes the ways that laws have been deeply implicated in the creation and solidity of systems of racial subordination and segregation. Where people of colour engage with law, and become immersed in law, we can ask how they deal with law's slippery insistence on racial justice whilst unseeing racism, law's mobilization in support of the racial status quo, but also the ways in which critical race theory proposes the possibility of law's use in community mobilization for the realization of racial justice.⁷⁴ Critical race theory also takes a granular approach to the question of the relationship between the socially constructed category of race, and more holistic notions of community, nation, and culture, pulling apart a set of ideas which have become entwined.⁷⁵

Feminist thought has engaged with both post-colonial and critical race theory, demanding attention to the question of gendered forms of oppression within the structures of colonialism and racism. Often feminist thought has been critical in raising uncomfortable questions about cascading oppression; that is, subaltern communities in which power structures develop or exist that mimic the male dominated colonial power structures and that inhibit or silence the dissenting voices within.⁷⁶ Feminist theory also describes the way in which Western thought has used ideas about women and their bodies to support empire and to degrade the

73. Borrows, *supra* note 2; Henderson, *supra* note 1; Glen S Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6:4 Contemporary Political Theory 437; Alfred & Comtassel, *supra* note 6; Sharafi, *supra* note 28.

74. See, e.g., Eric K Yamamoto, "Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America" (1997) 95:4 Mich L Rev 821.

75. Mari J Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1989) 11:1 Women's Rts L Rep 7; Ian Haney López, *White by Law: The Legal Construction of Race*, 10th Anniversary ed (New York: New York University Press, 2006); George A Martinez, "The Legal Construction of Race: Mexican-Americans and Whiteness" (1997) 2 Harv Latino L Rev 321; Francisco Valdes, "Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities" (1996) 9 La Raza LJ 1; Stephanie M Wildman, "Reflections on Whiteness and Latina/o Critical Theory" (1997) 2 Harv Latino L Rev 307; George A Martinez, "African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition" (1998) 19 Chicano-Latino L Rev 213; Robert S Chang, "Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space" (1993) 81:5 Cal L Rev 1241.

76. Joyce Green, ed, *Making Space for Indigenous Feminism* (Black Point, NS: Fernwood, 2007); Beverly I Moran, "Keynote Address Delivered for the Journal of Contemporary Legal Issues Conference on the Future of Intersectionality and Critical Race Feminism" (2000) 11:2 J Contemp Leg Issues 691; Paulette M Caldwell, "A Hair Piece: Perspectives on the Intersection of Race and Gender" [1991] 2 Duke LJ 365; Mary Jo Wiggins, "The Future of Intersectionality and Critical Race Feminism" (2000) 11:2 J Contemp Leg Issues 677.

non-Western “other.”⁷⁷ Finally, feminist theory has engaged critically with law, questioning law’s ability to create transformational change, at the same time as other feminists turned enthusiastically to law as an important arena for feminist mobilization.⁷⁸ The work of Indigenous feminists, like the work of critical race feminists, has been critical in exposing the fraught positions in which Indigenous women experiencing intersectional or interlocking oppressions find themselves.⁷⁹

These are the theoretical lenses we plan to bring, but the larger project is to be Indigenous centered, foregrounding the voices and experiences of Indigenous lawyers, considering their approach to these questions and developing a descriptive account. The theoretical lenses illumine the context in which Indigenous lawyers exist, but the questions of belonging, contradiction and exclusion, questions about life experiences and how people make sense of it, are best considered through the words and experiences of Indigenous lawyers themselves. While this project is not based in a grounded theory approach, it does aim to bring or build theory to fit the voices, rather than to drag the voices to the theories. We want to ask about the experience of Indigenous lawyers, including the meanings that they bring to or put on their experiences. This is at least in part because of the descriptive rather than prescriptive aim of the work.⁸⁰

2. *Ethics*

The primary ethical concern here involves the implications of positioning Indigenous lawyers as objects of study or “exploration.” In developing a research proposal, we have been guided by our personal ethics and by institutional ethical policies and requirements developed and codified in the context of academic research and research funding.⁸¹ But the concerns

77. Cheryl Suzack et al, eds, *Indigenous Women and Feminism: Politics, Activism, Culture* (Vancouver: UBC Press, 2010); Green, *supra* note 76.

78. Penelope Andrews, “Introduction: Feminist Advocacy, Constitutions and Law” (2009) 9:2 *Intl Rev Constitutionalism* 1, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=1593747>; Rosemary Auchmuty & Karin Van Marle, “Special Issue: Carol Smart’s Feminism and the Power of Law” (2012) 20:2 *Fem Leg Stud* 65; Tracy Higgins, “A Reflection on the Uses and Limits of Western Feminism in a Global Context” (2005) 28:3 *Thomas Jefferson L Rev* 423.

79. Mary Ellen Turpel, “Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women” (1993) 6:1 *CJWL* 174; Mary Ellen Turpel, “Home/Land” (1991) 10:1 *Can J Fam L* 17; Monture-Angus, *supra* note 47; Lindberg, *supra* note 8; Sarah Deer, “Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty” (2009) 24:2 *Wicazo Sa Review* 149.

80. James C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998). See Chapter 9, “Thin Simplifications and Practical Knowledge: Metis,” where Scott describes collaboration between practical knowledge and scientific knowledge as essential, and the prioritization of scientific knowledge under high modernism as a political strategy of control.

81. *Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty-Year Commitment*, vol 5 (Ottawa: Supply and Services Canada, 1996) at Appendix E; Secretariat on Responsible Conduct

which these latter protocols try to address are rooted in the way in which Indigenous communities have been ill-treated in academic research. Research that proceeds disrespectfully, that fails to involve communities in meaningful ways, that operates only to the benefit of the researchers, or worse, facilitates the continued oppression of these communities (deliberately or inadvertently) is well known in this context. Engaging with some part of the community (or Indigenous lawyers) and seeking to design a project which could remain critical but secure is both a practical and ethical requirement. Securing in-depth interviews about often difficult experiences requires that we have considered our responsibilities and consulted about community concerns.

In its form and process our proposal seeks to meet these concerns. Two of the researchers self-identify as Indigenous lawyers, ensuring an overlap rather than a gulf between the study authors and the participants. In designing the proposal we engaged with senior Indigenous lawyers, asking them to weigh in on the purpose, form, and substance of the project itself—and in particular identify concerns and risks for which we would need to be accountable. There may be political risks, should the project findings fail to support ongoing community efforts, for instance in terms of what provincial law societies and Canadian law schools should be doing with respect to recruiting and retaining Indigenous lawyers. There is a risk of exposing internal disagreement which might harm political actions or projects if the community is seen as divided. For instance, the use of “Indigenous” obscures the finer grained approaches to self-identification within the community in which identifying as urban or rural, traditional or lacking in knowledge or interest about traditional ways of life, on or off reserve, full or “half blood.”⁸² What is the cost or benefit for Indigenous communities when research pokes at these questions and publishes the results? As we move into an era where, according to some, it is “desirable to be Aboriginal,”⁸³ will we see rising concerns about appropriation through self-identification? Finally, at the personal level,

of Research, Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans (Ottawa: Secretariat on the Responsible Conduct of Research, 2014), online: <www.pre.ethics.gc.ca/pdf/eng/tcps2-2014/TCPS_2_FINAL_Web.pdf>; York University, Office of Research Ethics, “Guidelines for Research Ethics Involving Aboriginal/Indigenous Peoples,” 11 October 2012, online: <www.yorku.ca/research/support/documents/#ethics>; York University, Office of Research Ethics, “Advisory Group/Research Ethics Board Checklist for Researchers: Research Involving Aboriginal People,” online: <www.yorku.ca/research/support/documents/#ethics>.

82. Monture-Angus, *supra* note 47 at 47, writes that the on/off reserve division is “a split...that troubles me greatly.”

83. Restoule, *supra* note 7 at 102. Restoule goes on to contrast this view with the experience of many that concealing Aboriginality because it came with shame is still a reality, perhaps especially for those who cannot hide their Aboriginality.

we must consider that asking participants to think about these things is to ask them to do something which may hurt. For instance, during the process of workshopping the proposed research, it was suggested that we avoid asking Indigenous lawyers whether they feel a sense of obligation to the/a/their Indigenous community, out of concern that the asking would *create* an additional burden. More obviously, this project would involve asking people to relate painful stories and to explore exclusions as well as inclusions. How can these questions be explored in respectful ways? These ethical questions do not have easy answers, and community consultation prior to the research cannot resolve them completely.

Conclusion

With the ethical complexities at least acknowledged, let us posit some important reasons to seek out and listen to, now, the voices of Indigenous lawyers. One is timing on a human scale. Many members of the first generation of Indigenous lawyers in Canada are still with us, and the younger generations are large and vibrant. This project will create a repository of these voices. Another reason relates to timing on a political and legal scale. The Chief Justice of Canada has named this the era of reconciliation, arguing that section 35 of the *Constitution Act, 1982* is coming to the fore and the *Charter* receding.⁸⁴ John Ralston Saul published *The Comeback* arguing that the political respect and legal recognition Indigenous people have won from Canada has reached a critical level, calling on all Canadians to support this movement.⁸⁵ There is attention to Indigenous issues inside law schools and in law which is unprecedented, although the implications of this attention are far from clear. All of this is happening at the same time as provincial bar associations are claiming to recognize the direct and systemic racism that prevents many Indigenous lawyers from advancing and staying in the profession. Settler voices in the highest places of law and governance are expressing the belief that settlers need to be developing new ways of engaging. Finally, there is the possibility that this kind of project, which gathers the voices of Indigenous lawyers, can serve as a way of attracting Indigenous youth to the idea of law as a career. The words of Indigenous lawyers may guide them through the shoals of this choice and enable an easier road.⁸⁶

84. The Right Honourable Beverley McLachlin, "Defining Moments: The Canadian Constitution," Remarks delivered on 5 February 2013 at the Canadian Club of Ottawa, online: Supreme Court of Canada <www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2013-02-05-eng.aspx>.

85. John Ralston Saul, *The Comeback* (Toronto: Viking, 2014).

86. We include this discussion of ethics in this more literature-review style piece because, in our minds, the literature review and the proposed further work are deeply connected. In the context of academic research "on"/about/with Indigenous peoples, where the political nature of the phenomenon

Legal practice is political practice, whether we treat it that way or not.⁸⁷ For Canada's Indigenous lawyers, the implications of their engagements with Canadian state law are likely to be clearer and harder to ignore. Likewise, connections between a personal sense of identity and community belonging and professional identification as a member of the community of lawyers are likely to be more complicated than they are for the mainstream of the profession. The existing literature highlights the complex position of Indigenous lawyers and the decisions and situations uniquely faced by this group. There are real implications to the various approaches this group of people takes to reconciling their personal identity and professional status. Listening, hearing and thinking about the ways that Indigenous lawyers construct, experience, and grapple with these questions will provide a new basis for both strategizing and theorizing about the relationship between Indigenous people and law.

we are discussing is something we are at pains to foreground, we feel that our expression of ethical responsibility must accompany our conclusion that further research is warranted and proposed.

87. As is the practice of academic research and writing.