MĀMAWĪ WĪCIHITOWIN:
COLONIZATION IS NOT ABOUT SHARING SPACE. THE TREATIES ARE.

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ABSTRACT

"Māmawī Wīcihitowin" is Nēhiyawin (Plains Cree) for "Working Together, Helping One Another". This thesis explores māmawī wīcihitowin in legal education. I perceived a gap in law school curriculum, settler colonialism studies and anti-racism training. It is innovative and necessary to use anti-dominance training in an anti-colonial framework for student education in law schools. This accompaniment involves helpers and supports from law schools and the legal profession in genuine partnership with Indigenous communities to promote legal community engagement and outreach for law students.

Everyone needs anti-colonial training. The need for anti-colonial training in law school is the focus of my thesis. Defining anti-colonialism can be difficult, because it is often confused with diversity initiatives meant to reduce the harm caused by settler colonialism. Law schools rely on typical diversification strategies, to heed the calls of deep transformation of contemporary Canadian society that are recommended by numerous inquiries. Although settler harm reduction strategy is necessary, without doing more, this reinforces a dominant system instead of changing it. We become once again spell bound under the ghosts of unarticulated embedded assumptions, especially those that haunt the law school curriculum.

I focus on law school education because it teaches a system. Indigenous peoples have a counternarrative to this system, a way of forcing this ghost out into the open. This counternarrative is unlike other marginalized peoples. We have evidence of nation to nation relationships between Indigenous nations and the Europeans which are the Treaties.

Using the term anti-dominance in the experiential training of all law students, is because it clarifies the process of learning mutual and equal partnership with Indigenous communities. There is a specter in academia that the dominant culture and the subordinate marginalized peoples are on either side of an invisible barrier. But the seeming transparency is a distraction, where neither side can simply walk through it. There is a great deal of research devoted in essence to teach someone not to be subordinate. But my question in this thesis is, is it possible to teach someone who benefits from the dominant culture in modern Canada, to not be dominant?

ACKNOWLEDGEMENTS

This thesis is possible because of my supervisor, Professor Emeritus Larry Chartrand. Actually, my career in law to this day would not have been possible without his assistance. About to flunk out of the Program of Legal Studies for Native People in the last weeks, I all but gave up; but I paid Professor Chartrand a visit. I spent ten minutes blathering and going through my writing submissions, when he bluntly said "You're doing everything backwards! Just flip it and you'll see the patterns." When I approached him to be my LLM supervisor, about three years and a Juris Doctor later, he kindly agreed and navigated my creative thinking with the respect and kindness of a true gentleman.

I thank the incomparable Professor James Sákéj Youngblood Henderson for his undeniable genious; his steadfastness and fortitude as a true Indigenous legal warrior. I will be hanging off his words for the rest of my academic life. I thank Professor Felix Hoehn, whose book "Reconciling Sovereignties" changed my world. So did his patience and compassion. He is one of the most compelling academics of my time.

Lastly, I have the deepest, heartfelt gratitude to two incredible mentors, and I dare say friends, Ben Ralston and Heather Jensen. Your faith and belief in me has given me the strength to keep walking this legal path. I am honoured to have met such brilliant minds in the legal profession. I pray I am even half as gifted as either of you someday.

Ekowsi.

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My mother, in her repeated attempts to improve herself through a university education that was influenced at the time by unchecked settler colonial perspectives, paraphrased for me an anecdote from one of her undergraduate psychology classes when I was eight years old. It was one of those experiments done on animals to glean data and insight into how we behave as human beings that most would consider cruel today. Although many animals were involved with varying results in Wolfgang Köhler's experiments on cognitive behaviour[1], my mother's narrative to me at that time involved a chicken and a dog. Her explanation of this experiment, from my recollection, was that the chicken and dog were both starved equally under sensory deprivation. Near death, the experimenter individually placed the animals in an open yard, directly in front of a section of a wire barrier fastened into the ground. The barrier was a couple meters high and about the same for width. Starting with the chicken, the animal was placed on one side of the barrier, directly across from the most savoury food for fowl that was positioned on the other side. The chicken proceeded to kill itself trying to reach the food. Up next was the dog and the strategic placement of appealing dog food. The dog continued to bang, hit, bite and dig its way to the food, but to no avail, eventually collapsing from exhaustion. Laying back a few feet, the dog's eyes studied this barrier. After some time, it wobbled back up with whatever strength it had, walked around the barrier and ate the food.

This story was traumatic as it had a strong but odd somatic resonance in me for many years.[2] My mother gave me no context as to why she shared it with me as a child. But my mother's narrative of this dated experiment has become a reflective metaphor behind this thesis. As I pursued my own improvement through post-secondary education, the settler colonial systemic organization of Canada was a barrier I kept smacking myself up against as an Indigenous woman and as an academic. Through my journey in law school, however, upon reflection using my own diverse worldview, I have realized it is just a limited barrier for me to go around, despite the illusion that it is arcane and insurmountable. I have realized now that there is no need for this way of organizing our shared society of nations at all. Forcing diverse and creative ideas through a wire fence of Eurocentric epistemologies risks dismembering, destroying or detaining them. To opt for a "paradigm detour"[3], like Köhler's clever albeit beaten down dog, in law school curriculum, is not only timely for everyone, but a necessity.

Chapter 1: Introduction

"*Māmawī Wīcihitowin*"[4] is Nēhiyawin (Plains Cree) for "Working Together, Helping One Another". This thesis explores māmawī wīcihitowin in legal education. In my observations,

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[1] Can Kabadayi, Katarzyna Bobrowicz and Mathias Osvath, "The detour paradigm in animal cognition" (2018) 21 *Animal Cognition* 1, online: https://doi.org/10.1007/s10071-017-1152-0 at 22-23. "Köhler (1925) described his observations [in The Mentality of the Apes] on dogs, chickens and chimpanzees making detours around wire fences. Whereas dogs and chimpanzees were usually successful, chickens had difficulties and often attempted to go directly for the food through the fence. But he also found individual variation within the species, and later studies have shown remarkable detour performances in chickens, even within a few days after hatching. As Köhler notes, the goal visibility behind the barrier is one of the major factors influencing detour performance. A common finding in detour studies is that detours become harder to perform if the goal behind the barrier is more clearly visible, e.g., when the occlusion is reduced through mesh grids or Plexiglas barriers (chickens, dogs, human infants, mice, ring doves and pigeons). Some researchers argue the visible reward behind the barrier acts like a "perceptual magnet," creating a prepotent tendency for a direct reach. This makes it difficult to move away from the visible goal as a detour requires… [s]imilar to goal visibility, the distance to the goal affects detour behaviors: with increasing goal distance, it becomes easier to execute detours."

[2] Peter Payne, Peter A. Levine and Mardi A. Crane-Godreau, "Somatic experiencing: using interoception and proprioception as core elements of trauma therapy." (2015) 6 *Frontiers in Psychology*, online: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4396130/ at 423. "[Somatic Experiencing ("SE")] is a novel form of therapy, developed by [Dr. Peter A.] Levine over the past 45 years. It focuses on resolving the symptoms of chronic stress and post-traumatic stress. SE differs from cognitive therapies in that its major interventional strategy involves bottom-up processing by directing the client's attention to internal sensations, both visceral (interoception) and musculo-skeletal (proprioception and kinesthesis), rather than primarily cognitive or emotional experiences. SE is not a form of exposure therapy; it specifically avoids direct and intense evocation of traumatic memories, instead approaching the charged memories indirectly and very gradually, as well as facilitating the generation of new corrective interoceptive experiences that physically contradict those of overwhelm and helplessness."

[3] Kabadayi, *supra* note 1.

[4] I met with Woodland Cree Instructor, Charlotte Ross, a fluent Cree speaker and Treaty Kit Facilitator for the Office of the Treaty Commissioner, and Saulteaux Bob Badger, a Traditional Knowledge Keeper and Cultural Co-ordinator, First Nations and Métis Relations with the

research and experiences in legal education, I perceived a gap in law school curriculum, settler colonialism studies[5] and anti-racism training.[6] This perceived gap became clearer to me, and this thesis is an attempt to address it, by explaining that it is innovative and necessary to use anti-dominance training to accompany what I describe as an anti-colonial framework for student education in law schools. I define accompaniment as having an array of helpers and supports from Indigenous communities, law schools, and the legal profession in genuine partnership with Indigenous communities to promote legal community engagement and outreach for law students.

Everyone needs anti-colonial training. The need for anti-colonial training in law school is the focus of my thesis. I posit that personal lived experience is not escapable, especially in the law school curriculum. This lived experience goes both ways when attempting to implement an anti-colonial framework to change law school education. Defining anti-colonialism can be difficult, because it is often confused with diversity initiatives meant to reduce the harm caused by settler colonialism, or what has been coined as "settler harm reduction"[7] activities. Universities, including law schools, rely on typical diversification strategies, such as academic accommodation and so on, to heed the calls of deep transformation of contemporary Canadian society that are recommended by numerous government inquiries and reports. Although settler harm reduction strategies are necessary, if left as the "catch-all" solution without doing more, such as addressing the cavities of systemic learning, this reliance on an assimilating veneer of change, although voluntary on the part of marginalized participants, reinforces a dominant system instead of changing it. Although diversification strategies are initially a formidable threat to shaking us all out of a systemic spell, we become once again spell bound under the ghosts of unarticulated embedded assumptions, especially those that haunt the law school curriculum.

There is an antidote to this 'spell-binding'. I focus on law school education because it teaches a system. Part of this antidote is that Indigenous peoples have a counternarrative to this system, a way of forcing this ghost out into the open. This counternarrative is unlike other marginalized peoples. True, we as Indigenous peoples have lost so much in terms of colonization, famine and

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Vice-Provost of Indigenous Engagement at the University of Saskatchewan, who both confirmed the meaning of *māmawī wīcitowin*. After participating in ceremony with them, it was an honour to be able to use this Cree term as a guide for my LLM thesis.

[5] Brian Slattery, "Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title" (1983) 2 *Studies in Aboriginal Rights* (Wiyasiwewin Mikiwahp Native Law Centre, University of Saskatchewan) at 1, online: https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=http://scholar.google.ca/&httpsredir=1&article=1311&context=faculty_books. Slattery is considered one of the foremost academics in studies of settler colonialism. I circumscribe an anti-colonial framework as inspired by Slattery's focus on four nation states in more detail below in this thesis. Settler colonialism studies, defined by Slattery, involves the "histories of Canada, the United States, New Zealand and Australia, [that] despite considerable differences, have certain common features. These countries were originally inhabited solely by [A]boriginal peoples organized in relatively small-scale societies. At various stages, Great Britain asserted sovereignty over these territories, and proceeded to introduce European settlers and to establish novel legal and political institutions. Over time, the settlers grew to outnumber the [N]ative people, and the new British-derived institutions assumed a position of dominance. English law was generally introduced. Much of the land originally held by [N]ative peoples passed into settler hands, by processes ranging from peaceful agreement to forcible dispossession. In recent times, all of these countries have witnessed a resurgence of [N]ative political and cultural activity. All are confronted with a number of complex and inter-related legal problems concerning [N]ative people, problems inherited from colonial times."

[6] Merriam-Webster online dictionary defines anti-racism as simply, "opposed to racism", online: https://www.merriam-webster.com/dictionary/anti-racist; There is a plethora of approaches to anti-racism training and education. Although I explore later on in this thesis some of the history of the term of anti-racism post The Civil Rights Movement and the substantive equality programming that has resulted, some anti-racism initiatives can be found federally, online: https://www.canada.ca/en/canadian-heritage/campaigns/anti-racism-engagement/anti-racism-strategy.html; provincially, online: http://mcos.ca/multicultural-ethnocultural-and-anti-racism-organizations/; and even on the municipal level, for example in the City of Saskatoon, online: https://www.saskatoon.ca/community-culture-heritage/cultural-diversity/anti-racism-public-education.

[7] Patricia Barkaskas and Sarah Buhler, "Beyond Reconciliation: Decolonizing Clinical Legal Education." (2017) 26:1 JLSP (Osgoode Hall: York University) at 14.

legislated inequality (such as with *Indian Act* policies[8]) in our own lands, but we have evidence of nation to nation relationships between Indigenous nations and the Europeans. Put bluntly, the Treaties.

Another part of this antidote is what I describe as the non-Indigenous stages of curiousness. For example, many Indigenous activists and legal scholars have toiled greatly and at length to bring issues, mostly untenable crises that affects Indigenous demographics all across Canada, to the forefront of public attention. But how do these issues quickly go from important "buzzwords" to cliché banality, such as reconciliation and decolonization? It may be that the average settler who hears such terms detaches from the underlying meaning because there is little to no access to lived experiences precisely because there is no access to systemic change through education. If we can partner in providing treaty informed lived experiences in all levels of education - that goes both ways - between nation to nation through communities, we can ensure a beneficial stage of curiousness that could prevent the radicalization of the settler.

Dominant settler culture in modern Canada prevails without an anti-colonial awareness. Introducing new plans of action according to a new terminology is welcome. But what are we really trying to achieve with terms like Indigenization? What is its purpose? Are we changing the conversation or are we keeping the same racially subordinate narratives because we are using poorly understood terms? Or is it the poor understanding that is perpetuated by unconscious, and in some cases conscious, colonized perspectives in academia, especially when these terms rub up against traditions that inform the legal curriculum. This in turn has a parallel contemporary public conversation, as the media will turn to academics to elucidate on what is happening in current social and political events.

Using the term anti-dominance in the experiential training of non-Indigenous and Indigenous law students, or any post-secondary students, I believe would be more effective because it clarifies the process of learning mutual and equal partnership with Indigenous communities. There is a specter in academia that the dominant culture and the subordinate marginalized peoples are on either side of an invisible barrier. But the seeming transparency is a distraction, a "perceptual magnet"[9] if you will, where neither side can simply walk through it. We need accompaniment as we attempt a paradigm detour in decolonizing the law curriculum with guidance and support from all forms of mentors, Indigenous and non-Indigenous. There is a risk of creating programs "just for" and "specifically geared towards" as these initiatives may become so exclusive, no one outside these limitations can weigh in substantively to contribute. For example, there is a great deal of research devoted in essence to teach someone not to be subordinate.[10] But my question in

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[8] Indigenous Foundations, *The Indian Act*, (University of British Columbia), online: https://indigenousfoundations.arts.ubc.ca/the_indian_act/.
[9] Kabadayi, *supra* note 1.
[10] See Linda X. Zou and Sapna Cheryan, "Two Axes of Subordination: A New Model of Racial Position" (2017) 112:5 *Journal of Personality and Social Psychology* at 107. "[Using] evidence from history and law to theorize that Whites have strategically positioned African Americans and Asian Americans along the dual axes of inferior/superior and foreigner/insider. Asian Americans are positioned as inferior to Whites but valorized relative to African Americans; simultaneously, they are ostracized as foreigners relative to both Whites and African Americans. These axes operate together to "[shape] the opportunities, constraints, and possibilities with which subordinate groups must contend.""; and see Anishinaabe scholar, Stephanie Masta, "Challenging the Relationship Between Settler Colonial Ideology and Higher Education Spaces" (2019) 8 *Berk Rev Ed* 2 at 190-191. "The positioning of Indigenous knowledges as equal to western-based knowledges provides a more holistic understanding of what is and is not knowledge." and at 191 "Faculty can also integrate different forms of knowledge in their classes. For example, in the research methods courses I teach, Indigenous methods are positioned as equal to western-based methods. It is not presented as an alternative approach. Changing how one engages in settler colonial discourse is vital for disrupting its presence in educational spaces.".

this thesis is, is it possible to teach someone who benefits from the dominant culture in modern Canada, to not be dominant?

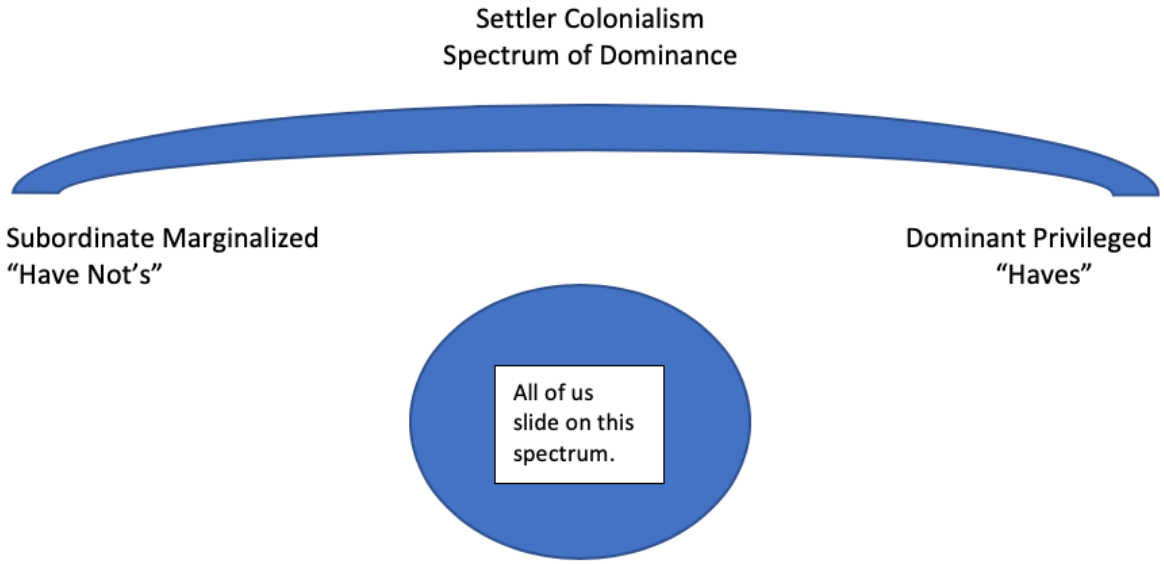

Figure 1.1: We all slide on a settler colonial spectrum of dominance in varying degrees.

I attended law school during the time that the Truth and Reconciliation Commission's (TRC) Final Report[11] was just being concluded and released. The reaction in most communities across Canada post-TRC was hopeful. A lot of buzz terms entered the media and there seemed to be considerable receptivity to create academic environments for conversations to discuss solutions towards a more equitable future, especially in the law school. For example, reconciliation is a touchstone term from the TRC as it carries the weight of the responsibility to act, hence the "94 Calls to Action".

The TRC's Final Report specifically highlighted legal education and the legal profession as a major part of reconciliation. Defining reconciliation, and who has responsibility for what action to the general public, however, has shown to be difficult. I discuss the issue of "defining reconciliation" further throughout the chapters of my thesis, including how it has become another form of domination. Which "side" is privileged to define the term? Can that side control the other's definition of it? I believe reconciliation is a process that we can all participate in, and that process is in Calls to Action #27 and #28, where there is a declared need for skills-based anti-racism training:

> 27. We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

[11] The Truth and Reconciliation Commission of Canada, *Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Library and Archives Canada Cataloguing in Publication, 2015) at 319.

> 28. We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism. [12]

Most, if not all Canadian law schools, have genuinely moved forward to heed these calls, especially with a focus on Indigenous cultural introduction for general law students. For example, since the TRC, starting in my own backyard, the College of Law at the University of Saskatchewan, has had decades-long support for Indigenous legal scholars through the Indigenous Law Centre's (formerly Native Law Centre) retired intensive summer law program that has offered student scholarships, ongoing support, cultural spaces and much more. Recently, the College of Law has also introduced a mandatory first year course titled *Kwayeskastasowin: Setting Things Right*, that is instructed by an Indigenous professor. Of note, the University of Victoria Faculty of Law now offers a joint degree program in both Canadian common law and Indigenous legal orders, worldviews and traditions.[13] Other efforts include the University of Alberta's Faculty of Law, in support for the TRC Call to Action #50 that calls for the development of Indigenous law institutes, established the *Wahkohtowin* Law and Governance Lodge[14]; and another example is the Osgoode Hall Law School Anishinaabe Law camp hosted by Anishinaabe law professor John Borrows' own his home reserve of *Neyaashiinigmiing* (Cape Croker on the Bruce Peninsula)[15].

There are many other wonderful initiatives, spearheaded through the efforts of Indigenous and non-Indigenous legal scholars alike. Too numerous to mention an exhaustive list in my thesis, they are full of participants working hard to collaborate and introduce into the law school curriculum Indigenous worldviews and legal traditions, with of course some form of cultural competency programming. Although these initiatives that are housed by the various law schools are crucial on the path to reconciliation, it does lead to the following question. What do law schools think they are doing (more accurately what the law administrators and faculty think they are doing), and what are they actually doing?

The focus for law schools pre TRC to address the imbalance of who could access a legal education has been, and continues to be, through diversification strategies. Canada is not alone. The United States of America, Australia and New Zealand all have attempted various diversification initiatives regarding enrollment in law schools and adjusting the curriculum for academic accommodation. Diversification strategies have been typical efforts and responses to reconcile the disparity in society caused by settler colonial histories in Canada, and other state territories, whether they are termed substantive equality (Canada), or affirmative action policies (United States of America). Initiatives in legal education, such as through poverty law clinics to

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[12] *Ibid*.
[13] The University of Victoria Faculty of Law Joint JD/JID program, online: https://www.uvic.ca/law/about/indigenous/index.php.
[14] The University of Alberta Faculty of Law Wahkohtowin Law and Governance Lodge, online: https://www.ualberta.ca/law/faculty-and-research/wahkohtowin.
[15] John Borrows, "An emphasis on [I]ndigenous law could help shape a future that's brighter than our past" *The Hill Times* (28 June 2017), online: https://www.hilltimes.com/2017/06/28/emphasis-indigenous-law-help-shape-future-thats-brighter-past/111748.

address access to justice, and so on, are invaluable settler harm reduction activities and in my opinion, should be increased. Only employing these kinds of initiatives will only go so far.

In regards to the above Calls to Action #27 and #28, however, I found the term "anti-racism" when it came to "skills-based training" needed some unpacking as it is an inappropriate, if not antiquated term. Anti-dominance strategies, especially if done in an anti-colonial context, may have a more effective delivery because it would clarify why anti-racism strategies have been at best nominal in success for rooting out racism, especially in the context of settler-colonial countries. I identify anti-racism more than the other terms that the TRC mentions, as the most necessary in legal education in this thesis. Law schools are ground zero for the education and preparation of all our parliamentarians, policy and law makers, lawyers and politicians that informs - and reforms - our Canadian legal system.

Anti-racism training has been met with a lot of resistance when it is introduced in education settings, including post-secondary environments[16]. Law school administrators and faculty are no exception in believing that they are, indeed, not teaching "racism". They are teaching doctrinal classes and that meaningful attempts have been made to address racism only so far as an institution can interfere within the personal lives of students outside of training them to think and behave as lawyers. We are once again pitted against an elusive ghost that continues to haunt the legal curriculum, depending on the hope that diversification initiatives can alone exorcise such unarticulated embedded assumptions. In this thesis, I advance that it is innovative to use an anti-colonial framework for anti-dominance training instead of the term of anti-racism. By using programming for accompaniment (which I further elaborate later in my thesis) we can, through lived experiences, learn to hold and create space in the law schools themselves, precisely because we need to deal with the *trauma* that naturally comes from challenging a paradigm of dominance.

In Chapter 2, I discuss what I believe law schools think they are doing, and then discuss what law schools are actually doing. On its face, this thesis may appear like what I am advancing is unique, which in some ways it is, but not so unique that there is limited space for others to substantively contribute. I believe the concept of anti-colonial training can be contrary to what seems difficult with introducing something unique. Usually there is an unaddressed gap because with anything unique there is a tendency to theorize at a high level and in generalities, which could be more akin to dancing with this ghost, instead of fighting it. I begin by giving general "historical sketches" that are specific to the settler colonial histories of Canada, the United States of America, Australia and New Zealand. This sets the stage to explain how it is poorly understood that the rights of Indigenous peoples became a focus at the end of imperialism and colonialism, but it was well to the end of World War II when minority human rights was given significant attention by the United Nations. Diversification strategy initiatives can be quickly conflated with the struggle of other minorities in these countries. The Indigenous counternarrative is very important in distinguishing this injustice because of the strong potential

[16] Verna St. Denis, "A Study of Aboriginal Teachers' Professional Knowledge and Experience in Canadian Schools" (2010) *Canadian Council on Learning* at 47, online: https://www.ctf-fce.ca/Research-Library/ABORIGINAL-Report2010-WEB.pdf. "When asked how their non-Aboriginal colleagues and the school systems in general responded to racism in education, participants identified a number of programs such as, anti-racist programs, multicultural education, and anti-bullying and social responsibilities initiatives… For the most part, participants felt that racism was mostly denied, ignored or trivialized, and that it had become more hidden in recent times.".

of uninformed assumptions (similar in anti-racism education and training) that the struggles are the same.

By explicitly addressing in my Chapter 2 what law schools think they do and what they actually do, does not mean addressing *everything* that they do, which would be overwhelming and impossible. What I am aiming to do in this chapter is to define the things they do that I want to critique. For example, I explicitly point out that diversification strategy initiatives have reached a saturation point in their usefulness and are now reinforcing a dominant system without more. I am not trying to canvass a full literature review of legal pedagogy. Nor am I willing to shadow box with a caricature of law school that I have neither defined nor proven to be accurately depicted (one extreme). Also, I know I will never fit an exhaustive definition of what law school is into my thesis that is focused on what I think it should be (another extreme). I am attempting to stake out middle ground between these two poles. And it is precisely a middle ground, an ethical space[17], a trans-systemic pathway[18], that I am wanting to further explore in the subsequent chapter. I believe this is what leads Indigenous peoples to want to enter Canadian law schools. No matter how painful and alien the Canadian legal system is for Indigenous legal warriors to walk this Eurocentric pathway, the Indigenous counternarrative of who they are, as reflected in the Treaties, is what I believe gives them strength.

In Chapter 3, I elucidate on why the counternarrative of Indigenous peoples is part of an essential antidote. First, I discuss what has contributed in how law schools have been presently shaped. This ghost we wish to fight has a structure and this structure is what needs to be exorcised. The decolonization of law schools is important beyond diversification efforts, because you cannot tell someone that everyone is just as good as everyone else, then sort them by grades and other instruments of privilege. You can call anything what you want, but as long as you are speaking English, you are in charge. Law does not exist except in the mind and it is this collection of minds that goes back way before the point of contact to the origins of the English legal system. This collective of minds of all civilizations and its history of legal transformation can and should be decolonized.

Constitutional Law teaches an overarching system with subject matter that is broad. My concern in this chapter is what it does not cover, or what has been lacking for some time. Constitutional Law in how it is taught presently to law students is significant in how it sets up Aboriginal Law courses to be limited, or appear limited, in its effects on the rest of Canadian law. Further in this thesis, I discuss how Indigenous legal orders and law need not be brought into Canadian law for it to be effectual to the Canadian legal practitioner, and indeed it is not respectful of nation to nation relationships. Law schools teach a form of utopianism in its curriculum, and when this doctrinal law is given human agency in practice, things get complicated very fast. We need to

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[17] Willie Ermine, "The Ethical Space of Engagement", (2007) 6 *ILJ* 1 (University of Toronto) at 193-194, online: https://tspace.library.utoronto.ca/bitstream/1807/17129/1/ILJ-6.1-Ermine.pdf. Willie Ermine became inspired from a Roger Poole image of an invading soldier sitting in front of a civilian. They were both from entirely different cultures and worldviews. The space between them is what resonated most with Ermine and led him to define that space as ethical, the reason being that a myriad of consequences could flow from any potential interaction.

[18] James (Sákéj) Youngblood Henderson, "Constitutional Vision and Judicial Commitment: Aboriginal and Treaty Rights in Canada" (2010) 14 *Austl Ind L Rev* 2 at 24, online: http://classic.austlii.edu.au/au/journals/AUIndigLawRw/2010/21.pdf at 25. "The Court has determined that the wording of s 35(1) of the *Constitution Act 1982* - the recognition and affirmation of existing Aboriginal and treaty rights - provides a trans-systemic constitutional framework through which the fact that First Nations lived on the land in distinctive societies with their own sovereignty, legal orders, practices, traditions and cultures was brought within the protection of the constitutional law of Canada.".

introduce the Indigenous counternarrative, or the anti-colonial framework, through effective Treaty education[19] that focuses on partnering to navigate trans-systemic pathways in Canadian Constitutional Law and beyond.

In Chapter 4, I discuss the need for an anti-colonial framework for anti-dominance training as an alternative to the term of antiracism, or rather the need to keep settlers in a stage of curiosity or "cure-iousness". Most individuals I have spoken with believe that racism is tacit, and is a premeditated attack by unscrupulous agitators. I know myself I had a very difficult time even taking the term "systemic racism" seriously when I first heard of it as an adolescent because it felt so far from pinpointing any moral blameworthiness. But as the decades went by and of course as my research progressed in law school and eventually as a graduate student, I began to understand the concerns of many settlers, but from my different worldview. Simply, most settlers I have come to know do not want people to generally assume they are racist, especially when they themselves have worked hard to face and deconstruct their own biases with as much of an open mind as they feel capable. I believe this reaction should be met with an attitude of compassion and learning.

In this thesis, I propose that anyone facing whatever level of bias they may have, may actually be experiencing a reaction that could be measured on a sliding scale of a traumatic experience.[20] I think all of society, not just the legal profession, has a narrow view of trauma. Partly because the academic research on somatic experience is relatively new. We are just beginning in the settler medical system to realize that many somatic disorders, such as trauma experienced in the nervous system, actually range in a sliding scale from severe to moderate. Feelings such as discomfort and anger, however seemingly mild on its surface may be a psychosomatic felt sense of trauma, especially if it is in direct response to the subject matter at hand. Cote-Meek discusses in depth how many Indigenous students have experienced trauma in post-secondary settings, as they see similar lived experiences and community histories, picked apart, studied and commented on in classroom settings[21].

Is it so hard to believe that the inverse can occur for non-Indigenous students to have feelings brought up in response to anti-racism training that could have the danger of being translated as an attack on that individual's identity in defence of the current Canadian system - a system that they have been raised (including many Indigenous peoples) with the belief that it is "fundamentally fair and good"[22]; a system that is reinforced through, for example, principles of fundamental justice in Constitutional Law curriculum. I believe if we frame these issues, such as racism, lateral violence and oppression in systemic contexts, in the sense that we are all just products of systemic racist learning, it becomes clearer that racism as individual, is at its core, a myth.[23] When framed in this way, nation to nation partnership can also be achieved through accompaniment through lived experiences.

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[19] I capitalize "Treaty" on purpose as a sign of respect but also to highlight the importance of the need for this education.
[20] Payne, *supra* note 2.
[21] Sheila Cote-Meek, *Colonized Classrooms: Racism, Trauma and Resistance in Post-Secondary Education* (Fernwood Publishing: Halifax and Winnipeg, 2014) at 32. "Even postcolonial approaches, with so much emphasis on how the settler culture views the other, largely miss an incredibly important point: how do Indians view Indians?".
[22] Wendy Leo Moore, "Reflexivity, power, and systemic racism." (2012) 35 *ERS* 4 at 615.
[23] Wendy Leo Moore and Jennifer Pierce, "Still Killing Mockingbirds: Narratives of Race and Innocence in Hollywood's Depiction of the White Messiah Lawyer." (2007) 3 *QSR* 2 at 172.

Finally, in my concluding Chapter 5, I discuss why introducing methods such as negotiation, mediation and dispute resolution along with importing methodologies from other disciplines, such as critical reflection and empathy development, are virtuous in attempting solutions. Yet there has been little to no meaningful change for Indigenous peoples. I can understand the appeal of leaning on such paradigm shifts that unfortunately have a strong Eurocentric base. But it leads to the question of whether any of these movements are framed, if at all, in an anti-colonial context? I draw a parallel to such attempts at paradigm shifts in legal education that are not framed in anti-colonialism with the infamous historical figure of Guy Fawkes and his failed Gunpowder Plot.[24] Guy Fawkes was caught with barrels of gunpowder under the English Parliament Building in 1605. He wanted real systemic change in the legal system but did not fundamentally change anything except in an overhaul of that time period's security system. Such attempts to create paradigm shifts without an anti-colonial framework in legal education and the legal profession, in my opinion, are not unlike the actual historical figure so desperately wanting change. But we keep getting caught in the cellar before having the opportunity to carry out such revolutionary plots. Just as with the study of natural sciences, dispute resolution methods and other such methods, are considered "neutral" in their discipline, but very alike to the natural sciences, it is anchored in anything but.

Instead, as introduced above, I suggest what I believe to be an entire paradigmatic detour. In this chapter I propose that accompaniment through lived experiences can do much to circumvent the feelings of trauma, and its potential negative results. I discuss what this accompaniment may look like in an optional Access and Empathy project offered in Canadian law schools. I suggest that past attempts to revolutionize legal education to address systemic inequalities in the Canadian legal system have been nominal at best, despite high hopes, because there is no framing through effective Treaty education in the anti-colonial context. I suggest we make mandatory a Treaty-Based Constitutional Law course in all Canadian law schools that focus on the treaties or unceded territory in the lands that the law schools are physically situated.

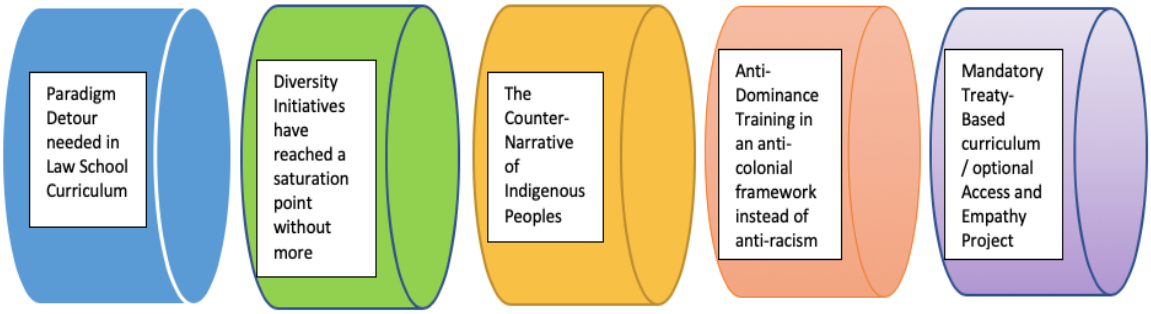

Figure 1.2: Thesis Chapter Organization for Māmawī Wīcihitowin.

In conclusion, I posit my own thoughts on how we can further develop anti-dominance training through accompaniment or genuine partnership with Indigenous communities to promote legal community engagement and outreach. Revolution is not scary if settlers transparently and

[24] History.com, (2009) "Gunpowder Plot." *History.com*, online: https://www.history.com/topics/gunpowder-plot.

peacefully revolutionize themselves. Decolonization is not just an opportunity to ‘do the right thing’. It is an undeserved gift to reimagine, recreate, renegotiate and reconcile what it means to be a human being and our need to connect with communities. Harry Lafonde, former Treaty Commissioner of Saskatchewan, has said that we all lost when the Treaties were not honoured, including settlers. What settlers gained short term with the land and its resources, they lost in connecting with the Indigenous peoples and the incredible potential in building social relationships. We could still make this society of shared nations truly great. I do not think it is too late. It is never too late to learn and there is still time to build a better tomorrow in partnerships as the Treaties first intended. After all, we are all Treaty people.

Chapter 2:
An Anti-Colonial Framework in Legal Education: "Fight the Ghost"

Growing up as an Indigenous person in the urban core neighborhoods of Saskatoon I received the typical public school education during the 1980's and 1990's in the province of Saskatchewan, Canada. I am going under the assumption that most public education systems in other provinces were similar, as I have not found any different. For example, there were many comments in my social studies classes that angered me to my core, like lighting a match to gasoline. But I had no idea why, I just knew my Nēhiyaw (Plains Cree) family was on the short end of this stick. Often my teachers, acting with as much authority (maybe even more so) than my parents due to their connection to being representative of the most modern stage of 'real' education, would make comments on history that made me feel terrible and less than my settler (and embarrassed me to my new-comer) peers.

A popular narrative went as follows, "Yes, those poor Indians lost the land here because of their greed for shiny beads, guns and alcohol – they called it 'fire water' back then," this ever-present term associated with Indians would consistently get a chuckle out of most students in class, "they would trade huge areas of their lands for these items to the pioneers and explorers who came over on dangerous voyages to start a better life in the New World. When they first arrived, almost all died from scurvy – that's what you get if you kids don't take your vitamin C! and where can you get the most vitamin C?" of course, there would be the resounding answer of oranges! More affluent witty classmates mentioned Flintstone supplements. I would give the odd enterprising comment that it can come from making a tea from pine needles, as I was told stories of this medicine from my own family members. Some teachers were impressed, but most were annoyed that I stole their punchline.

The narrative would continue, "once the first fur traders knew how to survive, it was easier for pioneers to make the ocean voyage and get through the harsh winters with the help of the friendly Indian tribes that allied with the English. The fur traders hunted the wildlife that they saw as plenty and never ending, sadly almost to extinction. By that time, the fashion for beaver hats and buffalo hides had changed and more farms were getting settled out here in the prairies. It was time to make a new life. That was extremely difficult and most settlers really had to work hard to make their own sod houses and plough land that before only big herds of animals aimlessly roamed" and so on.

The narrative of the Indian had almost fully disappeared at this point, until a story popped up as the teacher discussed the defeat of the French, an invasion of the odd fort or a supposed attack on a hapless settler family. The only focus past this point, especially here in Saskatchewan, would be a brief dedication to learning about the infamous "rebellion" of Louis Riel, the leader of the Métis who was hung as a traitor to Canada. That was it. That was how far in depth this education went, and I really liked history and paid close attention. I had no understanding even of the complexity of the fur trade, let alone a true general timeline of it until my undergraduate Native Studies class in 1998, and even then, most of those classes left out an enormous detail. The Treaties.

A. "You are fighting a ghost." – Sákéj Youngblood Henderson

Fight the ghost. This "ghost" is representative of the unarticulated embedded assumptions in the law school curriculum. The system that is taught in law schools is based on colonial assumptions. These assumptions are not spelled out, but are nonetheless still there. The *status quo* just ignores that this haunting of historical baggage exists to the extent it does in law schools. It is hard to recognize what anti-colonial education is precisely because of this ghost.

In this chapter, I approach the layers of what some of these unarticulated embedded assumptions are. Put simply they are the "solutions" we continuously seek to reconcile Canada's settler colonial past (present and future) with a romantic nationalist tale Canadians have woven into our mythos as a society. These solutions are diversification strategies and initiatives for academic success or "settler harm reduction activities".[1] This settler harm reduction can look on the surface like anti-colonial work. But at a deeper level, it does not challenge the colonial frame. This chapter will discuss what law schools think they are doing and what they are actually doing.

Maggie Blackhawk in her compelling article, "Federal Indian Law as Paradigm with Public Law", clarifies that the Civil Rights movement cannot be a paradigm for Indigenous peoples as it focuses on a minority within a nation state rather than the plurality of nations in a colonial relationship for Indigenous peoples.[2] The diversification strategies/ameliorative program model for discrimination is individual focused. This focus deals with an unrepresented demographic by seeking their representative participation. This paradigm may be fine for most minorities but it is absolutely not what Indigenous peoples are seeking. Instead, Indigenous peoples are seeking mutual respect separate and apart from settler colonial states - not subsumption within them in equal numbers.

This is an issue that Gordon Christie, and many other Indigenous legal scholars for that matter, have had with "liberalism" for years.[3] This liberalism assumes Indigenous peoples, cultures, laws, etc. can be subsumed within a liberal democratic state that treats them as one minority among others or at best "Citizens Plus", a term that was coined in the first inquiry into Indigenous people's circumstances in the 1966 Hawthorn Report.[4]

This links to the decolonization and self-determination movement in public international law. In a nutshell, this movement in international law is premised on the Westphalian sovereignty of existing nation states.[5] Decolonization and anti-imperialism post World War II was simple for many countries. African countries wanted self-rule and to punt out European powers, as did Middle Eastern and Southeast Asian countries.[6] Settler colonial states and Indigenous peoples

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[1] Patricia Barkaskas and Sarah Buhler, "Beyond Reconciliation: Decolonizing Clinical Legal Education." (2017) 26 *JLSP* 1 (Osgoode Hall: York University) at 14.

[2] Maggie Blackhawk, "Federal Indian Law as Paradigm within Public Law" (2019) 132 *Harv L Rev* 7, online at: https://harvardlawreview.org/2019/05/federal-indian-law-as-paradigm-within-public-law/.

[3] Gordon Christie, "Implementation of UNDRIP within Canadian and Indigenous Law Assessing Challenges" in *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws (Special Report)*, (2018) CIGI, online: https://www.cigionline.org/publications/undrip-implementation-more-reflections-braiding-international-domestic-and-indigenous at 26.
"While I label the most vocal commentators "conservatives," at the core of their common ideology lies a strong liberal philosophy. They wish to conserve the world of liberalism. Terms of discourse set by these commentators are set down by allegiance to an individualistic, liberal conception of Canadian society, one that assumes Indigenous peoples are already contained within this ideological world…
This focus — on the suffering of peoples as individuals — shifts attention away from centuries of colonialism, dispossession, oppression, loss of self-determination and cultural genocide. Indigenous peoples resist this framing not because working to improve the lives of Indigenous peoples is somehow improper, but because *that* objective has its proper place in Canada in *other, separate* discussions."

[4] Kirstin Burnett, "Citizens Plus: Aboriginal Peoples and the Canadian State" (2002) 21 *Canadian Woman Studies* 4, online: https://www.academia.edu/27112421/Citizens_Plus_Aboriginal_Peoples_and_the_Canadian_State at 231. "'Citizens plus' status, according to Cairns, is the best vehicle through which Aboriginal people can ameliorate the conditions they experienced under colonialism without giving up the benefits of citizenship in a modern state."

[5] OER Services, "Chapter 12 The Rise of Nation-States: The Peace of Westphalia and Sovereignty" *Western Civilization*, online: https://courses.lumenlearning.com/suny-hccc-worldhistory/chapter/the-peace-of-westphalia-and-sovereignty/.

[6] The University of Luxembourg, "The beginnings of decolonisation and the emergence of the non-aligned states" *The CVCE.eu*, online: https://www.cvce.eu/en/collections/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/0397bac4-10f2-4b69-8d1a-366ca4a08c34.
"Decolonisation unfolded in two phases. The first lasted from 1945 to 1955, mainly affecting countries in the Near and Middle East, and South-East Asia. The second phase started in 1955 and mainly concerned North Africa and sub-Saharan Africa."

were the unsolvable puzzle. Colonizers were the majority and were not going anywhere. They were generally open to equality for Indigenous people as citizens, in theory at least. Maybe even Citizens Plus as mentioned above. But self-determination and secession were off the table for minorities subsumed within nation states, as opposed to nation states subject to imperialism. This essentially was the basis for why the *United Nations Declaration of the Rights of Indigenous Peoples* ["UNDRIP"][7] was needed, among other reasons.

What do basic human rights mean for Indigenous peoples as they have fallen through the cracks of norms developed for existing nation state divisions? Once again, Indigenous peoples are in a tough spot. We are not just looking for greater numbers in existing positions within an existing power structure. Indigenous peoples are looking for decolonization and Indigenization to account for their incommensurable laws, knowledge systems, and so on.[8] With this context, one can see that the debate for Indigenous rights seems to all take place under an equality lens that is actually oppressive for Indigenous peoples, but it is UNDRIP and its implementation that is the game changer.

B. Setting up settler colonialist systems did not come with universal IKEA directions, but they did come with similar romantic nationalistic narratives for the dominant culture to justify the depravity in the treatment of Indigenous peoples.

Any attempt to sketch an historical narrative, risks the accusation of over-simplicity. I rely on general historical facts, but request the reader of this thesis to pause their concerns of the relevance of these sketches until the end of the chapter (please refer to Figure 1.2 in Chapter 1 above). The purpose of the below historical sketches is to set a context as to how diversification strategies came to be, and why we need to implement something more. This context of settler colonialism historical sketches are followed by some thoughts as to why Indigenous students would want to go to a Canadian law school. This history is important for my thesis specifically, despite the general facts below, because it highlights how the diversity initiatives for Indigenous students historically differ from other race based remedial legislation or admission policies.

I believe it is extremely important to be sensitive in academia in how students, especially myself, begin with a struggle in the weeds. Eventually, the bigger narratives start to emerge as patterns. Once these patterns make sense, especially for the aspiring Indigenous legal practitioner or scholar, fundamental, albeit incremental, changes can be made. I am hoping to help shed light on one such pattern below.

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[7] United Nations, "Division for Social Policy and Development: Indigenous Peoples, "United Nations Declaration on the Rights of Indigenous Peoples"" (2016) *unhcr.org*, online: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html; see also *United Nations Declaration on the Rights of Indigenous Peoples* [UNDRIP], available online at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

[8] Larry N. Chartrand, "Aboriginal Peoples and Mandatory Sentencing" (2001) 39 *OHLJ* 2 at 463, online: https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1469&context=ohlj. This article discusses *Gladue* and the damaging effects of mandatory minimum sentences on Indigenous peoples. Chartrand argues that this issue should be about self-determination rather than systemic discrimination. This is just one example of the broader push for a different paradigm for Indigenous peoples compared to an "equality model". "These Aboriginal concepts are more than "alternative" sentencing principles to Aboriginal peoples: they are primary and fundamental. They are integral to the Aboriginal social structure and to how Aboriginal people structure their relations **with** one another. These principles would quite rightly be viewed as part of an Aboriginal right to control their social order."

i. Brief historical sketches of Canada, the United States of America, Australia and New Zealand

a) Canada: "Our home and native land".[9]

It is true in my personal anecdote above that most settlers from European nations that initially arrived to the "New World" post contact were mainly involved with the elaborate fur trade that occurred for centuries. Large and powerful Indigenous nations inhabited and controlled all areas of what was originally Turtle Island[10], despite the influx of numerous European settlers in the first couple centuries after contact. There was warring between Indigenous nations as reflected in their respective military might, prowess and knowledge of territories. The scale of these Indigenous nations demanded respect and treatment as nations that equaled other European counterparts. For example, after the English conquered the French colonies in 1760,[11] attitudes that simmered among the fur traders and settlers regarding the neighboring Indigenous tribes reached a point of conflict with the Pontiac Wars (named after the famous Chief Obwandiyag, known among the English as "Pontiac")[12]. The conflict concerned the English so much, that they expediently delivered from their King a "magna carta" of sorts insofar that it acknowledged the rights of the Indigenous peoples, *The Royal Proclamation of 1763*.[13]

This independence of Indigenous peoples in the territories that the English pushed to settle, is reflected in the historical statement in 1764 by Ojibway Chief Minavavana regarding a disrespectful trader, "Englishman, although you have conquered the French, you have not yet conquered us. We are not your slaves. These lakes, these woods and mountains, were left to us by our ancestors. They are our inheritance; and we will part with them to none."[14]

One of the most significant treaties that occurred in North America, was the *Treaty of Albany* in 1664 that was made in New York with the Indigenous tribes[15] and considered to form the base for the seminal *Treaty of Niagara*,[16] thereby continuing the tradition of "polishing the Covenant Chain" between nations. This treaty is also referred to as the *Two-Row Wampum Treaty*, due to the wampum belts used by Indigenous nations that were symbolic of these important covenants.[17] The importance of the negotiation that occurred prior to the signing of this treaty, involved over 2000 tribes from the surrounding areas, was recorded, and in part organized, by one of the more significant Crown negotiators, Sir William Johnson.[18]

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[9] Government of Canada, "Anthems of Canada", *Official Lyrics of 'O Canada': English version*, online: https://www.canada.ca/en/canadian-heritage/services/anthems-canada.html.
[10] Turtle Island Indigenous Education, *turtleislandeducate.com*, online: http://turtleislandeducate.com/about/turtle_island.
[11] James H. Marsh, "Pontiac's War" *The Canadian Encyclopedia*, (22 July 2012) online: http://www.thecanadianencyclopedia.ca/en/article/pontiacs-war-feature/.
[12] *Ibid*.
[13] Government of Canada, *Highlights from the Report of the Royal Commission on Aboriginal Peoples*, online: https://www.rcaanc-cirnac.gc.ca/eng/1100100014597/1572547985018. "The proclamation portrays Indian nations as autonomous political entities, living under the protection of the Crown but retaining their own internal political authority. It walks a fine line between safeguarding the rights of Aboriginal peoples and establishing a process to permit British settlement. It finds a balance in an arrangement allowing Aboriginal and non-Aboriginal people to divide and share sovereign rights to the lands that are now Canada"; see also Canada, "250th Anniversary of the Royal Proclamation of 1763", online: https://www.aadnc-aandc.gc.ca/eng/1370355181092/1370355203645#a1.
[14] John J. Borrows and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 4th ed (Markham, Ontario: Lexis Nexis Canada Inc., 2012) at 18.
[15] *Ibid* at 14.
[16] *Ibid* at 16.
[17] *Ibid* at 15.
[18] *Ibid*.

Other major historical turning points occurred soon after, that permanently shifted the relations with the Indigenous populations, including the merging of the two fur trade companies[19], the formation process of Canada's confederacy[20], and the starvation politics used in the clearing of the plains, including the forced signing of some of the later "Numbered Treaties".[21] Fortunately, the chiefs and headsmen that signed the Treaties 1 through 7, insisted on the promise of education.[22] With most Indigenous populations confined at this point to reserves in areas far removed from urban hubs, this physically accomplished the marginalization of Indigenous peoples in Canada. The *Indian Act*, as Canada's legal justification, empowered inhumane policies such as the pass system to leave the reserves and the forced removal of children to attend the infamous Residential School System. This legislation set a cycle of oppression and assimilation. Further oppression policies, such as the disenfranchisement of Indian status, the Sixties Scoop policies all have fed the continuing over incarceration and apprehension of Indigenous children along with chronic underfunding of Indigenous communities, which is still palpable in society today.[23]

The unchecked oppression and assimilation of Indigenous peoples in Canada was still in full swing when a Nisga'a gentleman of the name Frank Calder, who with the assistance of a lawyer, Thomas Berger, decided to appeal what became a watershed case,[24] *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313 ["*Calder*"].[25] Calder demanded the acknowledgement that Aboriginal title to Nisga'a lands was never extinguished.[26]

The *Calder* case is considered the introduction to modern Aboriginal Law, and the resulting effect the decision had on Prime Minister Pierre Trudeau was dramatic. Known for being outspoken, he acknowledged that his own convictions were changed and famously stated, "perhaps you have more rights than we thought you did."[27] Contemporary to *Calder*, the 1969 *White Paper*[28] was introduced under Trudeau's Liberal government. It was to be a benign 'final solution' of getting rid of the *Indian Act*, thereby bringing impoverished and isolated Indigenous communities into the fold of a united Canada that no longer had 'arbitrary' distinctions defined

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[19] Hudson Bay Company Heritage, "The North West Company", online: http://www.hbcheritage.ca/history/acquisitions/the-north-west-company.

[20] Parliament of Canada, "Confederation" *Our Country, Our Parliament*, online: https://lop.parl.ca/About/Parliament/Education/ourcountryourparliament/html_booklet/confederation-e.html.

[21] James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2013).

[22] Sheila Carr-Stewart, "A Treaty Right to Education" 26 *CJE* 2, online: https://www.afn.ca/uploads/files/education/8._2001_carr-stewart_treaty_right_to_education.pdf at 125.

[23] The Truth and Reconciliation Commission of Canada, *Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Library and Archives Canada Cataloguing in Publication, 2015) at 1,2.

[24] Nisga'a Lisims Government, "Honouring our Past: Dr. Frank Calder" *Nisga'a Nation*, online: http://www.nisgaanation.ca/news/honouring-our-past-dr-frank-calder.

[25] *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313.

[26] University of British Columbia, "Calder Case" *Indigenous Foundations*, online: http://indigenousfoundations.arts.ubc.ca/calder_case/. "What the Supreme Court concluded was groundbreaking. While the lower levels of court had denied the existence of Aboriginal title, the Supreme Court ruled in 1973 that Aboriginal title had indeed existed at the time of the Royal Proclamation of 1763. The Supreme Court's 1973 decision was the first time that the Canadian legal system acknowledged the existence of Aboriginal title to land and that such title existed outside of, and was not simply derived from, colonial law."

[27] Nisga'a Lisims Government, "Historic Calder Decision Marks 35 Years" (2013) *Newswire*, online: https://www.newswire.ca/news-releases/historic-calder-decision-marks-35-years-535388671.html.

[28] Canada, "Statement of the Government of Canada on Indian policy (The White Paper, 1969)" *Indigenous and Northern Affairs Canada*, online: http://www.aadncaandc.gc.ca/eng/1100100010189/1100100010191.

in a problematic and dated piece of legislation.[29] What resulted instead was a unified national resistance among Indigenous communities and the birth of the 'Indigenous legal warrior'.[30]

In the decades that followed, many reports were commissioned by the various federal parties in power to inquire into the systemic issues that were and still are deeply ingrained in the country. The *Royal Commission on Aboriginal Peoples* ["RCAP"] was a thorough and lengthy report that contained relevant recommendations that are still unmet today.[31]

After an enormous class action suit, the 2006 Indian Residential Schools Settlement Agreement resulted in a former apology by the federal government in 2008 by then Prime Minister Harper.[32] There was a large amount of restitution allocated for survivors, but funds were also used to sponsor the most well known inquiry to date in Canada, the *Truth and Reconciliation Commission* ["TRC"].[33] Even internationally, the results of this commission broke open a lot of closed conversations in the public, turning Canada's path as a nation towards reconciliation.

b) The United States of America: "Oh, say does that star-spangled banner yet wave o'er the land of the free and the home of the brave?"[34]

The United States of America was built on the oppression, extermination and subjugation of the Indigenous peoples in those territories, despite the treaties that existed such as mentioned above. Settler expansion increased west ward at alarming rates for Indigenous populations,[35] and led to military and non-military campaigns to bring to justice "rogue Indians" attacking hapless pioneers.[36] Although there may have been the odd pioneer wagons winding their way on the west bound trail, farmlands and maybe towns that were attacked by Indigenous peoples, there is actually very little, if any substantiated evidence that I have been able to locate for such aberrance[37], but plenty of evidence to the contrary.[38] Just the mere notion of such attacks,

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[29] *Ibid*.
[30] Harold Cardinal, *The Unjust Society* (Vancouver: Douglas & McIntyre Ltd., 1969) at 109, 110.
[31] See Canada, Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship*. Ottawa: The Commission, 1996; See also Patricia Monture, "Women's words: Power, identity, and indigenous sovereignty" (2008) 26 *Canadian Women Studies* 3 (ProQuest), online: https://search-proquest-com.cyber.usask.ca/docview/217445984?rfr_id=info%3Axri%2Fsid%3Aprimo. "Voice is also complicated by the international boundaries we know today. The line, which makes the country of my birth Canada and not the United States, is a line that bisects the territory of my people the Haudenosaunee. It bisects other nations such as the Cree, Blackfoot, Maliseet, Mi'kmaq, and Anishnabe. To speak just to the "Canadian" experience draws an artificial boundary"; and John Borrows, "Aboriginal and Treaty Rights and Violence against Women" (2013) 50:3 *OHLJ* (York University: Toronto), online: http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1021&context=ohlj at 703. It would be remiss not to accentuate the grass roots and major political wins garnered by Indigenous women. Their devotion pressured the Canadian government to pay attention to urgent social justice needs in their communities which led to legislation reforms to the *Indian Act* and has resulted in other various inquiries, such as the National Inquiry into Missing and Murdered Indigenous Women and Girls, online: https://www.mmiwg-ffada.ca/final-report/.
[32] University of British Columbia, "The Residential School System" *Indigenous Foundations*, online: http://indigenousfoundations.arts.ubc.ca/the_residential_school_system/.
[33] TRC, *supra* note 23 at 1,2.
[34] The White House, *United States of America National Anthem: Star Spangled Banner Lyrics*, online: https://georgewbush-whitehouse.archives.gov/national-anthem/newyork-full.html.
[35] Encyclopedia Britannica, "Westward Movement: United States History", online: https://www.britannica.com/event/westward-movement.
[36] History Bits, "Native American Attacks" *American History*, online: http://www.historybits.com/west-wagon-trains.htm.
[37] Donald L. Fixaco, "When Native Americans were Slaughtered in the Name of 'Civilization'" (2 March 2018) *History.com*, online: https://www.history.com/news/native-americans-genocide-united-states.
[38] Thomas King, *The Inconvenient Indian: A curious account of Native people in North America*, (University of Minnesota Press; Minneapolis, 2013) at 4-6. King exposes the illusion of "Indian aggression", especially the skewed perspectives of Indians massacring whites. Some few and far between examples of potential massacres of settlers are quite low in death toll numbers, as compared to the whites that massacred entire

however, was justified fuel to splash on a genocidal fire to annihilate entire peaceful Indigenous communities, whether man, woman or child (including infants).[39]

From the time of the original Treaties, almost a hundred years had passed when the American federal government halted treating Indigenous communities as nations. Concepts of Indigenous territory were shifted to having Indigenous tribes dependent on their neighboring states.[40] This attitude change towards treaties directly coincided with the west ward expansion of America all the way to the coast from the 1830's onward, culminating in the gold rush that occurred in the 1890's in Alaska and its aftermath.

During this attitudinal shift in American legal consciousness and dealing with an appeal of a trespassing missionary in the case of *Worcester v State of Georgia*,[41] the court made clear that Indigenous territories, in this case the Cherokee territory, were based on a nation to nation treaty and these original treaties still demanded acknowledgement from the American government.[42]

In an ill-informed attempt to save Indigenous children from the military and non-military annihilation campaigns plaguing various regions, boarding school policy for Indigenous people was introduced in the United States of America. Richard Henry Pratt, the "pioneer" for this policy, coined the quote, "Kill the Indian, save the man." Carlisle Indian Industrial School in Pennsylvania was among the most infamous and was first established in 1879.[43] Canada mirrored this policy in the Residential School System mentioned above, with their first schools established in 1880.[44]

Another contributor to the foundation of the settler colonial context of the United States was that it was economically built on the forced labour of mainly African slaves and their descendants. Although emancipation eventually occurred, it was very difficult to get rid of overnight what historical economists characterized as a billion dollar industry before the Civil War. "Such valuable property required rules to protect it, and the institutional practices surrounding slavery display a sophistication that rivals modern-day law and business."[45] American law is unique in the development of global English common law because of the southern States legal transactions that nestled their core slavery system.

Indian settlements in the hundreds, most of them peaceful. He uses the example of Almo, Idaho that claimed 295 settlers were massacred by roaming Indians, with only five survivors including a young woman crawling to safety with her nursing baby. But this massacre never existed. Even when the massacre was debunked, the town refused to remove its memorial plaque, because of its historical significance, despite the knowledge that the story is pure fabrication.

[39] Public Broadcasting System, "New Perspectives on the West, Philip Henry Sheridan (1831-1888)", (2001) *PBS*, online: http://www.pbs.org/weta/thewest/people/s_z/sheridan.htm.

[40] The United States National Archives and Records Administration, "American Indian Treaties." *Native American Heritage*, online: https://www.archives.gov/research/native-americans/treaties. "From 1832 until 1871, American Indian nations were considered to be domestic, dependent tribes. Negotiated treaties between tribes and the U.S. had to be approved by the U.S. Congress. In 1871, the House of Representatives ceased recognition of individual tribes within the U.S. as independent nations with whom the United States could contract by treaty, ending the nearly 100 year old practice of treaty-making between the U.S. and American Indian tribes."

[41] *Worcester v State of Georgia*, 6 Pet 515 (US 1832).

[42] Borrows, *supra* note 14 at 201 and 203. "It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied... (t)he words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense."

[43] Carlisle Indian Industrial School Project, *Institutional History*, online: http://www.carlisleindianschoolproject.com/history/.

[44] TRC, *supra* note 23 at 1, 2.

[45] Jenny Bourne, "Slavery in the United States.", *Economic History Association: EH.net* (Carleton College, Minnesota), online: https://eh.net/encyclopedia/slavery-in-the-united-states/.

From the beginning to the end of the trans-Atlantic slave trade, it was almost three centuries before an abolitionist movement in England finally pushed the British Parliament to declare it illegal in 1807.[46] It is estimated that nearly 12 million Africans were torn from their native territories to endure the inhumane conditions of being sold as slaves from port to port throughout Europe and then the Americas.[47] The transport of the slaves, despite some sparing edicts[48] to quell the numbers of men, women, children and even babies packed on ships, had conditions that were so gruesome that only 10 million slaves survived the Trans-Atlantic voyage to make it to the main port of Virginia and other lands in the Caribbean.[49] Many slaveholders in the southern states supported the ban, as it drove up the prices of slaves and encouraged an explosion of natural births of the existing slave population in America.[50] The complex development of American English common law protected this extremely lucrative economy.[51]

Once emancipation of slavery in the 13th Amendment occurred to the United States Constitution in 1865, the lives of African Americans were still very much fraught with peril. The northern states were still rife with overt racism.[52] The Southern States burgeoned with convict leasing as punishment for vagrancy (homelessness and unemployment),[53] lynching, Ku Klux Klan ["KKK"] terrorism and government sanctioned segregation.[54] The Civil Rights movement that occurred in the 1960's broadcasted to the general public around the world the deplorable effects of the Jim Crow segregation. Lynching, the KKK and segregation in the South finally came to a legal end under the *Civil Rights Act* in 1964 under President John F. Kennedy.[55] This president was also responsible in 1961 for what was called "positive discrimination" or what is more widely termed now as "affirmative action".[56] This ameliorative programming for employment eventually became a proactive trend in ensuring more minorities attended post-secondary colleges, including law schools.[57]

c) Australia: "For those who've across the seas, we've boundless plains to share".[58]

Australia is unique in its settler colonial history in that it was originally a settler experiment using penal colonies. To call it anything else would give the British too much credit, despite the wealth of its Empire. It would be too simplistic and exorbitant to ship the excesses of an

[46] The Royal Museums of Greenwich, "The Abolition: The Haitian Revolution." *Transatlantic Slave Trade and Abolition* (Greenwich, United Kingdom), online: https://www.rmg.co.uk/discover/explore/transatlantic-slave-trade-and-abolition.
[47] Bourne, *supra* note 45.
[48] The Royal Museums, *supra* note 46.
[49] Bourne, *supra* note 45.
[50] *Ibid*.
[51] *Ibid*.
[52] Paul Harris, "How the end of slavery led to starvation and death for millions of black Americans." (16 June 2012) *The Guardian*, online: https://www.theguardian.com/world/2012/jun/16/slavery-starvation-civil-war.
[53] Stephanie Buck, "This Southern program continued slavery long after the Civil War." (1 February 2017) *Timeline*, online: https://timeline.com/convict-leasing-slavery-1fd126f4ad0c.
[54] History.com, "Civil Rights Movement" (2009) *History.com*, online: https://www.history.com/topics/black-history/civil-rights-movement.
[55] *Ibid*.
[56] Harriet Alexander, "What is affirmative action in American universities?" (9 December 2015) *The Telegraph*, online: https://www.telegraph.co.uk/news/worldnews/northamerica/usa/12040823/What-is-affirmative-action-in-American-universities.html.
[57] *Ibid*.
[58] Government of Australia, *Anthem Lyrics*, online: https://www.pmc.gov.au/sites/default/files/files/pmc/Honours/anthem_words.pdf.

overcrowded prison population to such a remote environment. Initially bought from the Dutch, Australia had penal settlements set up all along the coast lines.[59]

These penal colonies were experiments in farming and most attempts were reasonably successful. Eventually some prisoners earned independence and chose to continue on a fairly successful lifestyle.[60] The penal colonies were strict with brutal punishments for even the smallest infractions, which contradicts an international myth that prisoners were dropped in the middle of nowhere and eventually populated the rest of settler Australia.[61] Eventually the British stopped sending prisoners and did their best to attract settlers in large numbers.[62] There is an assumption among the settler population in Australia that the demise and poor treatment of Australian Aborigines was due to the cruel nature of the prisoner base that eventually the modern settler population originated from. The few prison colonies that got things started found the contrary, that it was necessary to maintain friendly relationships with the Aborigines.[63]

It was when the enormous boatloads of settlers arrived due to the land being declared *terra nullius* by the British government that behaviours towards the Aborigines swiftly changed. Most of the outer edge of Australia eventually had settler populations. Smallpox outbreaks and violent slaughters of Aborigines eventually decimated the population that was once over a million when the penal colonies first arrived in 1788.[64, 65] Eventually the government and sovereignty of Australia was formed in 1901. Policies were approved to forcibly remove Aborigine and Torres Strait Islander (these are the preferred terms over Indigenous; Torres Strait Islanders are distinct from Aborigines and refer to the Indigenous Island cultures of Australia) children from 1910 to 1970, citing neglect, the need to civilize and to genetically remove all traces of their "blackness".[66] The victims of this policy became known as "The Stolen Generations".[67]

The settler colonization of Australia was rife with many programs designed to not only displace children, but entire Aborigine families as well. This could involve being trucked out of urban areas to remote areas, or vice versa.[68] During the turn of the century an inquiry into the awful treatment of Aborigines and Torres Strait Islanders led to an annual National Sorry Day and even garnered a 2001 Pope apology.[69] "The Council for Aboriginal Reconciliation was established by the Commonwealth Parliament, with unanimous cross-party support, as a statutory body under the Council for Aboriginal Reconciliation Act 1991."[70]

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[59] Australia Tourism, "Australia History", online: https://www.australia.com/en/facts-and-planning/history.html.
[60] Digital Panopticon, "Convicts and the Colonisation of Australia, 1788-1868." *Digital Panopticon*, online: https://www.digitalpanopticon.org/Convicts_and_the_Colonisation_of_Australia,_1788-1868.
[61] *Ibid*.
[62] *Ibid*.
[63] Sydney Living Museums, "The Convicts' Colony: Tentative Steps" *Hyde Park Barracks Museum*, online: https://sydneylivingmuseums.com.au/convict-sydney/convicts-colony.
[64] Jan Kociumbus, "Chapter 3: Genocide and Modernity in Colonial Australia, 1788-1850", in *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australia History*, (Berghahn Books; New York, 2004) at 77.
[65] Lyndall Ryan, *Tasmanian Aborigines: A History since 1803* (Allen & Unwin; Sydney, 2012).
[66] Government of Australia, "Track the History Timeline: The Stolen Generations." *Australia Human Rights Commission*, online: https://www.humanrights.gov.au/track-history-timeline-stolen-generations/.
[67] Common Ground, *Stolen Generations*, online: https://www.commonground.org.au/learn/the-stolen-generations.
[68] *Ibid*.
[69] Sahar Fatima, "How other countries have tried to reconcile with (N)ative peoples." (5 June 2015) *The Globe and Mail*, online: https://www.theglobeandmail.com/news/national/how-other-countries-have-tried-to-reconcile-with-native-peoples/article24826144/.
[70] The Council for Aboriginal Reconciliation (CAR), online: http://www5.austlii.edu.au/au/orgs/car/council/spl98_20/council.htm; see also this public awareness campaign with accessible materials on how to approach reconciliation carries on to present day, with its creation almost 25 years before the TRC in Canada at Reconciliation Australia, Reconciliation Action Plan, online: https://www.reconciliation.org.au/reconciliation-

d) New Zealand: "In the bonds of love we meet, hear our voices, we entreat, God defend our free land".[71]

New Zealand is comprised of two main islands and many smaller ones to the southeast of Australia. What was unique with their settler colonialist history was the initial reluctance to settle for fears of the extensive and powerful population of Maori. The first contact was with a Dutch explorer in 1642. It was a violent encounter in favour of the Maori, and it seemed to mitigate another attempt at contact until 1763 by the British.[72]

The British settlers made genuine attempts to placate the Maori.[73] For many years the Maori developed relationships willingly with the British, even implementing the settler ideas of trade and economy, including farming, in their own communities.[74] After some time, the numbers of settlers increased, and the desire to take over Maori territory spilled over political good will, as these lands were considered a "wasted" opportunity. In order to protect Indigenous laws such as "mana (status), tapu (controls on behaviour) and utu (revenge to maintain societal balance)", deep traditional divides were set aside, and all "iwi" (tribes) and "hapu" (clans) unified to push back on the settlers. After much blood shed on both sides, and also fear of being annexed by France, The Waitangi Treaty was made. New Zealand declared sovereignty, and since 1840 the Treaty has been in fierce debate.[75]

Many skirmishes continued between settlers and Maori after the Treaty, however, this dynamic shifted after the World Wars. The Maori faced a constant push of prejudice, inaction and infractions from various political parties in power. As a response, the Waitangi Tribunal in 1975

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action-plans/. Australia's Reconciliation Action Plan also includes an ongoing "Reconciliation Barometer" that is a "biennial, national research study, and has been conducted by Reconciliation Australia since 2008. The Barometer measures attitudes and perceptions towards reconciliation" including areas of progress; see also Diana Perche, "Ten years on, it's time we learned the lessons from the failed Northern Territory Intervention." (25 June 2017) *The Conversation*, online: https://theconversation.com/ten-years-on-its-time-we-learned-the-lessons-from-the-failed-northern-territory-intervention-79198. "Many Aborigine and Torres Strait Islander communities still live in remote areas in harsh and unsupported conditions. The pendulum seems to swing to extremes regarding the relationships between Aborigines and Torres Strait Islander peoples, depending on the political party that is voted in to the Australian government. For example, the Northern Territory Intervention was another policy of forced removal of children from the Northern Territories; see also Reconciliation Australia, "2016 Reconciliation Barometer." *Reconciliation.org*, online: https://www.reconciliation.org.au/wp-content/uploads/2017/11/RA_ARB-2016_Overview-brochure_web.pdf . From the Barometer report in 2016: "surveyed 500 Aboriginal and Torres Strait Islander Australians and 2277 Australians in the general community across all states and territories. The findings show us that there are positive signs of progress and still much to do to achieve our vision of a reconciled nation".

[71] Government of New Zealand, *Anthem Lyrics: English version*, online: https://mch.govt.nz/sites/default/files/National%20Anthem%20words%20%28D-0567007%29.PDF.

[72] Government of New Zealand, "A History of New Zealand, 1769-1914." New Zealand History, *Nga korero a ipurangi o Aotearoa*, online: https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief.

[73] *Ibid*.

[74] *Ibid*.

[75] *Ibid*; see also Encyclopedia Britannica, "Pacific Islands: Region, Pacific Ocean" *Britannica.org*, online: https://www.britannica.com/place/Pacific-Islands. The Pacific Islands are too numerous to give a detailed synopsis of their settler colonial history in this chapter, as they range in the thousands. What is generally known as Oceania and includes Melanesia, Micronesia and Polynesia, these islands have been colonized and controlled by many European and Asian powers, including Hawai'i by the United States. However, choices that Australia and New Zealand make regarding Indigenous populations, also has ramifications for the many Pacific Island nations that have economic dependence on these governments and whose island populations continue to emigrate to these larger countries in hopes of a better life; see also Stephanie Lawson, "Australia, New Zealand and the Pacific Islands Forum: a critical review." (2017) 55:2 Commonwealth & Comparative Politics 2 at 214. Many of the sovereign island states still have a settler colonial dependency, at least economically to New Zealand and Australia, who are perceived as taking on the role of "big brothers" in their political influence. "(B)oth are former colonial powers with considerable political and economic resources and are the major aid donors in the region as well as being members of the powerful geopolitical entity known as 'the West', it is not difficult to sustain an image of neo-colonial dominance." But the reality is for many of these sovereign island nations the infrastructure capacity is small and there is limited access to education, making it necessary to ask for outside influence and support.

was set up as a permanent inquiry that continues to address claims to ensure that the Treaty was and is being met. Because the Treaty is in both Maori and English, despite the contention as to the meaning of words between the two cultures, it has been a bright line to force the New Zealand government back on task.[76]

C. Why the Specific Focus on Law Schools?

A connection that these four nations states also share, was that all were permanent objectors to the *United Nations Declaration of the Rights of Indigenous Peoples* ["UNDRIP"].[77] In September, 2007, the General Assembly of the United Nations voted for the adoption of UNDRIP as it was hailed as a necessary and relevant instrument that would provide a universal standard for the rights and wellbeing of all Indigenous peoples around the world. 144 nation states voted in favour, and only 11 chose to abstain.[78] Canada, the United States of America, Australia and New Zealand all applied for permanent objector status despite the general global perception of these countries as free democracies and upholders of human rights. Almost a decade later, all four countries reversed their decision, with Canada coming fully on board in considering its implementation as late as 2016.[79]

Why would these four countries originally refuse an opportunity to celebrate what was an indubitable achievement for human rights? After all, it would be an opportunity to implement an international standard for the treatment of Indigenous peoples. One response included longstanding issues regarding lands and resources.[80] Another was that UNDRIP undermines the countries' paternalism that justifies attitudes in governments that perpetuate a power and resource imbalance that has left Indigenous populations in these countries disempowered, vulnerable and hence marginalized.[81]

Understanding why diversification strategies and initiatives emerged specifically to attract Indigenous students to Canadian law schools may be further clarified by the decolonization and elimination of racism movement on the international stage.

i. International initiatives to end colonialism and racism: attempts to reconcile the damage of imperial colonial histories.

From my research, it seems that the difficulty with grasping the concept of decolonization in Canada, especially in reference to Canadian law school education, is due to the lack of reference to the decolonization movement that occurred internationally. Post World War II, there was a

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[76] Waitangi Tribunal, Te Ropu Whakam i te Tiriti o Waitangi, justice.govt.nz, online: https://www.waitangitribunal.govt.nz.
[77] UNDRIP, *supra* note 11.
[78] *Ibid* [emphasis added].
[79] *Ibid*.
[80] United Nations, "General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, says President." (13 September 2007) *United Nations: Meetings, Coverage and Press Releases*, online: https://www.un.org/press/en/2007/ga10612.doc.htm.
[81] Jessica Dorfmann, "Undermining Paternalism: UNDRIP and Aboriginal Rights in Australia." (16 February 2016) *Harvard International Review*, online: http://hir.harvard.edu/article/?a=12545.

significant effort through the United Nations to eliminate racism and end colonization. This was quite a radical movement at the time and it was clearly not without challenges.

In 1946, this trajectory was set in motion by an impressive Canadian legal scholar, John Humphrey. Known for drafting the *Universal Declaration of Human Rights*, Humphrey was credited by Eleanor Roosevelt as creating "the Magna Carta for all mankind".[82] Interestingly, the government of Canada initially opposed this legal document, as it was concerned that it would "give rights to Communists, Jehovah's Witnesses, Japanese Canadians and Aboriginal Canadians".[83]

The drafting of other important international covenants followed, such as the International Covenant on Civil and Political Rights, that states at Article 1, "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[84]; the International Covenant on Economic, Social and Cultural Rights[85] ; and the International Convention on the Elimination of All Forms of Racial Discrimination.[86]

The diplomats and lawyers tasked with these important International Covenants were most, if not all, from Eurocentric backgrounds. Earnest strides were made, culminating in the *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*.[87] By reaffirming "its determination to continue to take all steps necessary to bring about the complete and speedy eradication of colonialism; [and] affirm[ing] once again its support for the aspirations of the peoples under colonial rule to exercise their right to self-determination"[88] this movement towards decolonization through self-determination has become United Nations law. There was a legal transformation from colonialism and racism to self-determination and inherent human rights in a new international legal order.

ii. Diversification strategies and initiatives: attempts to reconcile the damage of settler colonial histories.

Another key trajectory at this time was also in play, the historical context of Canadian legal education for Indigenous lawyers. Indigenous peoples in Canada were barred from obtaining legal counsel, let alone allowed to enter Canadian law schools through the *Indian Act*, unless agreeing to enfranchisement. The oppressive policy of enfranchisement was meant to assimilate Indigenous peoples with Indian status, where they would lose all status membership and its

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[82] McGill University, "John Humphrey: 1905-1995", online: https://www.mcgill.ca/about/history/humphrey.
[83] Rhoda Howard-Hassman, "Canada and the Universal Declaration of Human Rights" (2014) *Federation for the Humanities and Social Sciences* (Wilfred Laurier University), online: https://www.ideas-idees.ca/blog/canada-and-universal-declaration-human-rights.
[84] International Covenant on Civil and Political Rights, Adopted and opened for signature, GA Res 2200A (XXI), UNGAOR, entry into force 23 March 1976, UN Doc A 49 (1976), online: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.
[85] International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI) entry into force 3 January 1976, UN Doc A 49 (1976), online: https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx.
[86] International Convention on the Elimination of All Forms of Racial Discrimination, GA Res 2106 (XX), entry into force 4 January 1969, UN Doc A 19 (1969), online: https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx.
[87] *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res *0946819* [on the report of the Special Political and Decolonization Committee (Fourth Committee) (A/64/413)] (2010), online: https://digitallibrary.un.org/record/673054?ln=en.
[88] *Ibid* at summary.

benefits, not only for themselves, but for their descendants.[89] Influenced by the *Universal Declaration of Human Rights*, amendments were eventually made to the *Indian Act*, 1951.[90] As mentioned above, after the failed attempt at introducing *White Paper*, there was a shift among Indigenous peoples where there is a willingness to learn the Canadian legal system to be better equipped to advocate for their own peoples on common law terms.

Canadian law schools in the last few decades, have made their admissions process more accessible for Indigenous peoples. Most Canadian law schools openly advertise their academic support initiatives, at least the official programming available to the public, which reflects this support. Constructive dialogue is continuing in how to best implement the Calls for Action. But there are dangers with how diversification strategies may be perceived by the profession outside of law school of Indigenous legal practitioners.[91] As well, slapping the term "Indigenous" on curriculum delivered in the English language and providing boutique courses specific to the marginalized Indigenous experience in Canadian law does very little to disrupt this colonized perspective of Indigenous students.

Roger Carter, Dean of the College of Law, University of Saskatchewan in 1968, established the Native Law Centre in 1975. The purpose of the centre was to promote the academic success in Canadian law schools for Indigenous peoples in Canada, by participating in a summer law program, for decades known as the Program of Legal Studies for Native People.[92] At the time it was the first program of its kind in Canada.[93] Its focus was on core skills development, but also to help promote a support network for Indigenous alumni all across the country.

After the Royal Commission on the Donald Marshall, Jr., Prosecution, also commonly known as the Donald Marshall Inquiry, the Schulich School of Law at Dalhousie University, in Halifax, Nova Scotia, developed the 1989 Indigenous Blacks and Mi'kmaq Initiative.[94] The late Donald Marshall, Jr., an Indigenous man, was wrongfully convicted of stabbing a young man of African descent and was incarcerated for 11 years by the time he was acquitted.[95] This program is to encourage Indigenous students and students with African descent, or as Naiomi Metallic describes, "African Nova Scotians (who have also referred to themselves as Indigenous Blacks at times)",[96] to enter and succeed in the regular law school program.

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[89] First Nations and Indigenous Studies, "Indian Act: 1951 Amendments" *IndigenousFoundationsArts.UBC.ca*, online: https://indigenousfoundations.arts.ubc.ca/the_indian_act/.
[90] *Ibid.*
[91] Chantelle Bellrichard, "Indigenous lawyers speak out about bias, racism at work" (5 December 2017) *CBC Indigenous*, online: https://www.cbc.ca/news/indigenous/indigenous-lawyers-bias-racism-court-1.4433772; see also Melissa D. Atkinson, "But I was wearing a suit…" (10 September 2018) *Canadian Bar Association*, online: https://www.cba.org/Sections/Women-Lawyers/Articles/2018/September/But-I-was-wearing-a-suit.
[92] Indigenous Law Centre, "History", online: https://indigenouslaw.usask.ca/about/history.php.
[93] Heather Persson, "Roger Carter encouraged First Nations lawyers across Canada" (23 March 2017) *Saskatoon Star Phoenix*, online: https://thestarphoenix.com/news/saskatchewan/roger-carter-encourages-first-nations-lawyers.
[94] Dalhousie University, "Indigenous Blacks and Mi'kmaq Initiative" *Schulich School of Law*, online: https://www.dal.ca/faculty/law/indigenous-blacks-mi-kmaq-initiative.html.
[95] The Royal Commission on the Donald Marshall, Jr, Prosecution at 2, online: https://novascotia.ca/just/marshall_inquiry/_docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution_findings.pdf.
[96] Naiomi Metallic, "Celebrating 30 years of the Indigenous Black and Mi'kmaq Initiative" (2019) *Issuu*, at 2, online: https://issuu.com/crrf-fcrr/docs/directions2019_naiomimetallic_june.

There are two other programs specifically geared to supports for academic success of Indigenous students in Canadian law schools. One has been the Indigenous Legal Studies program offered by the Peter A. Allard School of Law at the University of British Columbia, an institution that is proud to have successful Indigenous student graduates since 1975.[97] The other is the recent Nunavut Law Program, a partnership between the College of Law of the University of Saskatchewan, the Nunavut Arctic College and the Government of Nunavut. It is a four year Juris Doctor program as opposed to the typical three year length at other Canadian law schools, with that extra year geared to fostering supports while studying in Iqaluit. It is now in its third year of operation.[98]

When the barriers and forms of discrimination at play are identified, it is simpler to explain why academic success programming considerations are necessary and urgent. For example, no one would suggest that it is unfair for someone who needs financial assistance, to receive coverage of necessary medication as opposed to providing coverage to those who do not need financial help and therefore are not entitled to claim the benefit. If efforts are being made by law schools to ensure more legal practitioners have a greater representation of Indigenous peoples in all levels of the profession, and people understand the reason why these barriers have a greater impact on Indigenous peoples, I think it makes it easier to understand why certain solutions are necessary. Another example would be that most English-speaking students can see the privilege that they have in terms of English-speaking teachers. Hopefully, students may recognize that there is a barrier for those who learn through a foreign language, even in their own homeland.

From an inherent human rights perspective, marginalized people in any of these countries are much less likely to pursue a profession through post-secondary education, which has the danger to become intergenerational. There is also the need for Indigenous representation in post-secondary schools, as many Indigenous students do not see themselves reflected in their instructors and most instructors may be poorly equipped to teach across cultural divides. The same is true of our unrepresentative legal profession, again having an impact on role modeling, confidence and so on.

If we are to characterize academic success programs as diversification strategies and initiatives, it seems more appropriate to view it through an inherent human rights lens. Although academic supports aid Indigenous students to enter and do well in laws schools and are classic ameliorative programming, it is not Indigenizing or decolonizing. Settler harm reduction such as academic support programming is necessary, but it is only one part of an entire toolkit that needs to be developed and implemented to truly decolonize and Indigenize, without wrongly conflating it as one marginalized student struggle.

Taking inclusive measures such as attracting marginalized students, with a special emphasis on Indigenous applicants, is a virtuous and necessary endeavor to provide access to a traditionally exclusive training environment. However, diversification strategies and initiatives may have the unintended result of reinforcing stereotypes, as others may perceive these programs as a handout and refer to it as such. I am not convinced that we can meaningfully compare law school

[97] Peter A. Allard School of Law, "Indigenous Legal Studies" *University of British Columbia*, online: https://allard.ubc.ca/about-us/indigenous-legal-studies.
[98] College of Law, "Nunavut Law Program" *University of Saskatchewan*, online: https://law.usask.ca/programs/nunavut-law-program.php.

academic success programming without engaging in a romanticism of comparative perspectives, wrongly lumping Indigenous people in with ethnic minorities, or even engaging in pan-Indigenous oversimplification. But I do believe we can make meaningful generalizations about the challenges these programs face in various settler colonial contexts.

iii. Unintended (or part of the legal hierarchy?) results of diversification strategies.

Sometimes it is harder to see the connection between diversification strategies and initiatives and the systemic barriers at play, which may inadvertently result in harm. What can be concerning is when there is a "soft bigotry of low expectations".[99] Indigenous students should be expected to do well and always be encouraged to strive for further improvement. There is the danger that some instructors may unintentionally play a part in softening expectations by expecting less of students who they know face distinct societal limitations.

For example, American law schools and their legal profession are considered a "traditional diversity hold out".[100] The first African American woman to hold the position of American Bar Association president in 2015 blamed the lack of diversity on a "real diversity fatigue" because there has been little dramatic change that diversity initiatives seem to promise.[101] Duncan Kennedy created a stir with his article "Legal Education and the Reproduction of Hierarchy",[102] an honest reflection of the intentional cultural training in the social hierarchy of law schools, which still resonates today. Inspiring an entire movement of "critical legal and race theory", his article did effect many policies for change.[103] Richard Sander however felt that this "diversity revolution" post-affirmative action programming does more to hurt, if not embarrass, minorities more than it has been of service as it sets them up to fail, as they do not benefit from the unarticulated resources that a privileged law student would be able to access.[104]

The profession of law is very arduous for everyone and it would do more damage than good to dilute law school standards just to let marginalized students pass. What is unfortunate is that many students who are not marginalized do not understand that there is a huge difference between lowering standards and being receptive to accommodating a marginalized student's needs.

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[99] Ian Rowe, "Reject the Soft Bigotry of Low Expectations." 29 (September 2017) *Education Post*, online: http://educationpost.org/reject-the-soft-bigotry-of-low-expectations/.

[100] Jena McGregor, "Diversity takes center stage with new American Bar Association president." (5 August 2015) *Washington Post*, online: https://www.washingtonpost.com/news/on-leadership/wp/2015/08/05/diversity-takes-center-stage-with-new-american-bar-association-president/?utm_term=.b6b7b425ccb3.

[101] *Ibid*.

[102] Duncan Kennedy, "Legal Education as Training for Hierarchy." *in* The Politics of Law: A Progressive Critique (1982), online: http://www.duncankennedy.net/documents/Photo%20articles/A%20Bibliography%20of%20cls.pdf. "We have made no attempt to define what CLS (critical legal studies) is. The CLS movement has been generally concerned with the relationship of legal scholarship and practice to the struggle to create a more humane, egalitarian, and democratic society… CLS has sought to encourage the widest possible egalitarian values and a belief that scholars, students, and lawyers alike have some contribution to make in the creation of a more just society."

[103] *Ibid* at 461.

[104] Richard H. Sander, "A Systemic Analysis of Affirmative Action in American Law Schools" (2004) 57 *Stan L Rev* at 368. "A student who gains special admission to a more elite school on partly non-academic grounds is likely to struggle more… If the struggling leads to lower grades and less learning, then a variety of bad outcomes may result: higher attrition rates, lower pass rates on the bar, problems in the job market. The question is how large these effects are, and whether their consequences outweigh the benefits of greater prestige."

Sander is not completely off the mark that the inequities that marginalized students face carries on well past entrance accommodation in law schools. Brown-Nagin discusses this as a "mentoring gap" that occurs when "[s]egregation in the real world begets social silos on campus".[105] There are of course indubitable and invaluable benefits from diversification programming in law schools. A lot of time and substantial resources are top priority to most if not all institutions. This institutional box gets checked - so to speak – which may risk an unintended reactivity of complaints that diversity and inclusion policies are not being met, as opposed to the ongoing proactiveness that sustainability demands for there to be genuine inclusion. Brown-Nagin believes that inclusion may work if there is more interpersonal accountability in the form of mentors for these marginalized students.[106]

This mentoring gap is not just a call for marginalized professionals to take on marginalized students. The exclusion that these students feel is reinforced by the harder to quantify social spaces that are in the law schools themselves, such as the common lobby, the library or extra-curricular events. These "daily interactions" need to have a personal, inclusive interaction with non-marginalized professionals in authority.[107] This seems almost obvious, but the more typical dominant law student (white and male) will have more "social capital", thereby attracting more mentors as these students are a reflection of who these mentors were at one time themselves.[108]

This lack of a support structure can become a deeper threat to the success of marginalized students. Brown-Nagin calls this the "stereotype threat". She mentions that there is quantifiable evidence that if a student is reminded of what makes them marginalized (i.e. race, gender, etc.) before writing a standardized exam, they will do poorly. However, if there is genuine inclusion, such as through support networking, this becomes a positive reflection in the student's potential.[109]

There are other unfortunate negative connotations that can come from ameliorative programming. Assumptions that marginalized law students will take on the responsibility of marginal representation and education for the dominate student body's edification. For example, not every Indigenous law student will want their individual experience to unpack teachable moments and not all Indigenous students have the end goal of promoting social justice issues.

What also gets muddied is the discussion of identity, as institutions do not want to be accused of policing who should self-identify. This has been in debate, especially in the last few years, as it was a practice of "checking a box" with little to no requirement to provide proof of Indigenous identity or community. At one time it was seen only necessary to provide this evidence in order to protect access to larger scholarships and bursaries. But it has been just recently that, if not

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[105] Tomiko Brown-Nagin, "The Mentoring Gap" in Race and Higher Education Commentary Series, (10 May 2016) *Harvard Law Review*, online: https://harvardlawreview.org/2016/05/the-mentoring-gap/.

[106] *Ibid*.

[107] *Ibid*.

[108] *Ibid*. "The demographic makeup of higher education — faculty are overwhelmingly white and male at most institutions of higher education — can compound the advantages of economically privileged, white, and male students. In addition, mentors sometime choose protégés who are "clones" of themselves or select mentees based on perceived ability."

[109] *Ibid*. "In *Sweatt v Painter*, the landmark case involving the University of Texas Law School, the Court held that the law school had to admit the black plaintiff, Heman Sweatt, to the state's flagship law school partly because of intangible and interpersonal elements of a quality education. The Court wrote that "qualities which are incapable of objective measurement, but which make for greatness in a law school" included the "interplay of ideas and the exchange of views" between respected faculty and students as well as the availability of a network of esteemed graduates."

required already, that law schools require proof for entrance accommodations. Further, not all Indigenous students come from poverty and not all of them need academic supports.

In a perverse turn of events, one can pay to secure a membership card in some Métis groups, but the roots of the organizations are in white rights activism.[110] For example, Darryl Leroux discusses how such dubious populations have organized as Métis groups, as they have seen other valid organizations do so in other parts of Canada, including the receiving of recognition in the courts.[111] Several times rebranding under different names, as many as 25 groups declared themselves Indigenous nations. In reality, they are from many generations of settlers who do not want to share what they perceive as their hunting and recreational parks.[112] There are many other examples, including on the east coast, and it is becoming a genuine threat to the public perception of genuine Métis groups.[113] Clarifying academic support programming as an attempt at settler harm reduction goes a long way to protect these academic spaces from what many perceive as a potential elite capture by privileged students with no, or at best tenuous, connection to Indigenous identity.

iv. Diversity strategies and initiatives also do not decolonize Canadian law schools that have been "colonized" by more than just settler colonialism.

The 1960s were a very exciting time for change and growth in all areas of society. Law schools were also going through a rapid growth in numbers and as a result many Canadian institutions demanded an increase in faculty members. MacDonald and McMorrow's article uses colonization as an analogy to discuss how the Canadian law curriculum was inundated during this time with British and American views. They describe five forces of colonization as a result, "intellectual, professional, market, consumerist, and herd" colonization. They are all interconnected, and still determine how practitioners are trained.[114]

Although not meant as a disrespectful comparison to the lack of humanity that imperial and settler colonialism invokes, what the authors did wish to shed light on, is that law school curriculums are very much determined by more than an innocent development of varying ideological frameworks and funding mandates for legal education.[115] What was problematic with hiring faculty members from other common law traditions, was that the Indigenous perspective was further buried instead of an opportunity for decolonization during a time of shifting political paradigms in the latter half of the 20th century. There was little, if any consideration for Indigenous partnerships.[116] MacDonald and McMorrow do not want to detract from the positive

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[110] Darryl Leroux, "Self-Made Métis" (26 November 2018) *Maisonneuve*, online: https://maisonneuve.org/article/2018/11/1/self-made-metis/.
[111] *Ibid*.
[112] *Ibid*.
[113] *Ibid*.
[114] Roderick A. MacDonald and Thomas B. McMorrow, "Decolonizing Law School" (2014) 51 *Alberta Law Review* 4, online: https://albertalawreview.com/index.php/ALR/article/view/34 at 717.
[115] *Ibid* at 719. "As an organizing framework for presenting the challenges confronting law school (challenges that we see as perennial) we have adopted the idea of colonization. We believe that the legal education establishment in Canada has been and remains thoroughly dominated by powerful exogenous forces in a manner that can be analogized to colonization."
[116] *Ibid* at 720.

influences that can be gained in hiring 'foreign' trained instructors, but point out that this "openness to influence is not submission to domination".[117]

This is an interesting point to keep in mind, especially in their description of professional colonization. For example, the influence of the Federation of Law Societies puts pressure on how a legal practitioner should look and act like. Law schools are in some ways a "finishing school" for job placement in the practice.[118] Market colonization entails the competitive ranking that publicizes the status of a law school, whether through the pressure of research grants or national ratings including LSAT scores. It has the unfortunate effect of demoting diversification strategies, however virtuous, as a service "to enhance a law school's competitive position in external rankings".[119] Rating professors by student evaluations, is seen as a consumerist colonization, and how this could easily be abused if an unpopular but fair academic content is pursued that a batch of students do not see as what they perceive legal education should be, as the "customer is always right".[120]

Although, this could be of concern when factoring in post TRC mandatory Indigenous content classes, I see student evaluations as an opportunity. Student evaluation and rating could have great diagnostic potential, and not just from a consumerist point of view. I expand on this further below in my later chapters, but potential metric tools could be developed from this mechanism to survey student information and could be used to identify dominance patterns, as well as responses to experiences as decolonization takes root in the legal curriculum.

MacDonald and McMorrow make some interesting points, but on the other hand, Daza and Tuck caution against the overuse of the term colonization, especially when analyzing curriculum. Colonization and all its variance, should not be a term that eventually creates 'colonization fatigue' and disassociation from the genuine meaning of the effects of settler colonization - which is similar to the description above of diversity fatigue.[121]

Willie Ermine defines ethical space as the space between two distinct cultures, particularly the "schismatic ambience"[122] that occurs when Indigenous and 'Western' worldviews meet. His work is based on the philosophical observation of Roger Poole, who first noticed the space between Czech civilians and Russian army soldiers sitting on a park bench in a photograph.[123] This image was taken shortly after the Russian army invaded the town and the space present in the picture struck Poole with how potent the inner dialogue and intentions were between the individuals.[124] Ermine emphasizes the relevance of an ethical space as a concept when two, or

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[117] *Ibid*. [Intellectual] [c]olonization works surreptitiously because colonized institutions either do not realize their subservient status, or they relish the thought of acceptance by the dominating offshore institutions. Its success also depends not just on a belief in its inevitability, but on the presumption of its necessity — a presumption often grounded in a sense of inferiority."
[118] *Ibid* at 723. "The Federation (of Law Societies) 's claim is grounded in the suspect premise that the purpose of law schools is to train legal professionals, and that the Federation and the provincial law societies it represents are uniquely placed to know what that training ought to comprise."
[119] *Ibid* at 726.
[120] *Ibid* at 729.
[121] Stephanie L. Daza and Eve Tuck, "De/colonizing, (Post)(Anti)Colonial, and Indigenous Education, Studies, and Theories" *Educational Studies*, (2014) 50 *JAESA* 4, online: https://www.tandfonline.com/doi/abs/10.1080/00131946.2014.929918 at 308, 309.
[122] Willie Ermine, "The Ethical Space of Engagement", (2007) 6 *ILJ* 1 (University of Toronto) at 193-194, online: https://tspace.library.utoronto.ca/bitstream/1807/17129/1/ILJ-6.1-Ermine.pdf at 195.
[123] *Ibid* at 194.
[124] *Ibid*.

more, diverse worldviews from completely different cultures come together in a societal interaction.[125] Ermine suggests that the reason that very little has tilted regarding the power imbalances between Indigenous and Euro-Canadian interactions is because "we lack clear rules of engagement between human communities and have not paid attention to the electrifying space that would tell us what the other entity is thinking across the park bench."[126]

But what if we can find together clear rules of engagement by engaging in effective Treaty education in the law curriculum? I believe this would invigorate this fatigue with diversity and decolonization. It is the responsibility of everyone who lives in Canada to know our Treaties, and find out what it means - and how to be good Treaty partners. The spaces in a legal context that are created between the meeting of different worldviews that have a "distinct history, knowledge tradition, philosophy, and social and political reality" become "fragile intersection(s) of Indigenous law and Canadian legal systems".[127] As soon as two cultures interact with one another there is an engagement of varying intentions, which becomes an ethical space.[128] Ermine describes these varying intentions as an "undercurrent" that "inevitably influence(s) and animate(s) the kind of relationship the two can have."[129]

D. Concluding Reflections: It is because of diversity strategies and initiatives that I am able to write this thesis.

What I aimed to accomplish in this chapter was not to compare the plight of Indigenous peoples in different regions or to generalize their needs, except of course to highlight that they are very individual and have very different needs. What I did wish to look at was the settler colonialist parallels and the need to understand the distinct reason why "equality" is a threat to the self-determination of Indigenous peoples when it comes to sovereignty and the law. The stigmatization of student academic success programming in these regions, is to wrongly lump the decolonizing access for Indigenous peoples with the human rights paradigm of other minorities to help achieve equality with the rest of the Canadian nation. That is not the foundation of our Treaties. After all, "(m)ythologies about egalitarian societies inhabiting 'quiet' continents, and the reality of underdeveloped historiographies are related to the long-lasting resilience of a settler colonial consciousness."[130]

For this to occur, it is necessary to have Indigenous people with Indigenous knowledge to work closely with the Canadian legal system as partners. Treaty partners. It is bizarre that the courts continue to do the framing on what should be consulted on in collaboration. But how else do Indigenous peoples put the Crown to task, and why does it continue to be so adversarial? This weighty but necessary endeavor must be done in partnership with all levels of Indigenous community members, most notably Elders, Traditional Knowledge Keepers and Indigenous professionals. Sounds like a tall if not impossible order? I believe it is more of a question of how

[125] *Ibid*.
[126] *Ibid* at 197.
[127] *Ibid*.
[128] *Ibid*.
[129] *Ibid* at 195.
[130] Lorenzo Veracini, "Historylessness: Australia as a settler colonial collective." (2007) 10 *Postcolonial Studies* 3 (Routledge; Taylor and Francis Group) at 271.

to change our attitudes towards achieving it, and we must start by seeing diversification strategies for what they are – and what they are not. If we use just one remedy, which is a great remedy for a particular ill, then we risk disillusionment when this one medicine is not a panacea.

I think it is important to keep in mind what law schools are doing well, and much of it is the result from the incredible benefits that diversity strategies and initiatives provide. For example, there seems to be a higher number of Indigenous women as opposed to Indigenous men who enter and end up graduating law school, a significant number of them are mothers.[131] I myself fall into this category and most definitely needed and appreciated all the supports, and mentoring, that I have received. But I also believe that there needs to be something more, or we risk reinforcing a settler colonial system, rather than changing it. We as a society of shared nations cannot afford to become spellbound by this elusive ghost any longer.

I believe that the law school curriculum is uniquely placed in our society to provide the ethical spaces we need for true anti-colonization. We are unique as a country in how federalism has evolved. We are also unique in how we use the term *sui generis* when describing Indigenous rights, which is Latin for "of its own kind", because there is no analog of Indigenous legal traditions to any known European social, cultural or legal system.[132] We are unique as a country precisely because of the centuries-old roots in Indigenous knowledge. "Properly understood, Aboriginal sovereignty is the source of all law in Canada."[133]

[131] Cynthia Wesley-Esquimaux and Victoria Bolduc, "Aboriginal Transitions Programs – Literature Review." *Aboriginal Initiatives Office, Lakehead University*, online: https://www.lakeheadu.ca/sites/default/files/uploads/286/22Sept14/LitReviewAug16FINAL.pdf. Many of them are mothers and need childcare and other supports when they come to the city. According to this review on Aboriginal Transitions Programs, the lack of Indigenous men attending law schools, and more generally post-secondary academic institutions is due to the perceived masculinities surrounding academia in their communities, be they urban or reserve. In order to offset the romanticized pull to a hyper-masculine role of "strength" that being a gang-member, or having spent time incarcerated may bestow, culture is stepping in. The introduction of drumming groups and talking circles specifically geared to encouraging men to attend post-secondary in colleges, universities and high schools seems to dispel a lot of myths many Indigenous men have towards furthering their education.

[132] *Ibid* at 31.

[133] *Ibid*.

Chapter 3:
The counternarrative of Indigenous peoples.

One day in passing, a judge asked to hear my 'elevator pitch' regarding my thesis. He really enjoyed how I framed my thesis and asked me to elaborate on parts while remaining quite courteous and interested. Throughout our conversation, he kept inserting "in academics", "in the academic environment", "if you are an academic" and so on.

It didn't take long for me to pick up on that he perceived things to be a lot different in practice. I began to wonder why the necessity of beginning at the root of where a law student starts education is not synonymous with where they begin "the real training" as practitioners. However, law school is where the student begins to develop their human agency as they navigate relevant curriculum to transfer into practice.

A. The counternarrative of Indigenous peoples is an essential antidote to settler colonialism.

What if we took the Indigenous counternarrative more seriously in legal education and reimagined it? But then, what exactly is the Indigenous counternarrative? Reconciliation is not a confusing buzzword that caught on after the Truth and Reconciliation Commission's ["TRC"] Final Report.[1] There has actually been an entire era of reconciliation in this country which began in Canadian courts attempting constitutional reconciliation of both Aboriginal and treaty rights with governmental power. For example, the Supreme Court of Canada ["SCC" or "the Court"] recognized in *R v Van der Peet*, [1996] 4 CNLR 177 ["*Van der Peet*"][2], a just reconciliation needs to account for both the Indigenous peoples' perspective and the common law perspective. This may be the reason, presumably, why the SCC has occasionally flirted with describing Crown sovereignty as *de facto* (as opposed to *de jure*)[3] in cases like *Haida Nation v British Columbia (Minister of Forests)*, [2005] 1 CNLR 72 ["*Haida*"].[4]

The Court recognized that while Canadian law is constituted by and upholds Crown sovereignty, not all Indigenous peoples see that as legitimate. But then not all Indigenous peoples have the same view on Crown sovereignty. Some might have separatist or sovereigntist type inclinations like the Mohawk.[5] Others might want to form part of Canada but based on a type of shared

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[1] The Truth and Reconciliation Commission of Canada, *Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Library and Archives Canada Cataloguing in Publication, 2015) at 1,2.

[2] *R v Van der Peet*, [1996] 4 CNLR 177 at para 49, see: "Courts must take into account the perspective of [A]boriginal peoples themselves." and "However, the only fair and just reconciliation is… one which takes into account the [A]boriginal perspective while at the same time taking into account the perspective of the common law." at para 50.

[3] Ryan Beaton, "*De facto* and *de jure* Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada" (2018) 27 *Const L Forum* 1 (University of Alberta), online: https://journals.library.ualberta.ca/constitutional_forum/index.php/constitutional_forum/article/view/29371 at 25. See: "In particular… when the Court speaks of *de facto* sovereignty, this is not a simple reference to the factual issue of who may be, or may have been, exercising authority — having effective control, capable of enforcing laws — on the ground in a given place at a given time. Rather, in the broader context of its case law on assertions of Crown sovereignty and Aboriginal title, the Court's reference to *de facto* Crown sovereignty functions somewhat like a suspended declaration of invalidity in cases where a court concludes that legislation is unconstitutional, but grants Parliament or the relevant legislature time to repair the law".

[4] *Haida Nation v British Columbia (Minister of Forests)*, [2005] 1 CNLR 72.

[5] Mohawk Nation Council of Chiefs, online: http://www.mohawknation.org. "The mission of the Mohawk Nation government is to be responsible for governing the Mohawk Nation on Confederacy issues in regards to Canada, United States and International relations."; see also

sovereignty. For example, the Inuit of Nunavut is willing to be part of Canada but based on a relationship that clarifies their autonomy within it.[6]

Felix Hoehn, in his book *Reconciling Sovereignties: Aboriginal Nations and Canada*, hits the proverbial nail on the head that the racist premises that once informed the doctrine of discovery has no place in the legal paradigm shift that is already underway; or as Kent McNeil reflects, "this shift could lead to a reconciliation of Indigenous and Crown sovereignty in a reconstructed Canada that is no longer based on racist premises."[7]

This era of reconciliation included the Royal Commission on Aboriginal Peoples ["RCAP"] that placed heavy emphasis on a "national policy of reconciliation and regeneration".[8] This concept of reconciliation was eventually expanded on in the TRC, which used the firm base of UNDRIP principles to help define the term:

> We remain convinced that the United Nations Declaration provides the necessary principles, norms, and standards for reconciliation to flourish in twenty-first-century Canada. A reconciliation framework is one in which Canada's political and legal systems, educational and religious institutions, the corporate sector and civic society function in ways that are consistent with the principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples*, which Canada has endorsed. Together, Canadians must do more than just *talk* about reconciliation; we must learn how to *practise* reconciliation in our everyday lives—within ourselves and our families, and in our communities, governments, places of worship, schools, and workplaces. To do so constructively, Canadians must remain committed to the ongoing work of establishing and maintaining respectful relationships.[9]

Prior to the Robinson-Huron Treaty annuity case from Ontario[10] there was very little discussion of Indigenous law in treaty jurisprudence. The early treaty rights cases were framed around individuals having treaty rights associated with their status under the *Indian Act*.[11] But the treaty case law should be more focused on nations, their laws and their sovereignty than it has been to date. The idea of individuals having treaty rights just takes us back to Citizen Plus, as mentioned in Chapter 2 above. This is why I feel we need to focus on effective Treaty education in the legal curriculum.

As for common law treaty interpretation, *R v Badger*, [1996] 1 SCR 771 ["*Badger*"][12], and *R v Marshall*, [1999] 3 SCR 456 ["*Marshall No 1*"][13] spell out the approach and it involves the

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Evan Dyer, "Akwesasne to hold own referendum if Quebec pursues sovereignty" (26 March 2014) *CBC News*, online: https://www.cbc.ca/news/canada/ottawa/akwesasne-to-hold-own-referendum-if-quebec-pursues-sovereignty-1.2585986.

[6] The Nunavut Agreement, online: https://nlca.tunngavik.com/?lang=en.

[7] Kent McNeil, ("The Doctrine of Discovery Reconsidered: Reflecting on Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies, by Robert J Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, and Reconciling Sovereignties: Aboriginal Nations and Canada, by Felix Hoehn" (2016) 53 *OHLJ* 2, online: https://digitalcommons.osgoode.yorku.ca/ohlj/vol53/iss2/10 at 702.

[8] *Royal Commission on Aboriginal Peoples* (1996) vol. i, online: https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/introduction.aspx at 229.

[9] TRC, *supra* note 1 at 1,2.

[10] *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at para 3. In response to the pittance of treaty annuity payment that was left unchanged from the signing of the Robinson-Huron Treaty, it was decided that "the Crown has a mandatory and reviewable obligation to increase the Treaties' annuities when the economic circumstances warrant."

[11] *Regina v Taylor and Williams*, 1981 CanLII 1657 (ONCA); *R v Badger*, [1996] 1 SCR 771; *Guerin v The Queen*, [1984] 2 SCR 335 as some examples.

[12] *R v Badger*, [1996] 1 SCR 771.

[13] *R v Marshall*, [1999] 3 SCR 456.

honour of the Crown as an interpretive principle.[14] It also requires an interpretation of how Indigenous peoples would have naturally understood the treaty, which requires some reference to pre-treaty culture, practices, and laws or the Indigenous perspective.

What is concerning is the justified infringement test used in the Aboriginal rights case, *R v Sparrow*, [1990] 1 SCR 1075 ["*Sparrow*"] that was applied in *Badger*. Since the *Sparrow* test allows for justified infringement as an override against treaty obligations, this creates a mess in the sense it allows an "out" from what was agreed to and makes the treaty subordinate to the Canadian state. But there is a difference between Indigenous individuals having treaty rights and Indigenous nations having a treaty relationship with the Crown. Effective Treaty education needs to focus on the latter situation and get us away from the individualistic Citizen Plus concept of Indigenous people (singular).

But I do not think treaty interpretation is what I want to necessarily propose in the legal curriculum, especially in Constitutional Law. Instead, the treaties themselves are a form of constitutional law if, as per *Haida*, they are a reconciliation of Indigenous sovereignty with *de facto* Crown sovereignty. After all, would this not put treaties as the center of Canada's decolonized constitutional order? Treaty interpretation is subordinate to that, as it will need to be an interpretation that examines the treaties from the perspective of both partners as having their own legal and constitutional orders that must be reconciled.

In order to have effective Treaty education, it must be emphasized in Constitutional Law that the treaties were between particular Europeans and particular Indigenous nations, not just some generic notion of a settler, or an *Indian Act*[15] definition of who is legally an Indian. This does not critically evaluate for law students what is "dominance" within the common law perspective. Without including the Indigenous perspectives of the Treaties, the curriculum will keep perpetuating the settler colonial system to do precisely what it was set up to do once these students enter practice – to keep the dominant society in charge. This concept of dominance I further elaborate on in Chapter 4.

B. Sharing space.

Law students upon entering Canadian (and other) law schools should be made familiar with the Indigenous counternarrative. There seems to be a type of Hegelian historicism perspective that society assumes things are moving along a progressive trajectory from a dark ignorant past into a bright and fair future. For example, slavery was abolished during the feudal era, as it was considered an abomination in Europe and transitioned into serfdom.[16] But it was once again in

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[14] Aimée Craft, "Treaty interpretation: A tale of two stories" in *Breathing Life into the Stone Fort Treaty*, (Victoria: University of Victoria, 2011), online: http://www.cba.org/cba/cle/PDF/ABOR11_Craft_Paper.pdf at 11, 12. "Canadian Courts have struggled with treaty interpretation for three generations. Faced with various possible common law approaches under which to consider treaties, including international law, contract law and statutory construction, Canadian courts found that treaties with the Indians were not international treaties, and that international law principles, although they are helpful by analogy, are not determinative… Given the unique character of the treaty agreements and their public nature, the court's approach was to develop a "new" and "sui generis" set of interpretive rules for treaties… A compendium of principles governing treaty interpretation were articulated by Justice McLachlin (as she then was) in the Marshall No.1 decision."

[15] *Indian Act*, RSC 1985, c I-5.

[16] David Rheinstrom, "Slavery and serfdom." *Serfdom in Europe*, Khan Academy, available online at: https://www.khanacademy.org/humanities/world-history/medieval-times/european-middle-ages-and-serfdom/a/serfdom-in-europe.

full operation when it came to using the labor of non-Europeans in America. The *Connolly v Woolrich* decision from 1867[17], should, at the very least, be required reading in Constitutional Law. The court in that decision declared that a Cree marriage was just as legal as a European one. It was a true acknowledgement of Indigenous laws. We may never see another case as generous as that one in terms of recognizing Indigenous laws and sovereignty.

i. History and politics impact the common law's application, but why not also the legal curriculum?

It is worth considering how history and politics impacts the common law's application. The Court's 1990 decision in *R v Sioui* has - what I see as - an accurate statement of how Indigenous rights were addressed in the 18th and 19th centuries, "At the time with which we are concerned relations with Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens."[18] That is a high water mark that has only been roughly approximated again in the current era. But during the *Indian Act*'s heaviest application, these relations did **not** look this way at all, and Indigenous rights were mostly "honoured in the breach" in the Court's words.[19] *Calder v AG of British Columbia*, [1973] SCR 313 marks a return to this earlier approach rather than an escape from it.[20]

However, there was a surge of political unification among Indigenous activists that occurred following the 1969 *White Paper* policy proposal to remove the *Indian Act*.[21] The intention was to effectively remove all legislative distinctions between Indigenous peoples and the rest of Canada's polity. It was a sincere, if not misled approach by the Canadian government inspired from the international movement to decolonize and eliminate racism, as discussed in Chapter 2. After strong reactions consistent across the country, high hopes for genuine acknowledgement of Indigenous perspectives were felt during the 1982 patriation of Canada's Constitution, "Section 35 calls for a just settlement for [A]boriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."[22]

Academic literature was scant if not silent on anything regarding the colonization of Indigenous nations since *The Royal Proclamation of 1763* up until the 1982 Constitution reforms and through the enshrinement of Section 35 Aboriginal rights. Even gender in *Edwards v Canada*

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[17] *Connolly v Woolrich et al* (1867), 17 RJRQ 75.
[18] *R v Sioui*, [1990] 3 CNLR 127 at 1038.
[19] *R v Sparrow*, [1990] 1 SCR 1075. "And there can be no doubt that over the years the rights of the Indians were often honoured in the breach".
[20] McNeil, *supra* note 7 at 699-700. ""There can be no doubt that the Indigenous nations in North America, Australia, and New Zealand were factually independent and sovereign prior to the arrival of Europeans. They occupied specific territories and had viable social, political, and legal systems that suited their needs and were adapted to the circumstances in which they lived. Consequently, the European powers should not have been able to acquire territorial sovereignty by original means such as discovery and settlement; instead, sovereignty would have had to be acquired derivatively from the Indigenous nations by conquest or cession. With the exception of Australia, the British Crown's acceptance of this was to some extent confirmed by the fact that it entered into numerous treaties with the Indigenous peoples, which can be regarded as acknowledgement of their sovereign status. And yet for many years the highest courts in the four settler nations of the United States, Canada, Australia, and New Zealand have relied, explicitly or implicitly, on the so-called discovery doctrine that was judicially articulated by Chief Justice Marshall of the United States Supreme Court in his seminal 1823 decision in *Johnson v M'Intosh*."
[21] Canada, "Statement of the Government of Canada on Indian policy (The White Paper, 1969)" *Indigenous and Northern Affairs Canada*, available online at: http://www.aadncaandc.gc.ca/eng/1100100010189/1100100010191.
[22] *R v Sparrow, supra* note 19 at 412.

(Attorney General), 1929 CanLII 438 (UK JCPC) ["*Edwards*" or "The Persons Case"][23], had more focus and attention in Constitutional Law curriculum before *Sparrow*. Actually there was no mention of even Treaty or Aboriginal rights from the time of *The Royal Proclamation of 1763* all the way up to the 1982 Constitutional reforms. For example, in *Sparrow* the Court brought up this strange absence. Due to the presumption that academics had of British sovereignty, none of the Canadian Constitutional materials covered Aboriginal rights, let alone any mention of the Treaties:

> For many years, the rights of the Indians to their [A]boriginal lands – certainly as legal rights – were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's *The Law of the Canadian Constitution* (3rd ed. 1916), there was **a virtual absence of discussion of any kind of Indian rights to land even in academic literature**. By the late 1960's, [A]boriginal claims were not even recognized by the federal government as having any legal status. Thus the Statement of the Government of Canada on Indian Policy 1969, although well meaning, contained the assertion (at p. 11) that "[A]boriginal claims to land… are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community." In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the right of the Indians who lived there, even though these were expressly protected by a constitutional instrument; see the *Quebec Boundary Extension Act*, 1912, S.C. 1912, c. 45. It took a number of judicial decisions and notably the *Calder* case in this Court (1973) to prompt a reassessment of the position being taken by government (emphasis added).[24]

Blackhawk, makes the point that "political change, clear or not, [does] little to address the artifacts of colonialism."[25] Her discussion of American legal curriculum points out that their Constitutional Law curriculum focuses on slavery as its dominant theme. However, academic discussions do not analyze slavery or race, or even racism, the narrative is mostly about states' rights to enslave and ownership of slaves as property. Although slavery also occurred here in Canada, it is ignored for the most part.[26]

That is why decolonization is more important than the other diversification efforts, especially in the American legal curriculum. But also why anti-racism is imperative as well. This ghost has a structure and it needs to be exorcised through the legal curriculum. As Francis Lee Ansley analyzed in his article "Race and the Core Curriculum in Legal Education", the resistance to change in the legal curriculum delays the necessary confrontation that must occur with the legal canon, if we are ever to have a more just society.[27] Instead the "basic core curriculum endures"

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[23] *Edwards v Canada (Attorney General)*, 1929 CanLII 438 (UK JCPC).
[24] *R v Sparrow*, *supra* note 19 at 177.
[25] Maggie Blackhawk, "Federal Indian Law as Paradigm within Public Law" (2019) 132 *Harv L Rev* 7, online at: https://harvardlawreview.org/2019/05/federal-indian-law-as-paradigm-within-public-law/ at 1800.
[26] Matthew McRae, "The Story of Slavery in Canadian History: It happened here too." *Canadian Museum for Human Rights*, online: https://humanrights.ca/story/the-story-of-slavery-in-canadian-history.
[27] Frances Lee Ansley, Race and the Core Curriculum in Legal Education, (1991) 79 *Calif L Rev*, online: https://doi.org/10.15779/Z38T15R at 1514, 1515. "[L]egal education stands in a peculiar posture relative to this debate and the cluster of issues surrounding it, a posture that puts us in some ways behind but in other ways ahead of our colleagues in other disciplines. On the one hand, law schools are behind the times in confronting the issues posed by the debate over the canon. Our basic core curriculum stands astoundingly unchanged and unexamined compared to that of the rest of the academy… the centrality of racial texts, racial issues, and racial disputes to an educated understanding of our discipline and its heritage. If the history of the United States Constitution and the American legal system teaches us anything, surely one of its core messages is that race has played a key role at many critical and formative junctures of our development."

despite the political paradigm shifts and the many diversification strategies and initiatives that resulted in order to advance change.[28]

There are strong debates around much of the document of the American Constitution and that it is of no service to the law student that does not receive the training as to why race is the main reason for this controversy. "The power and burden of race, both past and present, should be seen as indispensable parts of minimal cultural and constitutional literacy for the legal practitioners and theoreticians we send forth into the bar and the world."[29]

Blackhawk states that federal Indian law is treated as a small area not central to American Constitutional Law curriculum. Part of this dismissal is that it "exists outside the courts".[30] However, she proposes that it actually provides the anti-canon to the legal canon:

> [F]ederal Indian law and Native history have much to teach about reimagining the constitutional history of the United States… It has often been said that federal Indian law is "incoherent" and in need of reform, because the doctrine does not comport with general public law principles. But perhaps it is the general principles of public law, and the incomplete paradigm of slavery and Jim Crow segregation on which those principles rest, that are in need of reform… Unlike slavery and Jim Crow segregation, federal Indian law teaches that nationalism is no panacea for majority tyranny, and that rights can wound as well as shield minorities."[31]

If race is central to the issues in property law, then it should follow that it be central in Constitutional Law.[32] "Race is and should be recognized as central to the Constitution, which is, of course, central to the law school curriculum."[33]

But the need to shift from a race centred debate to one centered around decolonization should not have anything to do with the degree to which Canada had slavery and Blackhawk is saying, unlike Ansley, that even the US needs to make a similar shift. The idea of ameliorating racial disparities through an individual rights framework that emerged from the Civil Rights movement in the United States and the inherent rights movement in response to WWII internationally, is centered around an ideology of liberalism that is individualistic.

It is organized around the need to ensure equality of individual citizens within a liberal state and the reduction of differences between them on racial grounds. It doubles down on the nation state as the central arbiter of power and rights disputes. An Indigenous sovereignty or treaty framework would seek to disrupt this and would seek to address Indigenous difference by recognizing a nation to nation relationship rather than erasing Indigenous difference within a liberal framework.

Many Indigenous academics will insist that Indigenous people are not minorities. They are minorities within the nation state but we are not looking for those rights as such. Instead, Indigenous rights are supposed to emanate from treaty or inherent sovereignty. Race only matters within the state centered legal system because different races are treated differently within the

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[28] *Ibid* at 1516.
[29] *Ibid* at 1520.
[30] Blackhawk, *supra* note 25 at 1799.
[31] *Ibid* at 1790.
[32] Ansley, *supra* note 27 at 1523.
[33] *Ibid* at 1526.

overarching monopoly of state sovereignty. If Indigenous people are citizens of their own nations this issue is less pertinent because they look to their own parallel processes for their rights rather than competing with non-Indigenous people within the unitary state.

C. The need for effective Treaty education in Constitutional Law: Without it, we are creating injustice.

When I attended an International Law course in my third year of law school, my discussion with the instructor about the Treaties in Canada was one of dismissal, "yes they are "treaties" but it is not the same. They are sui generis here in Canada." I asked how it is not the same, as the Treaties were between nations with independent military might, the characterization of sui generis was only applied later by the Court around the 1990s in case law concerning Aboriginal rights. Again, I was met with an attitude of dismissal. Classmates approached me after class, one student in particular had mentioned the conquest of "the Indigenous people". I spent almost an hour educating well-meaning students who should know even just the basic history of the country they grew up in. This experience was just a couple of years ago.

The Special Rapporteur of the United Nations, Miguel Alfonso Martinez came to Canada in 1989. He concluded in his 1999 report that the British treaties with the Indigenous peoples here are international in nature and criticized countries like Canada for denying it.[34] His final report influenced the *United Nations Declaration on the Rights of Indigenous Peoples* ["UNDRIP"], adopted in 2007, notably Article 37 which reads: "Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements."[35]

It is not just law students that need effective Treaty education. I feel there is room to discuss how the lack of education of law faculty and legal practitioners already in the professional field contribute to this legal curriculum imbalance. The limits created by the colonizer's language and legal perspective perpetuates a system that does not allow for treaty partnership from the moment students enter law schools, which then carries into their legal and academic professions. But how does one achieve equal footing and have true reconciliation between Indigenous and settler societies? Mandatory first year law courses dedicated to Indigenous content is a step towards understanding some of the history and the politics that frame the legal issues that Indigenous peoples face. As well, making these classes mandatory gives testimonial justice of the importance of the Treaties. But this does not go far enough to decolonize the curriculum.[36]

"Epistemic injustice" occurs when there is "testimonial injustice".[37] For example, as mentioned in my above anecdote, as an Indigenous student, I voiced that the Treaties in Canada were

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[34] Miguel Alfonso Martinez, "Study on treaties, agreements, and other constructive arrangements between States and [I]ndigenous populations." (1999) *United Nations Social and Economic Council*, online: https://digitallibrary.un.org/record/276353?ln=en; see also Anthony J. Hall, "Treaties with Indigenous Peoples in Canada", (June 06, 2011) *The Canadian Encyclopedia*, Historica Canada, online: https://www.thecanadianencyclopedia.ca/en/article/aboriginal-treaties.

[35] *United Nations Declaration on the Rights of Indigenous Peoples* [UNDRIP], available online at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

[36] Kirsten Anker, (2016) "Reconciliation in Translation: Indigenous Legal Traditions and Canada's Truth and Reconciliation Commission" 33 *WYAJ* 2 at 23.

[37] Franziska Dübgen, ed. "Epistemic Injustice in Practice" 15 *Wagadu: A Journal of Transnational Women's and Gender Studies* (2016) Special Issues at 1. "Epistemic injustice gives a name to experiences that we struggle to articulate due to the injuries of hegemonic speech… By looking at epistemic injustice in practice, this scholarly endeavor is aimed at making experiences of marginalized groups readable, pointing to hidden

between independent nations and are international treaties and I had this comment dismissed by the professor in front of my peers. I perceived my comments were dismissed because I was not given the same status of credibility because I am Indigenous. It is discussed in Dübgen's article that "[p]eople inhabiting such identity positions are made objects of knowledge formation rather than taken seriously as subjects of knowledge in their own right. As speakers, persons suffering from testimonial injustice, are invisible."[38] This is a concern as we move towards decolonization and the Indigenization of academic spaces. Greenwood talks about "exploitative inclusivity"[39] that comes from academia's desire to include more Indigenous content and spaces in universities. We must be cognizant that Indigenous students are relegated to only affirm what the dominant structure expects to hear from the curriculum that has been learned.[40] Including Indigenous perspectives of the Treaties in Constitutional Law would go a long way in curbing such exploitative inclusivity.

The term sovereignty needs to be contextualized as well. There are some Indigenous perspectives that do not prefer what the term sovereignty represents in the European sense. "I don't even like the word sovereignty because… it denotes the idea that there's a sovereign, a king, or a head honcho, whatever. I don't think that [N]ative people govern themselves that way… I think [N]ative peoples' government was more of a consultative process where everyone was involved – women, men and children."[41] Borrows explains that Indigenous sovereignty is "not about absolute power, but the subtle art of generating and sustaining relationships."[42] This force has been derived from centuries of distinct social and cultural evolution far from European influences. Our worldviews, our symbiosis with the environment and our language and legal traditions are its own kind and embody this sense of decentralized government. Youngblood Henderson describes Indigenous sovereignty as the "*grundnorm*", or foundational norm that was instrumental in the "reorientation of the constitutional framework of Canada."[43] Without the *grundnorm* of Indigenous sovereignty there would be no base to implement the rights discerned in the Treaties.

In keeping with effective Treaty education, it would be fascinating if I as a Nēhiyaw (Plains Cree) woman could research and write about the revitalization of Nēhiyaw legal traditions, in Nēhiyawewin. Why can we not do this type of research in our law schools in Canada? A Maori student wrote his entire doctoral thesis in the te reo Maori language.[44] The concern was that there is a limited audience on who would read it outside of te reo Maori speakers. That concern could be remedied with more speakers of the te reo Maori language. The same remedy can apply here. "A fundamental issue of trans-systemic constitutional analysis or *sui generis* analysis requires

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practices of power, and detecting silences of what is not on the agenda in public discourse – forms of domination and exclusion that a conventional vocabulary of social critique cannot grasp so easily and oftentimes is itself complicit in reproducing."

[38] *Ibid* at 2.

[39] Margo Greenwood, Sarah de Leeuw and Tina Ngaroimata (2008) *When the Politics of Inclusivity Become Exploitative: A reflective commentary on Indigenous People, Indigeneity, and the Academy.* 31 CJNE 1, Proquest, available online at: https://search.proquest.com/openview/ee5bf004cbb5187bcbd86f5c33c00d3d/1?pq-origsite=gscholar&cbl=30037 at 198.

[40] *Ibid* at 199.

[41] John J. Borrows and Leonard I. Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 4th ed (Markham, Ontario: Lexis Nexis Canada Inc., 2012) at 5.

[42] *Ibid*.

[43] James (Sákéj) Youngblood Henderson, "Constitutional Vision and Judicial Commitment: Aboriginal and Treaty Rights in Canada" (2010) 14 *Austl Ind L Rev* 2 at 24, online: http://classic.austlii.edu.au/au/journals/AUIndigLawRw/2010/21.pdf at 27.

[44] Te Aniwa Hurihanganui, (16 November 2017) "Victoria Uni lecturer completes thesis in te reo Māori." *RNZ News*, available online at: https://www.radionz.co.nz/news/te-manu-korihi/344011/victoria-uni-lecturer-completes-thesis-in-te-reo-maori.

non-Aboriginal scholars and courts to be taught Aboriginal languages and how to translate or comprehend Aboriginal traditions."[45]

Non-Indigenous attempts at understanding Indigenous legal systems scratch at the surface at best because it is limited by European languages.[46] Our legal traditions, our cultural systems are independent and not reliant on the acknowledgement from the common law system, and vice versa. But how can we communicate across this divide? How can we engage with each other ethically and respectfully? Youngblood Henderson proposes that this is possible using a trans-systemic approach. We can build bridges of neutral commonalities so we can sustain the diversity, communicate between legal systems and create new opportunities for "distinct traditions to generate an 'intersocietal' legal system" thereby we "can breathe new meaning and new life"[47] into Canadian federalism in Constitutional Law curriculum.

As we go forward on the path to reconciliation we need to do so on a firm foundation of mutual and equal partnership. Without effective Treaty education there is no place to be "sufficiently grounded in a reciprocal relationship of respect between the Canadian state and [Indigenous] peoples for it to constitute "law" in a meaningful sense, rather than mere power or force."[48] We can do much better than this. We can train our legal practitioners to think, feel, conceptualize and do much better than this.

D. *Sui generis* is not synonymous with pan-Indigenous.

Indigenous nations and the communities within those nations, are very distinct from each other. They have their own cultures, customs, legal traditions and worldviews, even as more Indigenous people reside in close proximity of one another in urban environments, the effects are to diversify not homogenize. There is always a risk, especially in academic settings, of treating the diverse Indigenous cultures as "pan-Indigenous" which is defined as "tendencies for particularly non-Indigenous peoples to generalize characteristics about Indigenous peoples, a practice known as *pan-Indigenizing*."[49] There are over 50 Indigenous nations, over 600 First Nation communities[50] and more than 70 Indigenous languages that are spoken in Canada.[51] "[I]t is vital to note that Indigenous identity does not mean the same to all people, nor is it consistent across geographies."[52] The concern of what is called pan-Indigenizing, or generalizing the Indigenous experience can be of concern, especially in the academic setting, and especially true in law schools.[53]

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[45] Henderson, *supra* note 43 at 36.
[46] *Ibid*.
[47] *Ibid*.
[48] Benjamin Ralston, (2014) "Where Seas Meet: Reconciling Indigenous and Crown Projections of Marine Space in British Columbia and Aotearoa New Zealand" (University of Otago), available online at: https://ourarchive.otago.ac.nz/handle/10523/5106 at 77.
[49] Greenwood, *supra* note 39 at 203.
[50] Government of Canada, *Indigenous Peoples and Cultures*, available online at: https://www.canada.ca/en/services/culture/canadian-identity-society/indigenous-peoples-cultures.html.
[51] Statistics Canada, "The Aboriginal languages of First Nations people, Métis and Inuit.", *2016 Census in Brief*, available online at: http://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016022/98-200-x2016022-eng.cfm.
[52] Greenwood, *supra* note 39 at 203.
[53] *Ibid* at 203. "[S]ingle Indigenous peoples [that] are constructed as representing a larger Indigenous voice, for example, there can be assumptions that Indigenous peoples and perspectives have been consulted when in fact the voices and perspective of only one or two individuals have been presented."

Leroy Littlebear in his article "Jagged Worldviews Colliding", elucidates that there is a unity and certain commonalities that most Indigenous groups share. The world itself is a living entity that is imbued in a constant flux of energy or spirit. Everything exists in a cyclical, circular and seasonal pattern that keeps moving and is dynamic.[54] But this unity is not to be taken as meaning all Indigenous perspectives are the same, and there may be differing perspectives of what is effective Treaty education, along with Treaty implementation.

Unfortunately, through the colonizing effects of the Residential School System,[55] many children of various Indigenous cultures were forbidden their languages, and suffered a tragic disconnect from their families and much knowledge was lost.[56] The cultures have continued, however, and are going through dynamic processes of reclamation and renewal, which is reflective of the commonalities of Indigenous worldviews mentioned above. The colonizing effects from European cultures had an individualistic focus to their worldview that was hierarchal in nature but predicated on "free-will" and the proclivities of an individual.[57]

Despite the loss of language and customs that have occurred, a resurgence in reclaiming what is Indigeneity has been occurring for decades. Some say this needs to be done by reviving language, and through the language we can more fully understand Indigenous legal traditions. Borrows discusses that the root meaning for the word tradition, is *transmit* and that "[t]raditions have the most relevance when each generation actively participates in their construction and application."[58] There have been continuous efforts on reserves, communities and urban centers to teach and preserve Indigenous languages.[59] Elders and Traditional Knowledge Keepers from all nations strongly encourage the need to keep the languages alive because by "learning and speaking a particular language, an individual absorbs the collective thought processes of a people."[60] There is importance of understanding Indigenous languages in order to understand the Treaties, as this would be a genuine attempt at sharing space.

As well, it must be kept in mind that there has been an overemphasis on "land and resource conflicts between the Crown and Indigenous governments to the exclusion of other human rights issues."[61] These issues focused on in Aboriginal case law are obviously pertinent to the growth and sustainability of Indigenous rights and economies, especially in an economic self-government context, but this focus has a tendency to overtake the "pressing structural inequalities related to violence against Indigenous women."[62]

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[54] Leroy Littlebear, "Jagged Worldviews Colliding" *Walking Together: First Nations, Métis and Inuit Perspectives in Curriculum*, (2000) University of British Columbia Press, available online at: http://www.learnalberta.ca/content/aswt/documents/fnmi_worldviews/jagged_worldviews_colliding.pdf at 1.

[55] Truth and Reconciliation Commission of Canada, "They Came for the Children" *Historical Document* (2012), available online at: http://www.myrobust.com/websites/trcinstitution/File/2039_T&R_eng_web[1].pdf at 1.

[56] *Ibid* at 3.

[57] Sakej (James) Youngblood Henderson, *Research*, Native Law Centre, University of Saskatchewan, available online at: https://www.usask.ca/nativelaw/staff/sakej_research.pdf at 3.

[58] Borrows, *supra* note 41 at 271.

[59] Jorge Barrera, (25 October 2017) "Indigenous population growing rapidly, languages surging: census." *CBC News: Indigenous*, available online at: http://www.cbc.ca/news/indigenous/indigenous-census-rapid-growth-1.4370727.

[60] Littlebear, *supra* note 54.

[61] John Borrows, "Aboriginal and Treaty Rights and Violence against Women" (2013) 50:3 *OHLJ* (York University: Toronto), online: http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1021&context=ohlj at 703.

[62] *Ibid*.

When mentioned above, I do not want to dismiss the Persons Case as not as important as effective Treaty education in the Constitutional Law curriculum. Because "the courts are not particularly sensitive to Indigenous peoples' lived realities",[63] it has been Indigenous women who have tirelessly pushed for many decades to fearlessly advocate to the public for a focus on the many inequalities, such as issues of violence, that result from these systemic inequalities that are rooted in Canada's colonialist and patriarchal policies.[64]

As we work towards creating ethical spaces in the Constitution Law curriculum, we need to be cognizant of how we are all susceptible to colonialist thinking. It is important to empathize and be aware that there is still a patriarchal undercurrent in what is taught in law schools. But we also must have the empathy and emotional intelligence to recognize that because all of us suffer to some degree from colonized thinking, it could manifest itself in varying forms of lateral violence, especially in the academic environment.[65]

E. Although the legal curriculum does create order in our mythos, it is not qualified as Revealed Truth.

We teach a form of utopianism in law schools, which then in practice becomes very complicated as opposed to learning law in books. For example, when there are First Nation laws that the RCMP will not enforce, how do we reconcile that with the rule of law in a regulatory state? Any doctrine will have human agency whether religious, law and so on. If we take the laws in religious scripture, such as in the Bible, and enforce it literally in our society, it would radically transform our lives into something unrecognizable. Human language is ambiguous precisely because it evolves with the meaning we attach to it, and we forget about the human agency to activate the law. We are taking dead common law in books and in practice we bring it into play through individual human agency. This is why we need to focus as much on training human agency as we do on "feed[ing] on the spectres of books".[66]

Logicians believe that there is logic to language and that eventually one could break down language to quite literally the building blocks of logic.[67] However this is just not possible. Recursivity is biological. From long ago when the Cromagnon and Neanderthal, our human precursors, developed brain capacity for language, it has only been - so far - human language that can allow for such an evolution in our verbal communication. Because of this recursivity[68],

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[63] *Ibid*.
[64] *Ibid* at 701, 702. "Indigenous women across the country have creatively developed detailed policy proposals and grassroots models for dealing with violence against women. Their work includes support for Indigenous self-determination that recognizes and affirms women's rights."
[65] Amy Bombay, "Origins of Lateral Violence in Aboriginal Communities: A Preliminary Study of Student-to-Student Abuse in Residential Schools" (2014) *Report for the Aboriginal Healing Foundation*, online: http://www.ahf.ca/downloads/lateral-violence-english.pdf at 2. "Lateral violence: residential schools have been suggested as the primary cause of a cluster of behaviours known as lateral violence thought to be prevalent within Aboriginal communities. Lateral violence can occur within oppressed societies and include bullying, gossiping, feuding, shaming, and blaming other members of one's own social group as well as having a lack of trust toward other group members."
[66] Walt Whitman, *Song of Myself* from "Leaves of Grass" (1855): "You shall no longer take things at second or third hand, not look through the eyes of the dead, nor feed on the spectres in books. You shall not look through my eyes either, nor take things from me, you shall listen to all sides and filter them from yourself."
[67] Percy Liang, "Learning Executable Semantic Parsers for Natural Language Understanding" (2016) 59 *Comm ACM* 9. This type of logician rendering of natural languages is important in the development of artificial intelligence.
[68] E. Thomas Finan, "The "Lords of Life": Fractals, Recursivity, and "Experience" (2012) 45 *Phil & Rhet* 1 at 71. "By perpetually recasting phrases, [there is] a provisional quality for all phrases: each phrase may undergo a conceptual reversal in which its earlier solid resonances are inverted.

for example the words in the order of "purple" "offering" "dirtbag" "dog" put together without context is jibberish, but "purple offering dirtbag dog" could still work its way in our conversations to become meaningful and sacred in language evolution.

Just as we see when we look at conversation, however, not every mutation is meaningful. Just as we have had an evolutionary "bush" as opposed to the inaccurate linear link ("missing link"), we are not able to accurately anticipate where our evolution in language will go. Language is like our 'feelers', we are feeling our way through the darkness that is evolution, and at some point we need to dramatically evolve in order to adapt to our ever-changing environments. We are at such an evolutionary turn with reconciliation in our society today.

What is law? What do lawyers do and how do we frame things in a law context? We frame it by practising law. To become practitioners, we go to law schools to learn the general rules of social organisation and frameworks of legal expertise. It is a huge responsibility to be in a position of power as policy makers, lawyers, judges, parliamentarians and other government or academic positions. A lot of harm can and has resulted from paternalistic attitudes towards Indigenous communities because of the paternalism that results from epistemic imbalances in the law itself.

For example, as a practicing lawyer there would be limits on how one could frame things, such as on their firm's letterhead. If your firm acknowledged being on Treaty 6 territory and the traditional homeland of the Métis, but your firm does not deal primarily in Aboriginal law, would you run the risk of alienating potential clients because you are perceived as making a statement? Why would this create or limit opportunities for a firm? What if all firms were to do so just as an ethical standard of acknowledging the Treaties because law students are taught that this is important from the moment they enter law school? Law schools equip practitioners for what they can do, and this behaviour would shift the available frameworks, thereby influencing the practice of law and the public's perception of the acknowledgement. Once again, we come back to how we have a conversation in academics with the public, and how the curriculum informs law students is a large part of it. How we frame issues in a law context will also either create or limit opportunities with Indigenous practitioners and clients. If we continue to define socio-legal problems between settler and Indigenous societies using "us against them" constructs we are perpetuating unnecessary silos of skewed cultural perceptions that goes both ways.

Having just the common law perspective taught in Constitutional Law is saying - without saying - that the common law is superior to the Indigenous legal systems that have been developed on this land since time immemorial:

> By looking at epistemic injustice in practice, this scholarly endeavor is aimed at making experiences of marginalized groups readable, pointing to hidden practices of power, and detecting silences of what is not on the agenda in public discourse – forms of domination and exclusion that a conventional vocabulary of social critique cannot grasp so easily and oftentimes is itself complicit in reproducing.[69]

The formal qualities of language allow for this effect of slipperiness; the same lexical form (a phrase, a word, etc.) embodies multiple, often opposed meanings. The meaning of a word or phrase does not stand still but perpetually eludes a fixed grasp. One meaning slides to the next."

[69] Dübgen, *supra* note 37.

We are all sharing space. They say time is our most valuable resource, but I believe space in all its infinite forms, or lack of form, is just as valuable. Much of our conflicts can be resolved by renewing this relationship with how we share space in legal education.

F. Attempts at Legal Pluralism in Canada as another way of sharing space.

The Canadian legal system has attempted to treat Indigenous legal systems in particular ways to be effectual. The most success has been through attempts at solutions through legal pluralism. "Sometimes different traditions can operate within a single state or overlap between states. This is known as legal pluralism: 'the simultaneous existence within a single legal order of different rules applying to identical situations."[70] These attempts fall under either a "soft pluralism" or "hard pluralism" approach. The Honourable Sébastian Grammond used the distinction of "soft" versus "hard" pluralism. "Soft pluralism obtains when a government… delegates the power to enact in certain domains to other governments or authorities… Hard pluralism… prevails when parallel legal orders co-exist. Legal orders can thus exist apart from an official recognition and can even be disputed by one or more governments or authorities."[71]

Custom and customary law represent one area of Indigenous legal orders that have been more readily found justiciable. For example, customary law in election disputes has been recognized since the *Indian Act* amendments in the 1990's as justiciable. Likewise, marriage and adoption "customs" have been seen as justiciable going back to the earliest period of colonialism. Certain customs fit more readily into soft pluralism as it can be recognized and then incorporated into Canadian law without challenging its institutional hegemony in the same way that other forms of Indigenous legal traditions might.

Learning in an environment of epistemic imbalance, it would make sense that concepts such as 'making room for everyone' will quickly get lost in a theoretical fog. Most academic environments have a difficult time being pragmatic outside the paternalistic 'I'm sorry' stage that seems to characterize post TRC reconciliation efforts. In legal practice, however, there have been sincere explorations of possible solutions to bridge the diverse legal worldviews that could potentially coexist in partnership, such as with attempts at legal pluralism. Legal pluralism is an intricate matter and is often confusing to implement.

An example of soft pluralism is the 1867 seminal case, *Connolly v Woolrich*, as mentioned above.[72] The facts of this case involved a fur trader disenfranchising his children from his estate because their mother was Cree and he remarried and had more children with a European wife. The defense was that because it was a marriage that occurred under Cree custom, it was not valid. The Quebec civil court held that the Cree marriage was valid and the estate must be divided accordingly.[73] Although, a private family law issue, it is important in recognizing the Cree marriage as being valid under a European legal system, even though it was not exactly an acknowledgement of a full Cree legal tradition. It still took on the European legal compartment of marriage in order to have the characterization needed to determine the estate of the father.

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[70] John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press: Toronto, 2010) at 8.
[71] Albert Breton, Anne Des Ormeaux eds., *Multijuralism: Manifestations, Causes and Consequences* (Ashgate Publishing: Vermont, 2009) at 3.
[72] *Connolly, supra* note 17.
[73] Borrows, *supra* note 70 at 30.

This is how most Indigenous law is characterized by the courts. In order for the courts to recognize an Indigenous custom as justiciable it needs to have a soft pluralism treatment. The courts have ultimate authority of whether Indigenous law is accepted, and if it is, then they will interpret how the Indigenous law or custom will be applied. Unfortunately, because the law or custom needs to be reframed to fit into the European legal system, it takes on an assimilated construction, thereby morphing it out of its original context.[74]

Another example is the *Algonquin of Barriere Lake* issue.[75] There was a dispute regarding the election of a hereditary chief. After much dissension and strife in the community, this internal governance conflict ended up in the Federal Court. The Algonquin of Barriere Lake were never required to follow subsection 74(1) of the *Indian Act* that sets out a community's election of chief and band council.[76] The community lived in relative political calm until the 1990's when a political conflict led them in 1997 to codify their customs into "*Mitchikanibikok Anishinabe Onakinakewin*, or in English, the *Law Codifying the Customary System of Government of the Algonquins of Barriere Lake*."[77] Because the Algonquin of Barriere Lake were able to codify their laws, the Federal Court was then able to determine they had jurisdiction through s 2 of the *Federal Courts Act* because the "Elders Council, are included in the expression "federal board, commission or other tribunal" used in subsections 18(1), 18.1(2) and (3)."[78] The *Indian Act* has a provision that discusses when subsection 74(1) does not apply as in the case of electing a chief according to the "custom of the band". This then falls under the parliamentary power given to the Federal Court.[79] Because this custom had to become recognizable and thereby subsumed under the *Indian Act*, and then decided on by the Federal court, this is hardly an ideal prospect for legal pluralism.

On the other hand, if the compromise is not agreed on or an analog to common law cannot be found, the courts could rule the custom "non-justiciable". In *Wesley v Canada*,[80] the Federal Court discussed the settling of an internal governance issue. "The intervention of the Court at this stage would be premature because it would interfere with the rights of members of the Gitwilgyoots to make their own leadership choices according to their customs… [and] it is doubtful that this Court has jurisdiction over such a question."[81] The intent of ruling a custom non-justiciable was for the sake of preserving the autonomy of the Indigenous legal tradition. But Indigenous laws do not have to be recognized to be upheld by Canadian courts to be law. Although there are consequences of falling outside of what is justiciable; a custom law is living and should be enforceable.

An example of where hard pluralism would come into play would be the name change for Calgary and other Albertan centers, in the sense that there are two independent legal traditions

[74] Brian Z. Tamanaha, (2008) "Understanding Legal Pluralism: Past to Present, Local to Global." 30 SLR at 383. "When colonizing powers undertook to expand the reach of law, three basic strategies were applied to incorporate customary or religious law: the codification of customary or religious law; the application by state courts of unwritten customary or religious law in a fashion analogous to the common law; and the creation or recognitions of informal or 'customary' courts run by local leaders."
[75] *Algonquins of Barriere Lake*, 2010 FC 160.
[76] *Ibid* at para 9, 10.
[77] *Ibid* at para 17.
[78] *Ibid* at para 96, 97.
[79] *Ibid* at para 98,99 and 100.
[80] *Wesley v Canada*, 2017 FC 725 (CanLII).
[81] *Ibid* at para 10.

that exists. The Stoney Nakoda are asking for a return to the original historic location identities of their territory. "Calgary will be renamed Wichispa Oyade — Stoney Nakoda terms that roughly translate to mean elbow town… in order to allow the culture and history of these lands to become more known and respected [because] [t]his lack of recognition contributes to an increasing threat that Stoney Nakoda heritage will be overrun."[82] The Stoney Nakoda culture and worldview is not dependent on Alberta recognizing the traditional names of their territory. But in order for the heritage of the area to not be "overrun" and forgotten for the sake of all of Alberta's present and future generations, this is an attempt to reverse the colonizing effects that have been imposed on traditional Stoney Nakoda territory.

Of course, most Indigenous nations would rather keep their legal traditions intact without them being warped to fit "appropriately" into the Canadian legal system. But then the customs in these traditions run the risk of being ignored. But if law is law, then this is a difficult decision for each independent tradition to make.

Neither of these options are appealing and the need for other solutions is apparent. Younger generations of Indigenous nations and communities need to see the credibility of their legal traditions acknowledged as equal to the Canadian legal system or it runs the risk of becoming overridden and potentially forgotten. But it is very important for non-Indigenous law students to see this credibility as well, if not more so. Indigenous students do not need to prove they are equal, they know they are. "As Indigenous scholars such as John Borrows and Sákéj Henderson have been stressing, the challenge is to educate non-Aboriginal judges, lawyers, and law students to comprehend Indigenous legal traditions."[83] Anker says in her article regarding the reconciliation of Indigenous legal traditions in light of the TRC, this "cannot be a one-way street – an invitation to look at "Aboriginal people under glass. Non-Indigenous people must also be called on to explain their own culture and legal traditions."[84]

We originally began as mutual partners post contact and it was maintained all through the fur trade, but that language is now lost in 'it's just the way it is now' rhetoric. But is it really? Even John Borrows, a renowned and leading Indigenous legal scholar, in his *Canada's Indigenous Constitution* book, said he first lacked the language and self-confidence to defend this idea of unequal terminology.[85] Epistemic injustice "also exposes scholars' historic lack of regard for, interest in, knowledge of, and predisposition towards the contemporary nature of Indigenous law throughout the last century."[86]

For example, the "Medicine Chest" clause of Treaty 6 is one of the promises made by the Crown to Indigenous First Nations that is not well known to the general prairie public. The clause stipulates that "a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent."[87] In the case, *Dreaver v The King* (1935)

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[82] John Cotter, "Stoney Nakoda hope to change Calgary's name to reflect Indigenous history." (13 November 2017) *Calgary MetroNews*, online: http://www.metronews.ca/news/canada/2017/11/13/what-s-in-a-name-plenty-for-alberta-first-nations-seeking-heritage-recognition.html.
[83] Kirsten Anker. "Reconciliation in Translation: Indigenous Legal Traditions and Canada's Truth and Reconciliation Commission" (2016) 33 *WYAJ* 2 at 28.
[84] *Ibid*.
[85] Borrows, *supra* note 70 at 13.
[86] *Ibid* at 9.
[87] Copy of Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions, online: https://www.aadnc-aandc.gc.ca/eng/1100100028710/1100100028783.

["*Dreaver*"][88], one of the original chiefs to sign Treaty 6 resorted to the courts to recover the costs of over a decade of medical supplies and care, citing the above clause as justification. The court ruled in his favour, generously interpreting the clause to include the transition and growth that the medical system and its care had gone through since the signing of the Treaties.

In a subsequent case, *R v Johnston* (1966), 56 DLR (2d) 749, the appellate court overruled the lower trial's decision to uphold the decision in *Dreaver* holding that "only a 'first aid-type kit' was required to be provided by the Crown".[89] Besides some obiter commentary on a case in recent years that agrees with the original generous interpretation of the Medicine Chest clause, there has been no binding decisions to reverse the narrow interpretation of this clause.[90] The narrow interpretation is embarrassing in its inhumanity of the Canadian legal system, and it is doubtful that such an interpretation would be made today. But that is the nature of our *stare decisis* common law and why a much more consultative approach in our relationship as Treaty people is so desperately needed.[91]

Part of this lack of compassion in the Canadian legal system as to what the Treaties are and how they should be honoured, is systemic and rooted in the absence of effective Treaty education. Re-examining the legal curriculum I am certain will influence how law students may frame the development of their education and practical experiences in the future. When people comment, 'we can't rewrite history', the answer is 'yes, we can' and 'yes, we should'. Especially if it has been solely from the perspective of the colonizer. Just as we can let go of bad law, we can let go of bad historical accounts that lead to bad interpretations in law.

Epistemology is defined as "the philosophical study of the nature, origin, and limits of human knowledge."[92] In the legal context, it is the study of our legal reasoning, the debates, the limitations, and all the constructs and frameworks necessary to develop the specialized skills to practice this legal knowledge. Samuel describes the evolution of legal reasoning in the common law as the simplistic response of solving legal issues in practice, and then there is the more complex, or "the paradigm orientations that inform these schemes and reasoning techniques."[93]

G. There is a politics to "whiteness", which is very different than having European ancestry.

> "White workers had a voice in the Democratic Party, the unions, and the local political machines, and all too often they opted for whiteness rather than class solidarity. Dixiecrats continually obstructed any legislation that whiffed of racial equality. White bosses deliberately established two-tiered wage systems. White parents consistently opposed efforts to desegregate their children's schools. White liberals constantly

[88] *Dreaver v The King, Exchequer Court of Canada*, Angers, J, April 10, 1935, Doc No 15186 (unreported).
[89] James B. Waldram, D. Ann Herring, and T. Kue Young, *Aboriginal Health in Canada* (University of Toronto Press: Toronto, 2006) at 179.
[90] *Ibid*.
[91] Office of the Treaty Commissioner, online: http://www.otc.ca/pages/about_us.html. "The mandate of the Office of the Treaty Commissioner (OTC for short) is to facilitate a bilateral process to discuss treaty and jurisdictional issues between Saskatchewan First Nations and the government of Canada, with the government of Saskatchewan present as an observer."
[92] A.P. Martinich and Avrum Stroll, "Epistemology: Philosophy" (2019) *Encyclopedia Britannica*, available online at: https://www.britannica.com/topic/epistemology. "The term is derived from the Greek *epistēmē* ("knowledge") and *logos* ("reason"), and accordingly the field is sometimes referred to as the theory of knowledge. Epistemology has a long history within Western philosophy, beginning with the ancient Greeks and continuing to the present. Along with metaphysics, logic, and ethics, it is one of the four main branches of philosophy, and nearly every great philosopher has contributed to it."
[93] Geoffrey Samuel, *Rethinking Legal Reasoning*, (Cheltenham, United Kingdom; Edward Elgar Publishing, 2018) at 1, 2.

> castigated Black civil rights leaders for "moving too fast." I do not intend for my argument to be too voluntaristic, but white citizenship must be posed as a choice (even if it is not just a choice) in order to suggest political alternatives. Historically white citizens have made the wrong choice about their democratic alternatives, but the beautiful thing about the ability to make a decision is that one can always change one's mind."[94]

"Whiteness" is a political decision, as Joel Olson so aptly puts in this quote. By framing being white as a political choice one can now look at how the problem of systemic racism is reframed as systemic privilege or white privilege. The way to solve white privilege is to eliminate it.[95] Olson reasons that racism is almost impossible to eliminate because society just does not know what to do with it, other than oppose it. There has to be an explanation that race is a political theory because we "bracket race from democracy", especially in the legal curriculum, but all this does is give the illusion, or casts the spell, that racial discrimination contradicts our democratic ideals.[96] This binds us in a perceptual magnet as appearing so within our grasp to solve, but in actuality distracts us from any genuine attempt at approaching the problem.

We want to believe so badly that if we can only educate the dominant society to become aware of the plight of the marginalized, this understanding will eventually lead to the answers to remove the inequalities. But what we do not realize is that racial discrimination and its ideologies are "perfectly compatible" with our society's systems.[97]

I believe that opening the Constitutional Law curriculum to include Indigenous perspectives and other forms of effective Treaty education, would soon make this compatibility untenable. I say other forms of effective Treaty education because it is dangerous to assume that our democratic ideals are free of any discrimination, let alone racial discrimination.[98] These democratic ideals are elevated ideals of what we strive for in our society. But are they? In America, it took Black activists participating in the Civil Rights movement to make what we perceive as so obviously racist today a possibility. The same is evidenced with the *White Paper* and the issues leading to the *Calder* case here in Canada. "[D]emocracy is not just a solution; it is a political problem itself. The question is not just democracy for whom but what kind of democracy, not just who is to be made equal but what kind of equality."[99]

Battiste explains that in Canada we practice a "compulsive" education, where "family and parents give up or hand their children over to be educated by the state"[100], even if it is just for a few hours per day during the school week and not overnight. What takes place in these institutions is an "aspirational marketing of nationalism" as the only sound objective way of perceiving reality. This "cultural linguistic imperialism" justifies perspectives based on what is really settler colonialist fictions of nationalism.[101]

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[94] Joel Olson, *Introducing the White Democracy* (University of Minnesota Press, 2004), online: https://www.jstor.org/stable/10.5749/j.ctttts9q2.4 at xxix.
[95] *Ibid*.
[96] *Ibid* at xii.
[97] *Ibid* at xiv, xv.
[98] *Ibid* at xvi.
[99] *Ibid* at xvi.
[100] Marie Battiste, *Decolonizing Education: Nourishing the Learning Spirit* (Saskatoon: Purich Publishing, 2013) at 28, 29.
[101] *Ibid* at 30, 31.

Democracy does not escape this critique of its surrounding romantic nationalism. Democracy is not the ending to a historical story of advancing humanity into a future of equality and freedom. By viewing whiteness as a political choice we can eliminate it from democracy and sift and uncover what can radically change. We need to understand that race because it is bracketed from our legal curriculum is "a relatively autonomous political system in its own right" that keeps the white privileged in a position of dominance over all others.[102] "The result is the political docility and economic utility of all races, as the dominant race represses the subordinate one and is itself disciplined by the imperatives of perpetuating the system of privilege." [103]

Being white is not about the colour of your skin, or who your European ancestors were. The differences of race is a genocidal lie and this lie is a political choice. "White men—from Norway, for example, where they were Norwegians—became white: by slaughtering the cattle, poisoning the wells, torching the houses, massacring Native Americans, raping Black women… It is not something one is; it is something one does."[104] It has nothing to do with genetic evolution, it is based on domination of who does not have this whiteness.[105] Olson explains this is the reason he does not capitalize "white", which is also the reason I do not capitalize "settler".

Having whiteness is not saying that a white person's life was perfect. Many white people are impoverished and have many daily challenges. But whiteness has privileges that one cannot just renounce. The "distinctive feature of white citizenship is that it crosses class lines."[106] This white citizenship is evidence to settlers that came to North America that they could protect themselves from ever becoming enslaved. Because being Black meant you could be enslaved, the idea of being white meant citizenship that was above the threat of being subordinated. Having white citizenship meant having equality and rights "including suffrage, the right to join political parties, access to desired jobs, the ability to compete in an unrestricted market, the capacity to sit on juries, the right to enjoy public accommodations, and the right to consider oneself the equal of any other."[107] If we continue to see white as just another culture, or keep making it synonymous with European cultures, we once again lose sight of the ghost we need to pull into the open to fight.[108]

H. Concluding Reflections: We can do so much.

It is hard to build a relationship with someone if you are afraid to get to know who they are. After the Gerald Stanley trial, race relations in Saskatchewan had been set back and strained between non-Indigenous and Indigenous peoples, including in law schools and the legal profession. In the wake of this controversy, what Saskatchewan needs to be reminded of is its history of socialism and fight for collective action. Although not a constitutional law example, but a healthcare example, I believe the following reflects our capacity to share space ethically. Tommy Douglas was the leader of Canada's only socialist government that designed

[102] Olson, *supra* note 94 at xvii.
[103] *Ibid* at xvii.
[104] *Ibid* at xviii.
[105] *Ibid* at xviii.
[106] *Ibid* at xix.
[107] *Ibid* at xx.
[108] *Ibid* at xxvi.

Saskatchewan's provincial example to the world of providing its residents with medicare. Fueled by the dire situation of the extreme financial hardship burdening families, there was a need to reimagine and redesign health care.

A Globe and Mail reporter in the 1960's wrote "the crying need of the day is to get medicare out of the marketplace and into the area of human need."[109] This is not a partisan political comment, but an observation of what I believe non-Indigenous and Indigenous peoples have as their greatest resource and commonality in Treaty 6 territory and the traditional homeland of the Métis - the capacity to build communities. Rural settler communities and Indigenous communities have more in common with each other than they ever will have with the urban sprawl of Toronto, Vancouver or anywhere else in Canada. We have been capable of great paradigm detours before. What I am hoping to achieve in this thesis, is that law students can not only better communities, but we can bridge them.

In the next chapter, I discuss why anti-racism as the term stands now, is just not capable of bearing the burden to decolonize society. Instead, we need to discuss the anti-colonial capacity that anti-dominance training may have in law schools, and why it is important to keep non-Indigenous law students in a state of "cure-iousness", in order to help prevent the radicalization of the settler.

[109] Canadian Museum for Human Rights, *Tommy Douglas: Health Care for All*, online: https://humanrights.ca/tommy-douglas-health-care-all.

Chapter 4:
Antiracism: The cure-iousness behind healing the disorder of dominance.

My daughter wanted a container of butterfly larvae. In the dissonance inspired by the modern capitalist world, human beings may feel they are separate from the environment, unless of course one shares Indigenous worldviews. But really, are settlers that far removed from resonating with such worldviews? Their greatest scientific advances have come from observing the natural world, from Isaac Newton's apple drop, to the observation of the curvature in the horizon, or how little seeds sprouted in potted plants in monasteries.

I observed these seemingly all-consuming caterpillars as they voraciously ate everything they could in their little container. Soon, once they grew and consumed what they could in their environment, they spun their chrysalides and began their amazing transformation. But how vulnerable they are in that transition. The unsustainability of how we interact with our environment is apparent to us all. The unsustainability of having an exclusive settler colonialist system with its sheer cruelty along with the human costs, should have been apparent, or at the very least, made apparent to the rest of society from the moment the Treaties were signed. Observing these chrysalides made me reflect that law schools are 'ground zero' for this settler colonial perpetration and will continue to be if they do not properly incorporate anti-colonialism and gift their students with partnering skill sets for when they enter practice. If we want transformation to occur, we must also recognize the vulnerability of students and compassionately acknowledge the extreme discomfort that this transformation in its very nature will elicit, even if it is underserved, as the dominant society are very hungry caterpillars indeed.

We can accompany each other through lived experience by creating our own chrysalides in law schools. Compassion always comes with initial frustration, but by doing this for each other, we are also having compassion for ourselves. The private supports in response to being publicly shamed for holding colonised views or limited education, will become a transparent acknowledgement in the institutions themselves. This may be a way we can foster the development of beautiful butterflies. Who knows how far reaching the changes could be from anti-dominance training as we decolonize and Indigenize law school itself?

The example of the journey of the butterfly larvae is a teaching to me from the natural world to show there is no way back from the horrific trauma from the violation of our Treaties. But there is a way through, and we must be compassionate, diligent and patient as we adapt to the urgent requirements for reconciliation. We can communicate between the theoretical and the "on the ground" practical if we can find ways to accompany each other. That way, we can walk these transsystemic pathways together.

A. "The label of anti-racism cannot carry the weight of the challenge."

~ James Sákéj Youngblood Henderson

The popular 1995 movie, "The Usual Suspects" has a line that is a common theme throughout its plot that, "The greatest trick the Devil ever pulled was convincing the world he didn't exist". I think the greatest trick colonialism ever pulled was convincing the world that race does exist. We know that race is a scientific falsehood, or should know, that the visible differences we perceive have nothing to do with biological differences but cultural ones.[1] But not very long ago, the legal

[1] Steve Olsen, "The Genetic Archaeology of Race" (2001) *The Atlantic*, online: https://www.theatlantic.com/magazine/archive/2001/04/the-genetic-archaeology-of-race/302180/. See: "Over the past decade or so genetics researchers have been undermining the widespread belief that groups of people differ genetically in character, temperament, or intelligence. They have shown that all human beings are incredibly similar genetically—much more so than other species of large mammals. They have revealed the folly of attributing group behavioral differences to biology rather than culture."

systems, especially in the nation states mentioned in this thesis, were adamant on using both science and "common sense" to justify systemic racism based on the classification of race.[2] Eurocentric science did originally create this "taxonomy" for visible differences to make sense of the new information Europeans gathered about other human beings and territories as they "discovered" the globe.[3] But science eventually realized, and it was not for lack of trying, that there was just no evidence to support such claims.

To be "anti" of a scientific falsehood makes no sense, as it almost implies a double negative. In order for the term "anti" to make sense when affixing to racism as a term for its removal, would be giving much more credit than deserved to a white superiority reflection. "Eliminating" racism, as the term the United Nations uses,[4] animates a more profound pragmatic investigation of what racism is outside of over simplifying an age-old circular blame game. I propose that to help eliminate racism is to see systemic racism as a disorder of dominance that has been empowered through law and politics.

In this chapter, I question the emptiness of the Eurocentric narrative that created racism through classifying who were citizens, and who were deemed less than.[5] I discuss how racism is actually about power and politics, and is sustained in these structures today, haunting the attempts at finding solutions through colorblindness, diversity initiatives and so on.[6] Dominance is the other part of this ghost story, and it must come out into the open. But seeing this ghost for what it is has real consequences, and we must be cognizant of the trauma it inflicts. Those who benefit from the dominant organization of Canadian society are vulnerable in this transition of learning to view systemic racism with an anti-dominance lens. We need to work together to bridge our worldviews so we can all go about the work of planting new seeds of learning and communication in our law schools.

B. We need a paradigm detour away from the perceptual magnet of the term racism.

Some academics have said antiracism will eventually have an impact on issues regarding systemic racism through vigilant education initiatives for law students. Other academics have said antiracism, no matter how vigorously implemented, cannot fundamentally change a system that has been set up from its beginning to benefit those who qualify for whiteness. I suggest that antiracism is only useful if it is framed as anti-dominance but in an anti-colonial context in order to genuinely disrupt settler colonial systemic structures.

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[2] Ian Haney Lopez, *White by Law: The Legal Construction of Race* (New York University Press; New York and London, 2006) at 4.

[3] Encyclopedia Britannica, "Legitimating the Racial Worldview: Scientific Classifications of Race" online: https://www.britannica.com/topic/race-human/Scientific-classifications-of-race. "Blumenbach divided humankind into five "varieties" and noted that clear lines of distinction could not be drawn between them, as they tended to blend "insensibly" into one another. His five categories included American, Malay, Ethiopian, Mongolian, and Caucasian. (He chose the term Caucasian to represent the Europeans because a skull from the Caucasus of Russia was in his opinion the most beautiful.) These terms were still commonly used by many scientists in the early 20th century, and most continue today as major designations of the world's peoples."

[4] United Nations, "International Convention on the Elimination of All Forms of Racial Discrimination" (21 December 1965) New York, online: http://legal.un.org/avl/ha/cerd/cerd.html.

[5] Lopez, *supra* note 2 at 2. "Naturalization laws figured prominently in the furor over the appropriate status of the newcomers and were heatedly discussed not only by the most respected public figures of the day, but also in the swirl of popular politics."

[6] Ian Haney Lopez, "Colorblind to the Reality of Race in America" (2006) 53 *The Chron of High Ed* 11 (Washington) at 1. "We find ourselves now in the midst of a racial era marked by what I term "colorblind white dominance," in which a public consensus committed to formal antiracism deters effective remediation of racial inequality, protecting the racial status quo while insulating new forms of racism and xenophobia."

Antiracism was a term that entered academic literature after the American Civil Rights movement in the 1950's and 60's that protested the racial segregation of Blacks during the Jim Crow rules in the South.[7] The timeline of the Civil Rights movement also correlated with the International Convention on the *Elimination of All Forms of Racial Discrimination* which was adopted by the General Assembly of the United Nations in 1965, and which came into force in 1969.[8]

> ***Article 1***
> 1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
>
> ***Article 7***
> States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination.[9]

Wendy Leo Moore, one of the leading antiracism scholars in America, discusses the trend of "reflexivity theory" in antiracism studies. For example, although identity politics may be used by the marginalized in society to contrast and bring awareness to their racialized positions in the dominant society, it is necessary for those who work with marginalized communities to become aware of their own dominance:

> What they fail to consider is that, on the one hand, [the] development of standpoint epistemology call[s] for a much more nuanced and thoughtful reflexivity than is being deployed by the majority of social researchers, and on the other, the very attack on 'identity politics' they identify originates from a location of white normativity in reaction to a potential threat to white dominion over knowledge production.[10]

Derrick Bell, was the first tenured African American law professor at Harvard Law school. He went on leave from Harvard to protest the resistance of the law faculty to hiring more diverse representation. He was stripped of faculty status at Harvard after he passed the two year maximum for a leave, which was the institution's policy, despite his request for an extension because his protest was for social justice.[11] Derrick Bell has contended that "Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance."[12]

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[7] Fact Sheet 8, American Civil Rights Movement, *Show Racism the Red Card*, online: http://theredcard.ie/american-civil-rights-movement/.
[8] United Nations, *supra* note 4.
[9] *Ibid*. "[A]ny doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and there is no justification for racial discrimination, in theory or in practice, anywhere".
[10] Wendy Leo Moore, "Reflexivity, power, and systemic racism." (2012) 35 *ERS* 4 at 615.
[11] New York Times Archives, "Harvard Law Notifies Bell of Dismissal for Absence." (1992) *New York Times*, online: https://www.nytimes.com/1992/07/01/news/harvard-law-notifies-bell-of-dismissal-for-absense.html.
[12] Joe R. Feagin, *Racist America: Roots, Current Realities, and Future Reparations* (New York: Routledge, 2001) at 235.

There is an undercurrent of hopelessness in the literature that I came across regarding the attempts in trying to change a system that has been designed to reinforce white dominance, because the system itself is fundamentally designed for it. Joe R. Feagin in his discussion of Bell's pessimism, hopes that may not always be the case. Feagin theorizes about an eventual hierarchal shift due to the ever increasing immigrant populations, creating a "white minority" demographic shift. Maybe that is the reason behind the disillusionment that occurred that assisted voters in ushering in the election of President Donald Trump whose policies were in direct opposition to the grass roots elected predecessor, President Barack Obama, the first African American president.

My issue with this eventual shrinking of a "white minority" characterization is that elitism has historically never seemed to mind being low in population numbers in its control over larger masses of non-elites.[13] As also mentioned in the previous chapter, whiteness is not about pigment or the lack of, it is a political choice of dominance. Despite the statistics that Indigenous peoples are the fastest growing population in Canada, my people and other Indigenous peoples around the globe are low in numbers as well, due in part to incomprehensible crimes against humanity that were committed by relatively small numbers of settler colonialists over the last few centuries. It is true that massive populations of Indigenous peoples were exterminated whether by the spread of disease, the blanket sanction of genocide through religious beliefs and greed and so on. The historical cruelty of power has always been brutally wielded by relatively small numbers of settlers. I know very little as to who constitutes the less than 1% accumulated wealth in the world, but I am convinced that their small population poses them no cause for alarm, except to the other 99% of the global population.[14] But where, in any of the antiracism literature that is not authored by an Indigenous person, is there a discussion of the Treaties?

C. What is anti-racism?

Antiracism needs to be clarified at this point. For the most part, antiracism is made up of a variety of policies or social campaigns to promote the awareness of marginalized peoples who suffer stereotypes and other forms of racial discrimination. Antiracism in education usually takes the form of a course or some other compliment such as training workshops. Such participatory training workshops are available outside of education institutions for varying areas of employment. The purpose of antiracism is for educating the participants of the many challenges that someone who is marginalized faces daily with the hopes they will return to society as more sympathetic. The premise of antiracism training focuses on building empathy in its participants, thereby contributing to a more equitable future for our society.

Some examples closer to my home for antiracism initiatives, include the Multicultural Council of Saskatchewan's Anti-Racism 101 webpage[15] and the City of Saskatoon's antiracism initiative for public education.[16] I feel these examples are fair representations of the work that is out there in Canada for the general public to access. Professor Verna St. Denis is a well-known antiracism

[13] Patrick Bond, *Elite Transition from Apartheid to Neo-Liberalism in South Africa* (Pluto Press; London, 2000).
[14] *Ibid*.
[15] Multicultural Society of Saskatoon, "Anti-Racism 101", online: http://mcos.ca/anti-racism-101/.
[16] City of Saskatoon, "Anti-racism Education", online: https://www.saskatoon.ca/community-culture-heritage/cultural-diversity/anti-racism-public-education.

scholar, has published much on the subject matter of antiracism and cross-cultural education from an Indigenous educator's lens.[17] As part of an upper year course at the College of Education at the University of Saskatchewan, Professor Paul Orlowski has developed a third year education course on "anti-oppression". This is much closer to the issue of oppression being in the social and political context. Titled "Educator Identity in Social and Political Context: Ethical Beginnings", one of the main objectives of this course is to "[r]ecognize that teaching is a political and ethical act involving social responsibility for oneself, others and society".[18] As students finish their training and become school teachers, it is important that they do not see the classroom as existing in a vacuum, that they must be cognizant of their political ideologies that they are bringing in to these vulnerable spaces. But we must not also forget that adult educators need this training as well.

The Anti-Oppression Network was created in Vancouver and "is a coalition of individuals, grassroots groups, and community organizations dedicated to grounding… work towards liberation in the principles of decolonization, anti-oppression and intersectionality".[19] By providing a description of what anti-oppression is, which is being against the use of power to silence and marginalize a social group or category in any of society's structures, it also differentiates what an "ally" is – which does not have an "identity", but helps in the mitigation of oppression.

The Blanket Exercise is actually my favourite antiracism initiative, as it involves an intimate lived experience. Many who have participated in Kairos Blanket Exercise found that it really communicated to them, and most recommend this simulation when they hear there is an opportunity to perform this exercise in their respective professional setting.[20] This initiative was created in response to the *Royal Commission on Aboriginal Peoples* ["RCAP"] and was developed in collaboration with Indigenous Elders. I myself participated in this exercise and it was very powerful in how it begins with many blankets representing the freedom and space that Indigenous peoples had. As contact occurred and more subordination resulted, the smaller the blanket spaces become. Each successive removal of a blanket comes with an historical fact that is read aloud. Although read as a factual statement, the content of the injustice, the subject matter of these statements, are horrifying and profound.

D. I wish all it would take to make a more equitable society would be antiracism training.

Individualism is one of the great myths of systemic racism. As Wendy Moore puts it, there is a correlation between the Civil Rights Era and post-Civil Rights Era regarding the "white saviour or messiah lawyer" trope still used today in blockbuster Hollywood movies.[21] This trope used in this popular genre communicates powerful messages that white people, especially the white

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[17] Verna St. Denis, "Aboriginal Education and Anti-Racism Education: Building Alliances across Cultural and Racial Identity" (2007) 30 *Can J Ed* 4 at 1068-1092.
[18] Paul Orlowski, "Educator Identity in Social and Political Context: Ethical Beginnings" (2018) EFDT 301 Course Outline (unpublished).
[19] The Anti-Oppression Network, online: https://theantioppressionnetwork.com/about/.
[20] Kairos, "Kairos Blanket Exercise.", online: https://www.kairosblanketexercise.org/.
[21] Wendy Leo Moore and Jennifer Pierce, "Still Killing Mockingbirds: Narratives of Race and Innocence in Hollywood's Depiction of the White Messiah Lawyer." (2007) 3 *QSR* 2 at 172.

liberal, are just clueless of the racism within the system - a system that is always portrayed as fundamentally fair in the end. Once the "innocent white" realizes this, they become a champion and potential martyr for advancing social justice values. The illusion becomes complete as this trope "[s]imultaneously highlights the racial innocence of the central characters and reinforces the ideology of liberal individualism."[22]

Moore points to many problematic issues that have arisen out of this popular trope during and after the Civil Rights movement. For example, television viewers from around the world focused on the 'superior' white spaces created by the American Constitution to benefit the white man through slavery - but this focus was then shifted to what the Black activists were doing instead.[23] Soon, a white saviour liberal male trope was used in popular movies, such as *To Kill a Mockingbird*, which was fed to media viewers through Hollywood, and it was able to pull that focus back once again on the 'dominating white male'.[24]

This time, and to maintain the illusion of a "romanticized nationalism",[25] the dominating white male in the narrative is "cleansed of all sin" because of his innocence as a white made to suffer the same cruelty at the hands of racists, in order to save or uplift the people of colour that have been wronged by racism. His narrative is the only focus of the movie, with everyone else of colour, and any trace of their narratives - falling once again into the periphery. This then causes the illusion of individualism, that there is no unconscious systemic racism at play. If there was, it is only because the system suffers from the abuse of extreme whites, either they are ignorant and poor, or rich and unscrupulous.[26]

Just from a human geographical standpoint, most white populations are not exposed to marginalized populations and have limited diversity in their personal lives. Because of this, when the mass white population watches these movies, a visceral connection is created, and this fictional narrative becomes "lived experience" thereby making these "films… seem more "authentic" and "true.""[27]

The leverage that is gained from the innocent white male social liberal trope, is that there are plenty of white social justice fighters who are willing to take up the mantle for marginalized people's rights. After all, the system is "fundamentally fair"[28] and many white women have benefited from affirmative action programming that is 'out there' in the name of feminism or ally-ship. "The white women who have benefited the most and for the longest from employment and education equity are the ones whose silence I often find deafening in conversations about racism."[29] From this, it begins to seem reasonable to believe that the cause of so many present social justice issues that continue to plague marginalized populations is due to their own lack of capacity to address their laziness in what is a "free market".[30] As Moore analyzes:

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[22] *Ibid*.
[23] *Ibid.*
[24] *Ibid.*
[25] Marie Battiste, *Decolonizing Education: Nourishing the Learning Spirit* (Saskatoon: Purich Publishing, 2013) at 30, 31.
[26] Moore, *supra* note 21 at 174, 183.
[27] *Ibid* at 173.
[28] *Ibid* at 177.
[29] Rakhi Ruparelia, "Legal Feminism and the Post-Racism Fantasy", (2014) 26 *CJWL* 81 at 82.
[30] Lisa B. Spanierman, Jacquelyn C. Beard and Nathan R. Todd, "White Men's Fears, White Women's Tears: Examining Gender Differences in Racial Affect Types" (2012) 67 *SR* 3-4 at 174-176; and Moore *supra* note 287 at 182.

> "when people who are not regarded as entitled to the center move into it, however briefly, they are viewed as usurpers." The Civil Rights Movement functioned to center the experiences of African Americans, and in doing so, blatantly challenged notions of the innocent and beneficent white community. As a result, the cinematic emergence of an empathic white civil rights hero during this era corresponds to the process of re-establishing a dominant narrative that registered with traditional cultural conceptions of goodness and innocence, while simultaneously de-centering, once again, the histories and experiences of African Americans."[31]

For example, Moore discusses that "academia has historically been an Imperial project" and that marginalized populations "have been deliberately excluded from knowledge production, resulting in both scholarly frames that embed white ideologies and frames that have dehumanized and objectified people of colour."[32] There is a lack of diversity representation. When diversity initiatives are implemented to bring up the numbers of marginalized students into an area that does not reflect the diversity in society, there are "consequences for students of colour who are asked to take law exams in which they must evaluate legal questions with deeply embedded racist stereotyping and imagery."[33]

I was struck by this concept of being forced to "objectify" my own self.[34] However, it became apparent to me that this is a transformative process that is necessary for settler students to also experience. Professor Tracey Lindberg discussed using a critical Indigenous legal theory to combat systemic racism. "Moving from reactor to actor requires that many Indigenous voices speak about the source of dissonance, not just the effects."[35] Having what Lindberg describes as an Indigenous lens is necessary if we are even going to approach decolonization in academic institutions because, frankly:

> [f]inding common ground with those who stole your land is hard work… It is part of our continuing colonial reality that we read and write about Canadian law without requiring the same of Canadian legal actors. Critically thinking about law requires all of us – colonizers and colonized – to examine our role in perpetuation of the systemic oppression of Indigenous peoples as actors and reactors. Ethically thinking about the legal perpetuation of oppression requires that we learn a third language. A language of legal emancipation." [36]

Although Lawrence and Dua discuss the Indigenization of antiracism in the context of police surveillance, they have pointed out that one cannot help but notice anti-colonialism being sidelined as a mere compartment of antiracism, instead of being what should be a framework. They point out that antiracism theorists have a tendency to compartmentalize the issues of Indigenous peoples as unfortunate collateral damage due to the ongoing ignorance of racists.

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[31] *Ibid* at 176.
[32] Moore, *supra* note 10 at 617.
[33] *Ibid*.
[34] Sheila Cote-Meek, *Colonized Classrooms: Racism, Trauma and Resistance in Post-Secondary Education* (Fernwood Publishing: Halifax and Winnipeg, 2014) at 32. "For many Aboriginal students at the university level, this may be the first time they have heard, studied, read and discussed [in such a depersonalized and clinical way] literature that bears witness to instances of extreme suffering… [and] is recounted in the class orally and through readings, students react in a variety of ways… with the exception of voyeuristic pleasure [from non-Indigenous students]… Pedagogically, there is a need to fully understand the implications of hearing, viewing and reading acts of violent colonial history when a person comes to that classroom already traumatized."
[35] Tracey Lindberg, LLD 2007 University of Ottawa uO Research Critical Indigenous Legal Theory https://ruor.uottawa.ca/handle/10393/29478 at 115, 116.
[36] *Ibid* at 116, 117.

"Though antiracist theorists may ignore the contemporary Indigenous presence, Canada certainly does not."[37]

Linda Alcoff's article, "Visible Identities", where "many still pine for the lost discourse of generic universality, for the days when differences could be disregarded."[38] Alcoff's theory of "haecceity" or how one is unique, or what gives its 'this-ness' is due to the fact that what is visibly marked on the body and how we have been trained in society to socially understand this visible marking to give social order to things. These visible differences are a communication of who we are and also where we stand.[39] They are viewed as a threat if they are used to empower, described as pushing a hidden agenda through "identity politics".[40] However, if you do not fall into these visible markers, such as 'looking Indigenous', or not appearing the gender you say you are, it becomes unsettling. On the one hand, you may be claiming an identity to use as some sort of racial capital[41] to advance your own standing in society, or you are hiding what should be out in the open, not so much as an act of solidarity, but to try to make sense of what could be "hidden".[42] "Visible differences are still relied upon for the classification of human types, and yet visible difference threatens the liberal universalistic concepts of justice based on sameness by invoking the specter of difference."[43] Although useful in explaining complexities to some extent, I worry that visible identities may basically be racism in another form. Unfortunately, academic framing of culture and identity in this way may just be race in 'new clothes'.

E. The trauma of challenging the dynamic of dominance.

When resistance happens, especially from Indigenous knowledge systems, languages, and laws, I believe a traumatic reaction occurs from having that dominance challenged. Most non-Indigenous law students that I have encountered think from a Eurocentric universalization of common law principles. The Indigenous perspective that calls into question this universality is what is at issue, or rather not presented as an issue, in the legal curriculum. For example, cultural relativism is an anthropological theory that promotes that sustainable solutions are best found within distinct cultures rather than what is forced from outside cultures or the belief that everyone is the same.[44] This is not about cultural relativism. This is about disrupting the political dominance of Eurocentric oppression.

Essentially, Eurocentric thought continues to position itself as an objective and universal way of looking at the world in the mainstream of academia, whereas Indigenous thought is placed in a subordinate position (i.e. othered). While acceptance of cultural relativism can ensure that

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[37] Bonita Lawrence and Enakshi Dua, "Decolonizing Antiracism" in *Race, Racism, and Empire: Reflections on Canada*, (2005) 32 SJ 4 at 120.
[38] Linda Martín Alcoff, *Visible Identities: Race, Gender, and the Self* (Oxford University Press, New York, 2006) at 5.
[39] *Ibid*.
[40] *Ibid* at 6.
[41] Nancy Leong, "Racial Capitalism" (2013) 126 Har L Rev 2151. "Affirmative action doctrines and policies provide much of the impetus for this form of racial capitalism. These doctrines and policies have fueled an intense legal and social preoccupation with the notion of diversity, which encourages white individuals and predominantly white institutions to engage in racial capitalism by deriving value from nonwhite racial identity."
[42] Alcoff, *supra* note 38 at 7.
[43] *Ibid* at 180.
[44] Anthrotheory, "Cultural Relativism." *Boasian Anthropology: Historical Particularism and Cultural Relativism*, available online at: http://anthrotheory.pbworks.com/w/page/29518607/Boasian%20Anthropology%3A%20Historical%20Particularism%20and%20Cultural%20Relativism.

Eurocentric thought is recognized as culturally situated in the same way that Indigenous thought is, this still does not deal with the power imbalance and the historical dynamic of colonialism. In other words, it does not go far enough to get you where you need to be in terms of deconstructing the way in which legal education replicates colonial biases.

Effective Treaty education and its obligations and understanding the exclusion from the legal curriculum of Indigenous perspectives, may only frustrate someone from a dominant perspective. They may dig their heels in deeper, even if there is a sympathetic connection. Anyone who has navigated law school is well aware of the excruciating stress and pressures that come from within a self-regulating profession. Compound this with a settler law student already under this stress, and then to attempt to unsettle their dominance by eliminating white privilege, may result in a traumatic reaction.

I do not have all the answers to how to heal settler law students of this disorder of dominance, but I also do not have all the questions either precisely because we all, Indigenous and non-Indigenous, need to collaborate to find them. Professor Rahki Ruparelia in her article, "Guilty Displeasures: White Resistance in the Social Justice Classroom", elucidated how emotionally exhausting it was for her as a racialized professor to counsel an angry, social liberal settler student. The student felt Ruparelia's class that dealt with critical racist pedagogy was too depressing.[45] I found Ruparelia's article uncovered a hidden indicator of what is a major gap in the delivery of antiracism teaching. As an Indigenous woman, I have experienced the jarring epistemological violence in all levels of my education. I know the chasmic hopelessness that infects the heart from the soul-bleaching exposure to settler colonialism's justifications of this same epistemological violence throughout my law school education. I am aware of the visceral repugnancy an Indigenous person experiences when settler students who have been immersed their entire lives in a culture of dominance and who have been taught that there was something wrong with us, that Indigenous peoples were just not culturally evolved enough for 'true' civilization, decry when the lens is turned on them.

Of course, I am also genuinely angry when settler law students are aghast when they first learn about Canada's starvation politics[46] or the truth behind the legislation of the Residential School System.[47] When pushed about their settler privilege, the last thing I find palatable is the reaction of how hard their ancestors worked, how they were unaware and would never condone these atrocities, and even that some grew up poor too. Alcoff provides the following observation from a similar experience:

> Student: Eurocentrism is a huge problem in the university here, in the selection of required courses as well as the content of courses.
>
> Professor: My family was extremely poor, and I had a very difficult time even getting to college.
>
> Obviously, the student's remarks had no connection whatsoever to the issue of the white professor's class background or the racial exclusivity of suffering. But the professor's response indicates that this is the way such charges of Eurocentrism are evidently heard, nonetheless, as if they imply that white identity is

[45] Rakhi Ruparelia, "Guilty Displeasures: White Resistance in the Social Justice Classroom" (2014) 37 *Dal LJ* 815 at 822.
[46] James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2013).
[47] The Truth and Reconciliation Commission of Canada, *Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Library and Archives Canada Cataloguing in Publication, 2015).

> monolithically privileged in all respects… Such responses are a constant problem besetting discussions of racism, inside and outside the academy.[48]

But as an Indigenous woman, I am also troubled with helping someone that suffers this disorder of dominance come to realize that disorder, then leave them to their own devices in hopes that they may engage critical thinking skills about race later on in practice.[49] From my own experiences with violence, it is not wise to confront a domestic batterer and have them face their abusive behaviors, and then tell them to "just sit with it" and hope they critically think about their disorder of dominance later. Especially in the context of settler law students who are being trained to be in real positions of power.

The Indigenous worldview of the use of ceremony would also help aid the concerns of energy drain and issues of re-traumatization among marginalized peoples, who are already angry at having the added burden of managing 'white tears and feelings':

> Part of my energy was expended not only in trying to engage the student intellectually in a discussion that she was not emotionally prepared to have, but also in managing my own sense of anger, exhaustion and resentment at having to manage her distress from being required to think about racism as a white woman.[50]

As Moore points out, "[t]here are two ways to dehumanize: the first is to strip people of all virtue, the second is to cleanse them of all sin, what they fail to note is that one of these processes has occurred and become embedded in mainstream academic scholarship about people of colour, the other has not."[51] Non-Indigenous law students (and faculty) may believe that law schools have "cleansed themselves of the sin" of racism by thinking settler harm reduction activities are enough. A response to realizing they have not, however may provoke very intense feelings of guilt, shame and other such reactions precisely due to their placement of dominance in the settler colonialist hierarchy. However, if these feelings are not acknowledged in a transparent and ethical space, it may have the unintended consequence of 'radicalizing' the need to justify that dominance. This radicalization of the settler becomes dangerous to my people.[52]

The late Professor Patricia Monture-Angus's article, "*Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah*", analyzed a similar experience with the settler legal profession at a conference. She had the following eloquent observation debunking the settler colonial myth that Indigenous peoples are at a disadvantage:

> [H]ow [is] the position of Native people… so frequently described as a position of disadvantage. This is not true simply for Native people, but also for Black people and Chinese people and Chicano people and Mexican people and anybody else who does not fit into the norm of White and middle class. Generically I am speaking about racism and sexism and classism and all the other 'ism's' and of how the individuals who fit those stereotypical classifications get qualified as disadvantaged. We are only disadvantaged if you are using a White middle class yardstick. I quite frequently find that White middle class yardstick is a yardstick of materialism… Looking only at the materialistic yardstick, just about everybody in the country knows

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[48] Alcoff, *supra* note 38 at 13.
[49] Ruparelia, *supra* note 45 at 822.
[50] *Ibid* at 823.
[51] Moore, *supra* note 10 at 618.
[52] Bruce Pardy, "The social justice revolution has taken the law schools. This won't end well." (27 February 2018) *The National Post*, online: http://nationalpost.com/opinion/the-social-justice-revolution-has-taken-the-law-schools-this-wont-end-well; Christie Blatchford, "Messing with jury selection won't fix Indigenous alienation from justice system" (28 February 2018) *National Post*, online: http://nationalpost.com/opinion/christie-blatchford-messing-with-jury-selection-wont-fix-indigenous-alienation-from-justice-system.

> that we have less education and less income and more kids and less life expectancy than the majority of the other people in this country, but I still do not see, I said, how we are truly disadvantaged. You see, when non-Indian people are not satisfied with the world they see around them, and it seems to me that more and more of the people that I meet are in this position, well, those people do not have anywhere to turn. They have nowhere to run to. I have an entire community, or rather, pockets of community all over this land… when the world of the dominant culture hurts me and I cannot take it anymore, I have a place to go where things are different… I see a lot of people who are hurt, a lot of people who know how to live in their heads and do not know that anything else even exists. I have a hard time understanding again how my experience is an experience of disadvantage. **Words like disadvantage conceal racism** (emphasis added).[53]

What Ruparelia and Monture-Angus discuss in their articles, I have myself experienced as a law student. I am convinced it is a common occurrence among Indigenous and other marginalized men and women who speak their truth, **even if we are only offering a different perspective regarding the same academic sources**.

For example, in my second year in law school, I walked in to my upper year Human Rights class, naively thinking it would be a seminar filled with like-minded individuals, as some were very good friends of mine. When I challenged what I thought was a short-sighted and colonial voyeuristic perspective of an author of an article I was assigned to present on, two settler women from third year became extremely offended. They asked "questions" that were more comments, including accusing me of being unfair and even aggressive. The tension in the room was palpable and even the professor seemed surprised. I was stunned at first but I held my ground, as I was academically solid on my research. I had a funny feeling they did no more than read the abstract, maybe briefly flip through the whole article at best. But the article regarding the outcome of the research collected was not the source of my criticism per se, and it certainly was not the source of their offence. It was not the content of the article they were defending, but were reacting to my comments on settler academics being voyeurs on "third world" poverty, basically performing "break and enter research". The author took no apparent responsibility regarding sustainable knowledge exchange as partners within the communities that she was researching.

What was even more surprising to me was that no one came to my defence, except one classmate. He was from my section and was a conservative settler male student who had barely said more than two words to me, despite us sharing classes from the start of law school together. As he spoke, he basically reiterated what I had said during my presentation, but the two settler women were nodding in agreement with him while intensely staring at me. I pointed that out, and of course they got even more angry. At that point, I had a hard time hiding my emotions, but by then the class was mercifully over. After the class finished, my friends came around me, almost in a visible support circle. They were immigrants and one was also Nēhiyaw like me. They talked about how great they thought my presentation was, "100%" agreed with me and although controversial, really hit home about how voyeuristic Eurocentric research and education is, as those two settler women and other students from the dominant society left.

Now in retrospect, this was a show of private support from a public shaming that Ruparelia and Monture-Angus continually identify in their ruminations regarding their confrontational academic experiences. As the seminar continued through the semester, one of the two settler women 'back pedalled' and even began smiling and chatting with me. The other settler woman,

[53] Patricia A. Monture, *Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah*, (1986) 2 *CJWL* 159 at 161, 162.

however, could not be clearer in her body language that although we shared the same circle of settler social liberal friends, she would not even be collegial. I was of course hurt and confused for a long time.

At first, I thought it was from the obvious discomfort of the experience. Being raised going back and forth from my reserve to 'the hood' aka 'inner city' or Saskatoon's core neighborhoods, I had developed a distinct skill set in protecting myself, especially in physically violent situations, as most children living in abject poverty and lacking safety have done. But these skills are not transferable to post-secondary cultural environments, and most especially not in law school. I thought maybe it was difficult for me to adapt and build skills to protect myself from what I perceived as 'academic violence'.

Now, however, I realize that experience may have just been my first exposure to the unsettling of the settler directed at me in an academic setting. It was my first time critically speaking in an academic environment with the belief that I was as dignified and equal a human being as everyone else, with every right to sit in that chair and voice what I know is necessary to be acknowledged. Interestingly, it was also the first time I started thinking critically about dominance, and that it is a disorder among settlers. As mentioned in my introductory chapter, you can teach someone not to be subordinate, but how do you teach someone not to be dominant? There needs to be some transitional help which should not be shouldered by one professor, especially a racialized professor or even a community of professors in law schools.[54]

Indigenous worldviews can assist with anti-dominance training that can affect meaningful changes to eradicate systemic racism in law schools, if done in the spirit of mutual partnering as required by our Treaties. Through significant Indigenous input for law school curriculum that is inclusive of Indigenous legal systems, frameworks, language classes, and so on, maybe altogether we can create the ethical spaces and lived experiences needed to assist each other to develop transsystemic pathways towards the fulfilment of Treaty obligations.

There is potential that this approach may not only help law schools, but other education, government and even corporate environments. As we learn to partner through effective Treaty education we could assist other nation states, especially regarding the implementation of the principles of UNDRIP. I am positing that 'anti-racism' training can be better achieved by building capacity with settlers through anti-colonial and anti-dominance skills training and accompaniment to study the disorder of dominance in themselves.

> One cannot evaluate the success or failure of white law students and students of color with white-created measures that ignore the reality of the white-space oppression faced by them… that white analysts who accent "merit" as a standard for educational performance need to consider the nonmerit-related privileges that **all** whites have inherited from their ancestors. A reflective academic analysis of white and black students should thus single out *white students* as the nonmeritorious group because their socially protected

[54] Guerrilla Guides to Law Teaching, online: https://guerrillaguides.wordpress.com/about/.
"The Guerrilla Guides to Law Teaching are a collective effort to acknowledge and confront our present "movement moment" within our classrooms. We embrace this moment as an important opportunity to revisit methods and sources of teaching in the legal academy, and to generate creative approaches that break us out of traditional modes of thinking. We approach this project with a sense of urgency given that many of the movements of the day –the Movement for Black Lives, #Not1More, #IdleNoMore, #Fightfor15, Occupy– have at the center of their critique our system of laws. And that those critiques represent long-standing concerns in communities of color and poor communities about law's violence and inequality. These critiques about law are important, they deserve our attention and scrutiny."

> white privilege has given them many unearned and unjust advantages not connected to their individual merits. Thus, white college students and law students should be those with the social *stigma* of having had many unfair advantages and unjust admissions, promotions, and placements in educational settings, *not* the students of color.[55]

Ruparelia's article, described her use of student evaluations in her analysis because of the anonymity aspect. Leslie Houts Picca and Joe R. Feagan also did an experiential exercise involving hundreds of white college students from post-secondary schools across the country. The students kept journals of their personal encounters "of racial events that they observed, for a month or two on average. In relatively brief journals, these students reported nearly seven thousand events of a clearly racist nature" but that they themselves were not victims of. Most were family and social context related.[56]

My suggestion is, if settler law students need the focus of attention on their experience from 'weaning' from dominance, then the use of self-reflective journaling would be a practical way to help assist as they go through their individual lived experiences. Obviously the potential reactions will vary, as there are many complexities involved in what makes up a worldview, no matter the background. What I am proposing is that anonymity could aid this process as the feelings of shame and guilt begin to surface during this transition, but also how a student may resonate or relate through their own personal complexities. Law is a helping profession. We are supposed to be problem solvers, we should not be complicit in perpetuating a system that creates so much suffering and indignity. As Marie Battiste states, "racialization is well known to all those targeted under the imaginary line of social justice. Whiteness and privilege are less evident to those who swim in the sea of whiteness and dominance."[57] So how do we get settler law students to acknowledge that they suffer from a disorder of dominance and that they need help? By accompanying them through the experiential. "People don't need a definition of trauma; we need an experiential sense of how it feels."[58]

Trauma has nothing to do with being right or wrong, socially accepted or considered silly. The human body's nervous system when experiencing moments of trauma responds in three ways. Fight, flight and "freezing".[59] There are many studies done in treating post-traumatic stress syndrome ["PTSD"], especially regarding one particularly strong settler cultural narrative. Now I am not saying that settler or any law students would develop something as severe as PTSD, but I do believe the that there are some parallels with the severity of PTSD that should not be dismissed. For example, is the story of how Perseus slayed Medusa. He obviously could not do so by confronting her head on, as he would turn to stone. He defeated the mythical gorgon by using the diluted reflection of her image in his shield so he would know where to strike.[60] In treating PTSD, the nervous system is likened to the metaphor of two sides of a river bank where a river, or a healthy nervous system, runs freely. The power of a traumatic memory 'breaks' the side of the bank causing a whirlpool of focus on the 'feelings of the memory', thereby preventing the healthy flow of the nervous system's current.[61]

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[55] Wendy Leo Moore, *White Space, Elite Law Schools, and Racial Inequality* (New York: Rowman and Littlefield Publishers, Inc, 2008) at xiv.
[56] *Ibid* at xii.
[57] Battiste, *supra* note 25 at 125.
[58] Peter A. Levine & Ann Frederick, *Waking the Tiger: Healing Trauma* (Berkley, California: North Atlantic Books, 1997) at 33, 34.
[59] *Ibid* at 64.
[60] *Ibid*.
[61] *Ibid*.

This causes the PTSD sufferer if triggered, and the trigger could be anything, to relive the memory **in the nervous system** even if the sufferer mentally knows the event is not actually occurring.[62] Levine posits that we can renegotiate this whirlpool by psychosomatically "renegotiating" the memory by creating a different visceral connection, or 'breaking the other side of the bank to cause another whirlpool, but a positive one which is a more powerful visceral connection.[63] This can be done by reimagining the event going the way one wishes so they are no longer 'stuck in the moment', or being what I call accompanied through a transition with feelings of support and safety. In Indigenous worldviews, talking circles, give aways, round dances, and so on provide such visceral connections and are essential for healing.

> Just as Perseus used his shield to confront Medusa, so may traumatized people use their shield-equivalent of sensation, or the "felt sense", to master trauma. The felt sense encompasses the clarity, instinctual power, and fluidity necessary to transform trauma…A felt sense is not a mental experience but a physical one. *Physical.* A bodily awareness of a situation or person or event. An internal aura that encompasses everything you feel and know about the given subject at a given time —encompasses it and communicates it to you all at once rather than detail by detail. The felt sense is a difficult concept to define with words, as language is a linear process and the felt sense is a non-linear experience. Consequently, dimensions of meaning are lost in the attempt to articulate this experience.[64]

Keeping a journal of racist encounters may aid in maintaining a "state of curiousness", which may be helpful in the future for the student to critically think about race as they go through their experiences in the legal profession, especially if it could be anonymized. There is so much fear in the legal profession about the consequences of speaking out about systemic issues that many stories never get told, whether it is stories about racism, sexism, or what have you within the legal profession. Instead, it never gets beyond gossip that one is only privy to if you have friends on the receiving end of such abuse/discrimination.

Using personal journals would be important in the way that it allows all law students to find their own path to the materials, as we all have diverse worldviews based not only on nationality and ethnicity, but also religion, politics, socio-economic class, and so on. I believe it would be immensely helpful to have all law students reflect on their own biases and the biases of those that they interact with, especially when engaging with Indigenous communities. By creating an ethical space for reflection on all sorts of challenging new information impacting a settler law student they can then reconcile this information with their own identity needs that are outside a generic notion of settler consciousness. This may have the effect of tilling new creative ground for continued collaboration. If we simply dismiss the emotional needs of the settler law student, no matter their partisan political stripe or experiences, I am afraid we ourselves will be doomed to keep hitting the unresponsive wall of systemic racism.

My focus for anti-colonial framing of anti-dominance training is to ask, how do we reach those who may already be radicalized or at risk of radicalization if they are confronted with an approach to the topic that they see as an attack on their own identity and self-worth? I do not have the answer to this question, but it seems that the Access and Empathy Project I propose in the following chapter, may be on the right track to find out with them together. If the project can

[62] *Ibid*.
[63] *Ibid*.
[64] *Ibid* at 65.

spark self-reflection then that seems intuitively more valuable than simply confronting students with information that might be contradicted by other authors and sources, should a student prefer to protect themselves from perceived attacks on their identity. And if that happens, what are we really achieving?

As their awareness increases of how systemic racism in our shared society is deeply entrenched, these students may enter a vulnerable state of transition – and it could be very brief. I posit that settler students, even ones who do not immediately indicate uncomfortableness while learning anti-dominance content and skills, should not be left to their own devices without some accompaniment throughout their transitions. I feel there is a responsibility in law schools to provide an environment of ethical space for such experiences. This may aid in preventing a settler student that begins to think critically about race from emotionally 'snapping back' from an initial state of curiousness to a reactive state of outright resistance. This may happen if strong feelings of guilt, shame and so on are left unacknowledged, resulting in resentment towards 'forced diversity'. By acknowledging this and accompanying them rather than leaving them to fend for themselves once this delicate stage is entered, we may avoid a type of 'radicalization' of the settler.

F. Using an anti-colonial framework for anti-dominance training in law schools: Why I think the term of 'Anti-Dominance Training' is better equipped to create legal practitioners of systemic change.

There is a way to change the system if we can collaborate on decolonizing that system. It is crucial to frame anti-racism in an anti-colonialism context. If approaches to antiracism in law schools are outside the context of the Treaties and the history of settler colonialism, the initial response of most settler students may be, "well I'm not racist" as antiracism is interpreted as automatically labelling them individually as racist. The extreme reaction to antiracism is the belief that being anti-racist is political code for being anti-white, and this extreme could potentially be derailed if antiracism is properly framed in the context of the ongoing positive Treaty obligations for settlers. White nationalism may be due to feelings of guilt and shame and from not understanding the full systemic machinery of the misunderstood settler consciousness, and the reaction may be, "I'm under threat, I am already viewed as racist, but this society is all I have and I'm going to protect it."

We need to help the settler law student see that being on a "side" is not all that there is, nor is it necessary. Ceremony, as I further discuss in my concluding Chapter, could decrease that pseudo sense of privilege scarcity. Not in the sense that 'you have your cake and you get to eat it but you must share with the many cakeless'. The trick would be to show, that we can all make cake and there are plenty of resources for that. The resources, however, are actually within the innovative and creative diverse peoples from our shared societies. We could make this cake-creation venture an incredible and sustainable cake economy for all, and our future generations. That way, we can all say, "Let them eat cake." and no disastrous consequences would result from it.

By framing antiracism as anti-dominance in an anticolonial context, we can start educating others on the difference between decolonization and what are settler harm reduction activities

that need to happen in tandem. Settler harm reduction are ameliorative initiatives and need to be viewed with a human rights lens, but adding some ceremonial 'window dressing' is not enough, without addressing the deeper issues of systemic racism. Barkaskas and Buhler wrote that "reconciliation in the context of an ongoing abusive relationship is impossible and unjust without an end to the ongoing abuse."[65]

Because First Nations never surrendered their right to control how education is to be administered, it is necessary for Canadian universities to include Indigenous peoples and their communities in every facet of how education is administered. As Professor Larry Chartrand says, "[t]he more a university undertakes serious and significant Indigenization, the more there is an expectation that Indigenous peoples should have a greater say in how much Indigenization should take place. Otherwise Indigenization will mean little more than well intended cultural appropriation."[66]

Professor Duncan Kennedy and his radical article on critical legal theory explained the concept of the social liberal law student while commenting on the social hierarchal nature of law schools.[67] Expanding on critical legal theory, Professor Robert J. Williams wrote an article comparing law professors to vampires, and how the system that teaches these fledgling professionals are caught up in their own struggle to maintain the hierarchy by feeding on the vigour and talents of these social liberal students. [68] His innovation was to take critical legal theory that had inspired critical race theory and engage the social liberal student with Indigenous communities in order to become Critical Race Practitioners.[69] That way these critical race practitioners can engage with Indigenous communities that need substantive assistance in developing their Tribal Law[70] and students benefit as well from the experiential learning.[71] This resonates somewhat with my proposed Access and Empathy Project. However, I want the anti-dominance training in my project to reach **all** law students and have them go through lived experiences to create an authentic connection with an Indigenous community, not just the self-identified social liberal.

G. Concluding Reflections: Law schools could be the chrysalis for legal practitioners of systemic change.

This idea of settler law students suffering from a disorder of dominance became clear to me when I bumped into a friend I had known since she was a small child. She came out as gay a few years ago and completely alienated herself from our community. I felt this was to protect herself and I was still certain this was her reason. When I saw her in a coffee shop, although her reception was warm and friendly, every emotion ran across her face when she saw me. I mentioned this to her brother who I am still good friends with, and he said that yes, she is

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[65] Patricia Barkaskas and Sarah Buhler, "Beyond Reconciliation: Decolonizing Clinical Legal Education." (2017) 26:1 JLSP (Osgoode Hall: York University) at 14.
[66] Larry Chartrand, *The Relationship between Decolonization and Indigenization*, Teaching and Learning Today Conference (University of Saskatchewan, 2018).
[67] Duncan Kennedy, "Legal Education as Training for Hierarchy." *in The Politics of Law: A Progressive Critique* (1982) 40, online: http://www.duncankennedy.net/documents/Photo%20articles/A%20Bibliography%20of%20cls.pdf.
[68] Robert A. Jr. Williams, "Vampires Anonymous and Critical Race Practice" (1997) 95 *Mich L Rev* at 742, 755.
[69] *Ibid* at 759,760.
[70] *Ibid* at 762.
[71] *Ibid*.

pretty sensitive about coming out and still perceives a lot of attitudes that she just does not want to be bothered with, whether real or imagined.

Of course, I piped up about how it absolutely made no difference to me at all if she is gay, but then her brother laughed and said, well I guess it is a lot like racism, one perceives a lot of hidden violence and microaggressions that others do not. I then realized with horror that my whole life I had lived and still live with the dominant luxury in society of being heterosexual. Who knows what attitudes, or comments, however subtle, unconscious and unintended did I perform, say or behave with this friend growing up? How many microaggressions had I unwittingly committed around her, that are now long forgotten for me, but may stand out enough in her heart that she did not perceive me as safe to remain friends with, or even as an ally. That was when the epiphany for the need for empathy for settler law students coming to terms with their dominant biases became realized for me and why I feel it is necessary to keep settler law students in a state of curiousness and not of reaction.

Settler colonialism has nowhere to go but into further maladaption. These maladaptive traits are perpetuating useless, and wasteful disorders of unacknowledged dominance, unnecessary power imbalances that are polluting our resources as a shared society. The epoch of settler colonialism has come and gone, both nationally and internationally. Put bluntly, the party's over.

Why do I care about the settler's feelings of intense unsettling? It may be because I am a mother. Along with the need to bear in mind the positive obligation of the nation to nation treaties, we need to also remember the peace and friendship treaties that were established among warring communities. I was taught that they exchanged their own children in order to secure peace and as a show of the utmost trust.

In a way, when we are exposing law students, who, yes, are full grown adults, they are going through a paradigm shift, and the experience of unsettling is going to be painful. From this perspective, I feel it is imperative that there is Indigenous representation when teaching anti-dominance training, because in this way, an **equalizing** and mutual partnering is occurring. It may not be an exchange of being given settler "children", but it is an entrustment of someone's training to become legal practitioners of systemic change.

"In a real sense all life is inter related.
All men are caught in an inescapable network of mutuality, tied in a single garment of destiny.
Whatever affects one directly affects all indirectly.
I can never be what I ought to be until you are what you ought to be, and you can never be what you ought to be until I am what I ought to be."

~ Reverend Martin Luther King Jr.

Chapter 5:
"*sâkîtowin*": why we need a Treaty-Based Constitutional Law Course and Access and Empathy for all Canadian law schools and beyond.

I have a lived experience that is absolutely inescapable for me. My first time I got to participate in a sweatlodge I was a five year old child. It was a big deal to be allowed in. I remember the many sweats my mother participated in, but who determined I was much too young to come inside yet. So I hung back with all the other wide-eyed children running around in our pyjamas in hopes we too would be allowed to go in, squawking in a mixture of shock and admiration when the bigger kids were let out at the coveted half way mark of the sweatlodge cycle. The children were bundled up in towels, and they would parade by us without making eye contact, their faces filled with an almost mystical dignity, and we oooed and awwwed over how much they glistened all over with what we thought was pouring sweat. There was an unsaid mixture of curiosity - and almost pity - for the kids that cracked quarter way through and could barely hold back from busting through the lodge to escape, as the oskapewsak (helpers)[1] lifted the tent canvases used to cover the lodge.

That summer my mother turned and motioned to me to come in with her. I was overcome with absolute awe as I walked beside her, my eyes as big as saucers as the Elder covered me in smudge. I walked as closely behind my mother as I could in case they changed their minds. As she sat, she motioned me to lay down beside her on what looked like hay straw, whispering in my ear it was cooler if I stayed flat against it. After some somber commands and a couple of jokes, the sweat began. My heart raced in excitement as the canvases were pulled over the opening and then we were plunged into instant dark. The prayers began and the splash on the glowing red rocks filled the sweat with so much heat, hot rivulets of moisture rolled off my lips. I was worried I would breathe in fire so I stuffed my face up against the wet linen covering my mother's thighs, comforted by her presence that felt as old and sure as the ground itself. I could barely make out the glow of the rocks, as the helpers were finally ordered to bring in more at the quarter mark. There was a relief of some heat escaping, then again the prayers began, the heat this time was more unbearable. I started crying, but as quietly as I could as I didn't want to wuss out. Almost knowing or sensing this, my mother's fingers found their way to my wet hair and caressed my scalp. With each stroke my heart calmed, my tears mingled with drops of sweat, then it was just the sweat that streamed down my face. I felt full, and safe. I felt I could now stay through the whole thing. At one point I tried to sit up to show how strong I was, but I only got up about a couple inches, and entered what felt like a thick band of heavy heat and collapsed back down on the straw as fast as I could.

Half time came quicker than I thought it would and I said to my mother in a groggy, but cocky voice that I could stay inside with her for the rest of the sweat, but she was having none of that and shooed me out. I still remember the poking pinches of the humid straw and then the almost cold but soft dry grass under my bare feet as I gingerly stepped out into the light. Immediately I was wrapped up like a baby bundle in the experienced and sure hands of the oskapewsak in a soft bright orange towel, who then herded me towards the big quilt on the ground with the other children who just left the sweatlodge. I was proud as a peacock as I passed by the other younger children gazing at me, careful not to make eye contact as I sat down on the patchwork quilt filled with pin flower designs, and corduroy squares. Plates were handed to us and all our eyes bulged with delight at the fresh bannock slathered in lard with a heaping dollop of Saskatoon berry compote from a pot near a fire. They were handed out with a styrofoam cup of tart orange juice to all the children. I remember a little toddler coming to sit by me in admiration as she balanced her plate and juice, her little toes peeking out beneath her nightgown like a row of peas in a pod. I remember stuffing my mouth with the soft sweet bannock and glancing at my mother who was smiling big showing her crooked teeth while she laughed with the others in the lodge, and the feeling of adoration I had for her as they closed the entrance to finish the final rounds of the sweat. Glancing up at the incredible beauty of the sky, I

[1] Janice Alison Makokis, "nehiyaw iskwew kiskinowâtasinahikewina – paminisowin namôya tipeyimisowin: Cree Women Learning Self Determination Through Sacred Teachings of the Creator" *MA Thesis* (University of Alberta, 2008) at 11, online: https://dspace.library.uvic.ca/bitstream/handle/1828/3609/Makokis_FINAL_THESIS.pdf?sequence=1&isAllowed=y.

could hear the rustling leaves of the poplars as I breathed in the sweet smell of their bark mingling with the impending rain as storm clouds gathered in the distance.

On the highway, I began to doze off as I stared up at the stars through the backseat windows of our old car. The sunset closed in with rays as soft and orange as the towel I was gifted. My eyelids grew heavy as they surrendered to the din of the Bee Gees playing softly on the radio while my mother chatted with a lady from the sweat we were giving a lift to back into the city. I have yet to remember a more perfect beauty. Although some could perceive that such an experience could have been traumatic to a child, I had all the accompaniment and supports to inform this lived experience. It is one of the anchors I have to who my very core is as an Indigenous person.

That is the beauty of the lived experience. Accompaniment through transitional lived experiences meant to bond us circumvents what would be inevitable trauma if we are left to fend for ourselves without helpers or supports.

A. Access and Empathy: The importance of community building through community bridging.

> "The closest words in Cree to empathy is *kisêwâtisiwin* that is translated as "kindness, compassion, goodness", or *kisîwâtisowin* 'a gentle, loving kindness' or *kitimâkiyimitowin* 'ultimate empathy'. These words overlap with *sâkîtowin* 'love'."
>
> ~ James Sákéj Youngblood Henderson

Canadian society needs a paradigm shift from the disorder of dominance that pervades the governmental structures that churns its system. The training and perpetuation of who populates this system through law and order, continues to favour the settler and subverts Indigenous peoples. I am proposing in this thesis that this paradigm shift, or even paradigm shifts, can be achieved by a simple paradigm detour as discussed in Chapter 1.

After setting up the previous chapters of my thesis in the particular order that I have, I feel we can now step back from the settler colonial "barrier" that limits us. We must make a paradigm detour around this barrier for not only ourselves but for the sake of our future generations. What I propose below would aid in training law students at the earliest level of their law school education, before they themselves populate the legal profession. However, those who are already in the legal profession can benefit as well through professional development by participating in this proposal at the law school education level. It would assist in deepening empathy among practitioners from all walks of life, as they have access to the legal profession. They in turn could contribute from their lived experiences in the legal profession that would be vital in assisting law students to navigate the power imbalances that are ultimately sustained by the *status quo*.[2]

[2] The Honourable Chief Justice Lance S.G. Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (2012) *Indigenous Legal Orders and the Common Law* (Paper 2.1; Practice Makes Perfect CLE, BC), online: https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-253.pdf at 2.1.3 – 2.1.4. "It is artificial to separate the concept of *pre-existing societies* from that of *pre-existing legal orders*." at 2.1.1; and "We speak often in the field of Aboriginal law of the honour of the Crown, which mandates, among other requirements, the duty to approach questions of interpretation generously, the duty to consult and the duty to accommodate. Now, I suggest, a more widely applicable concept of honour imposes on all members of the legal profession the duty to learn: at the very least, to holding ourselves ready to learn. In addition, the legal obligation to take account of the Aboriginal perspective engages the principle of the rule of law. If the rights of all Canadians, including Aboriginal Canadians, are to be articulated and guarded by the courts, the courts must necessarily be capable of understanding the nature of those interests."; see also Pooja Parmar, "Reconciliation and Ethical Lawyering: Some thoughts on cultural competence." (2019) 97 *Can Bar Rev* 3, online: https://cbr.cba.org/index.php/cbr/article/view/4558 at 546. "What is not acknowledged in conversations on cultural competence

There have been meaningful attempts across Canadian law schools at decolonization and Indigenization initiatives thus far, including the introduction of mandatory first year Indigenous law courses. As they almost all use a Eurocentric-based Canadian common law curriculum,[3] it has become clear that it is time to re-examine the legal curriculum to now fully include effective Treaty education. I propose in my thesis that this may succeed through a mandatory Treaty-Based Constitutional Law course. Of course, this is not a flippant observation or naïve trivialization towards the herculean efforts of countless Indigenous - and non-Indigenous - scholars and legal practitioners alike who have tirelessly pushed and continue to push for this equality. Without those ongoing efforts for decades, a proposal such as in this thesis would not be possible.

But even at the outset of introducing into Canadian law schools optional curriculum with Indigenous content, let alone mandatory education on Indigenous issues and the history of colonization, there has been criticism. "According to critics, making such courses compulsory effectively imposes illiberal restrictions on university students and faculty by limiting the epistemic aim of free inquiry, while wrongly prioritizing concern for the welfare of one social group over others."[4] As mentioned in the above chapters, one cannot have an 'epistemic aim of free inquiry' if the foundation is epistemic injustice, especially in a society of shared nations.[5]

Why do I propose taking the movement for Indigenous curriculum requirements a step further for a mandatory Treaty-Based Constitutional Law course? Karen Drake in her article, "Finding a Path to Reconciliation: Mandatory Indigenous Law, Anishinaabe Pedagogy, and Academic Freedom", tackles the spectrum of criticism in that the "claims that mandatory Indigenous content is at best a waste of time for students whose careers will not deal with Indigenous issues, and at worst a violation of academic freedom."[6] Drake's focus in her article is that a perspicuous rationale for mandatory Indigenous content will assuage even the harsher criticism and fears of violating academic pedagogic freedoms.[7] She uses the example of how the sitting judge in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, had an almost "culture shock"[8] type

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is that an Indigenous client may be speaking a different legal language, invoking a different law, and deploying different legal categories and claims that have been rendered untranslatable through colonial violence. This is the violence that is often enabled by the very law the lawyer is expected to translate an Indigenous client's claim into. A lawyer who recognizes this violence and takes reconciliation seriously will also see the encounters between lawyers and clients as encounters between different legal worlds. More specifically, such a lawyer will see them as encounters between the existing legal systems in Canada: the Common law, Civil law, and Indigenous laws. Understanding a lawyer-client encounter only as one between 'law' and 'culture' replicates colonial violence.".

[3] The exception is the Joint Degree Program offered through the Faculty of Law at the University of Victoria, (2018), online: https://www.uvic.ca/law/about/indigenous/jid/index.php. "The joint degree program in Canadian Common Law (JD) and Indigenous Legal Orders (JID) welcomed its first cohort of students in September 2018. It is the first program of its kind in the world, combining intensive study of Canadian Common Law with intensive engagement with Indigenous laws. The JD/JID will develop the skills needed to practice within Canadian Common Law, with Indigenous legal orders, and at the interface between them."

[4] Nicolas Tanchuk, Marc Kruse, and Kevin McDonough, "Indigenous Course Requirements: A Liberal-Democratic Justification", (2018) 25 *Phil Inq Ed* 2, at 135.

[5] *Ibid* at 136.

[6] Karen Drake, "Finding a Path to Reconciliation: Mandatory Indigenous Law, Anishinaabe Pedagogy, and Academic Freedom" (2017) 95 *Can Bar Rev* 1, online: https://digitalcommons.osgoode.yorku.ca/scholarly_works/2698/ at 12.

[7] *Ibid*. "[W]hen some precision is introduced into the analysis of academic freedom, it becomes clear that the concern is baseless. [M]andating the teaching of Indigenous law within a law program no more violates academic freedom than does the mandating of constitutional law, property law, or any other currently required law school course."

[8] Simon Fraser University, "Stages and Symptoms of Culture Shock", *International Student Advising Programs*, online: https://www.sfu.ca/students/isap/explore/culture/stages-symptoms-culture-shock.html. "What is culture shock?: It's common to experience culture shock when you're transplanted into a foreign setting. This is a normal reaction to a new environment where you are no longer in control as you have been at home. You may experience a range of emotions when adapting to a foreign culture, from excitement and interest

reaction to the oral traditions presented. Drake compares this to the genuine attempt given by Justice Vickers in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, to engage as best he could with another Indigenous legal order.[9] Although admirable, his treatment was still Eurocentric and fell short outside of what Tsilhqot'in legal principles validated. This is because Justice Vickers, with all respect due, lacked the ***skills*** of learning to set aside the Eurocentric worldview.[10] "No amount of progressive-mindedness or liberal orientation alone will bestow the skills needed to work within a fundamentally different legal system or the knowledge of another nation's ontology, epistemology, ethic, and logic."[11] As far as those already in the legal profession, having the best of intentions is not sufficient to achieve these skills. Drake makes a very strong argument in this article that "[n]o one knows, as a law student, whether one will eventually become a judge called upon to apply Indigenous laws."[12]

I would like to take this further in that we are mandating an investigation into historical accuracy and truth within the legal education of a society of shared nations, and "Love" is the justification, as "Love" in the law should be as high of an ideal, or principle as Peace, Order and Good Governance would be when considering a national concern[13]. I also propose along with a mandatory Treaty-Based Constitutional Law course, an optional Access and Empathy Project. The purpose of this project would be to provide access for all law students to meet Indigenous professionals, grass roots workers and other community members outside the power imbalances of habitually dominating environments of settler harm reduction activities and similar programs. The purpose of the Access and Empathy Project would be to provide the participants with supports needed for anti-dominance reflection as they go through sequences of experiential learning. Lived experiences for Indigenous and non-Indigenous law students would take place in an accompanied atmosphere of helpers and supports as they navigate the responsibility of their own emotions as the disorder of dominance becomes unsettled. Being Indigenous does not preclude attitudes of dominance, no matter the justification. Such a project may have the unique potential to spark decolonizing iterations in law schools and beyond, including what I refer to as "consultation services", discussed further below, in the law schools themselves.

However, Indigenization is not synonymous with decolonization. Indigenization requires partnering in an atmosphere of humility and respect. When a diplomat representing another nation meets another representative of a different nation, this attitude of deference and checks of power imbalance is generally expected. I propose, as a way of Indigenization, consultation services that literally include just having tea with Indigenous people in their own communities,

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to frustration, depression and fear of the unknown. Culture shock is a term used to describe what happens to people when they encounter unfamiliar surroundings and conditions."

[9] Drake, *supra* note 6 at 19.

[10] *Ibid* at 20.

[11] *Ibid* at 21.

[12] *Ibid*.

[13] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401. "[I]n relation to a matter falling within the national concern doctrine of the peace, order and good government power of the Parliament of Canada. The national concern doctrine, which is separate and distinct from the national emergency doctrine, applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern." *R v Crown Zellerbach Canada Ltd*, is a seminal case that discusses the difference between the principles of Peace, Order and Good Governance ["POGG"] for national emergencies or what would constitute national concerns. I have heard POGG described as a "constitutional blunt weapon" in my first year Constitutional Law class during a discussion on Division of Powers. I can understand the fears associated with the federal government having such a vague source of jurisdiction under the Canadian Constitution. It could be used to justify war measures, however POGG is not about limiting anyone's individual rights and freedoms. It is another head of power that balances against provincial powers.

after they have chosen to extend such an invitation to the law students and various legal professionals willing to participate. For example, a student, or a small group of students partnered with a professional, may choose to reach out to a community and, upon invitation, organize and fundraise to have a meet and greet, no less than law students who host a student social with the financial support from firms or other donors to mingle and create contacts who may be potential employers or clients.

For example, during an initial presentation of my LLM thesis to introduce others to my ideas as required by my graduate program, I experimented with a simulation. I asked all the professors in attendance, including the Associate Dean of Graduate Studies at the College of Law, University of Saskatchewan, to wait outside until they were invited in without informing them why they had to wait. In the classroom, I gave a quick justification to my fellow graduate students what I was doing, who promptly helped me figure out who would go out to the professors as "scouts". The directions to these scouts was not to tell the professors anything but to indicate that they were open to receiving gifts. If the students were not presented with gifts, to come back in, wait a few seconds, then go back out and repeat. The grad students inside helped me put whatever chairs in the room into a circle around the podium at the front of the room. It was particularly difficult to create a circle in this room, as it was used specifically for moots and mock trials so the desks that were organized like a court room could not be moved without specialized assistance. Eventually the professors figured it out and were allowed in as I was presented with an array of highlighters, post-it notes, pens and some gum.

I immediately began my introduction in Nēhiyawak (Plains Cree language). This was deliberate to still keep the professors in attendance in a state of unknowing, or a disruption of their dominance. After I repeated my introduction in English, I then explained why I chose to begin my presentation the way I did. After my presentation I offered everyone tobacco, explaining of course the intent and meaning of what I was doing. One graduate student from Nigeria was in tears, as the gift of tobacco reminded her so viscerally of her family and culture back home. The feedback I received was mostly positive, but some professors had negative reactions, which I reasonably expected. However, one professor from the neighboring Edwards School of Business, who was originally very interested in my thesis and wanted an invitation to attend, was offended. He emailed me that he was not sure he liked my presentation at all. We have never spoken since except to reluctantly greet in passing. The few minutes of creativity I expected to be more or less uncomfortable, especially when the professors were not the "in the know" group, but the rest of the presentation not only met the criteria of what I was required as a grad student to do, but the Associate Dean was thrilled with the ideas that it generated for her.

When approaching a community that is not yours, there is an importance of waiting at a boundary until invited in, no matter the status of who you are in your community and profession. The relationships that are at the root of the Treaties are based on a survey of intent between the partners. At least in the prairies, a nation long ago would send scouts to approach the border of another nation to treat them, and most often if there was not a treaty or truce already in place, then it was most likely an enemy nation. Upon real threat of death, the scouts would build a fire,

present gifts and be made to wait, sometimes for days to test the patience and good will of the scouts.[14]

I am proposing the same methodology in the form of a seminar, or even two seminars, used long ago to generate an invitation from an Indigenous community today. Of course, sitting on a hill at the border may have to be modified, but there are unlimited – and creative - ways to arrange this introduction. Upon receiving an invitation, the student(s) may then engage in a form of service done in full consultation with a legal professional and the community's Elders or Traditional Knowledge Keepers, and whoever else from the community, that wishes to participate. This service could take many forms, such as a giveaway or round dance according to the community's comfort level and customs. As part of this service, the project manager, be it a professor or sessional lecturer, would revisit with the students and the community the treaty respective to that area, including reading it together. If there is no treaty, then there could be a review of the area's history and what the past and present situations are in that respective territory. From this, I believe friendships and connections would be formed, but also a genuine window to determine together what effective Treaty education would mean in the law school, and in "practice" when it comes to engaging with communities.

After all, the entirety of Canada is either treaty land, yet to be treated, or unceded lands – and we should be all walking together to learn where our futures could be, by understanding what was once intended by the historic parties in an area. It is a chance for everyone, no matter where they are in their present education or legal career on this soil, to enter ethical spaces to navigate effective and balanced partnerships in a learning atmosphere.

The legal profession must also be included in this optional project for legal education, as we need everyone in this process. There is a precedent for this, at least at the College of Law, University of Saskatchewan, with the members of the legal profession participating in law students' education, including simulations when learning negotiation and mediation strategies that I discuss further below in this chapter. All are welcome to community build through community bridging.

How do I justify both this mandatory Treaty-Based Constitutional Law course and optional Access and Empathy Project? Because we need "Love" in order to have effective Treaty education.[15] Through love, whether for Indigenous nations, or even the nation of Canada, law students and the legal professionals who may participate, could embark on the reconciliation

[14] Hugh A. Dempsey, "Blackfoot Peace Treaties" (2006) 54 *Alberta History* 4, online: https://go-gale-com.cyber.usask.ca/ps/i.do?id=GALE%7CA153761721&v=2.1&u=usaskmain&it=r&p=EAIM&sw=w at 24. "There were a number of ways to actually conclude a treaty. If there was no trading post to act as an intermediary, someone had to make contact with the enemy tribe. This person was known as a peacemaker and had that reputation within his tribe… If a peace treaty was deemed necessary the peacemaker, either alone or in a small party, may enter enemy territory undetected and make his way to an enemy camp. At night, he crept to a nearby hill, where he sat, cross legged, pipe in hand, waiting for dawn. There he was usually sighted by a scout on early morning patrol. Here was the point of greatest danger. If the scout had a particular hatred for the enemy tribe, perhaps because of a recent loss within his own family, he might ride down upon the peacemaker and kill him. Usually, however, the scout returned to his camp and informed the chief of what he had seen. The chief with a party of warriors rode to the site where he invited the peacemaker to his lodge. There, he was safe and under the protection of the chief. In most instances the peacemaker brought a pipe and tobacco. If the idea of a treaty was acceptable, the pipe was smoked and plans made for the tribes to meet. At other times, the peacemaker might bring additional symbolic objects… Once they had agreed to a treaty, the peacemaker returned to his tribe, sometimes bringing an enemy emissary with him."

[15] John Borrows, *Law's Indigenous Ethics.* (University of Toronto Press, 2019). "Love should not be erased from our legal and political vocabulary just because aspects of our system are coercive. Law is not just about force – it also requires our participation and agreement." at 29.

journey through respectful and **inclusive** action. Through both propositions, I feel we would not only be training and improving critical thinkers and practitioners of law, but also cultivating legal practitioners of systemic change.

B. Why "Love" is the justification needed for a Treaty-Based Constitutional Law Course and how it aids in our effort at creating this paradigm detour.

> "The closest translation for trust in Cree is *mamisîwin*."
> ~ James Sákéj Youngblood Henderson

As John Borrows discusses in his book, "Indigenous Legal Ethics", the concepts of Peace, Order and Good Governance, or POGG, are just as complex and elusive as the concept of "Love". He dedicates two chapters on how love is just as necessary to elevate our standards in society as life, liberty and security of the person. When it comes to discussing the justification of using POGG in the context of national concern, "[w]e have no difficulty asking the state to abide by these principles."[16] It is beyond this thesis to give a robust discussion that the book itself does, but love is a very important concept interwoven in our entire society. It is what drives who we are as individuals living in communities, and as Borrows describes:

> Most law in Canada rests on customary norms and practices. This is more implicitly a place of love. Most of us participate in patterns of behaviour that do not require the police or any formal authority to ensure peace, order, and good government. We respect the life, liberty, security, equality, or other's freedom because of customary law's intimate, subtle, informal force… Without customary law, formal law, as it emerges from legislatures and courts, would not take us very far.[17]

Inspired by Borrows' detailed treatment of the principle of love, love is more than a sufficient justification for moving ahead with a nation-wide mandatory Treaty-Based Constitutional Law course for Canadian law schools. Because love can be "domineering and subordinating"[18], anti-dominance training would make sense as a path for decolonizing "Love". Would this be too difficult as another paradigm shift in legal education?

It probably seems straightforward that as in any post-secondary education, paradigm shifts are inevitable. Blackhawk used the example from Professor Thomas Kuhn, who defined paradigms as "exemplar problem-solutions that are used to socialize members of a discipline into the basic theories and presuppositions of that discipline [or] put simply, paradigms are the model examples relied on by a discipline to teach how the world works."[19] There have been some paradigm shifts in legal education that have had some traction in changing the critical ethical education of law students before they enter the legal profession. For example, negotiation and mediation strategies are introduced early in law school as alternative methods of dispute resolution ["ADRs"], and they are also strategies that promote civility and core ethics of professional behavior in future lawyers.

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[16] *Ibid* at 30.
[17] *Ibid*.
[18] *Ibid* at 28.
[19] Maggie Blackhawk, "Federal Indian Law as Paradigm within Public Law" (2019) 132 *Harv L Rev* 7, online at: https://harvardlawreview.org/2019/05/federal-indian-law-as-paradigm-within-public-law/ at 1803.

ADRs involve the law students learning skills to be effective at meeting parties' needs in reaching a negotiated agreement, usually through a process informed by legal professionals who have experience with these matters of negotiation in the field.[20] It should be noted that ADRs have a great use in assisting Indigenous communities as reflected in the Toolkit for On-Reserve Matrimonial Real Property Dispute Resolution[21] that was created in collaboration with Professor Val Napoleon. But it is important to acknowledge the potential for unintended power imbalances to cloud negotiation strategy, even when the typical power imbalance that is expected between the lawyer and client is openly acknowledged. For example, there is a power imbalance that is problematic when it comes to the negotiations between Indigenous peoples and the Crown. For decades, representatives of Indigenous nations and communities, along with many reports from various commissions into the legal issues plaguing these nations and communities, have demanded an independent supervisory body for negotiations that take place.[22]

ADR strategies may be effective at alleviating the long waits and extreme expense of the court system, but this methodology is still representative of the Canadian legal system and uses only its rules. "Getting to YES: Negotiating Agreement Without Giving In" describes the detailed methodology of interest-based negotiation. Fisher and Ury posit "that negotiators obtain the best results by understanding each other's interests and working together to produce an agreement that will meet those interests as best they can."[23]

Despite the interesting advice that *Getting to Yes* has disseminated, one of the authors felt the need to engage in a sequel, "Beyond Reason: Using Emotions as You Negotiate", which "address[es] the question of how to handle the emotions and relationship issues in our toughest negotiations."[24] This sequel was an attempt to acknowledge the unpleasant or even pleasant emotions that occur during a negotiation, and how not to lose out, or give in despite feeling overwhelmed, vulnerable or unacknowledged. Fisher and Shapiro do engage a little in the psychology of what an emotion is – or is not, and is more aligned with tips in how to manage negative feelings or being cautious with positive ones, such as compassion, as their "framework does not require [one] to reveal [their] deepest emotions or to manipulate others" as this can "divert attention from substantive matters."[25]

The authors acknowledge that positive emotions are great for meeting substantive objections,[26] but they also feel that one needs to be capable of anticipating that we all "suffer" from emotions and to be aware that no one has the capacity to just "shut off"[27] no matter the illusion of calm that is exuded. The premise in both these books co-authored by Fisher is to advise those seeking to improve their negotiation skills to "address the concern, not the emotion" and the best way to

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[20] Roger Fisher and Daniel Shapiro, *Beyond Reason: Using Emotions as You Negotiate* (Penguin Books; New York, 2005) at 42.
[21] Hadley Friedland, Jessica Asch and Dr. Val Napoleon, "A Toolkit for On-Reserve Matrimonial Real Property Dispute Resolution" (2015) *Centre of Excellence for Matrimonial Real Property*, (Indigenous Law Research Unit: University of Victoria) at 3.
[22] Canada, Parliament, Standing Senate Committee on Aboriginal Peoples, *Forging New Relationships: Aboriginal Governance in Canada*, (February 2000) (Chair Hon. Charlie Watt) at 8 and 9.
[23] Roger Fisher, William Ury and Bruce Patton, *Getting to YES: Negotiate agreement without giving in* (Houghton Mifflin Company; Boston, 1991) at 22, 23.
[24] Fisher, *supra* note 20 at 23.
[25] *Ibid* at 30.
[26] *Ibid* at 36.
[27] *Ibid* at 39.

do that, in his opinion, is to keep sight of "*core concerns*" which "are human wants that are important to almost everyone in virtually every negotiation." [28]

Discussed as a framework these core concerns are: "appreciation, affiliation, autonomy, status, and role."[29] It is a skill set to develop the capacity to meet each of these core concerns but "not excessively nor minimally, but to an *appropriate* extent (emphasis in original)."[30] Meeting these concerns in order to keep emotions from being in the driver's seat during the negotiation is the goal instead of maintaining empathy (although empathy is acknowledged as necessary to achieve this with some accuracy). The keys to getting control of the vehicle of negotiation is to understand the "difference between having a core concern ignored or met [and that it] can be as important as having your nose underwater or above it."[31] This analogy is deliberate as the authors are aware that the quality of some people's lives could be at stake and as such, negotiations could have devastating consequences if even one of these core concerns are left unmet.[32]

I found Fisher and Shapiro's discourse concerning the core concern of appreciation particularly interesting. They discuss listening for "meta-messages" where there are a multitude of small words in a sentence that, if emphasized, reflects a meta-communication about where the potential negotiation has taken a turn. These meta-messages "often suggest whether a person feels supportive, ambivalent, or resistant to ideas being discussed. An easy way to detect meta-messages is to listen for which word is emphasized."[33] At the end of the day, however, the goal of interest based negotiations is to reach a mutually satisfactory agreement where the interests of all parties are realized to some extent. It is not a true paradigm detour by any stretch of the imagination, despite being a reasonable paradigm shift in the critical education of law students along with the participation from members of the practicing legal profession.

There is another movement in legal education and even law in general, with an entire focus on the place of emotions and how it addresses empathy. Emma Jones in her article, "Transforming Legal Education through Emotions" shows how focusing on emotions in legal education is a significant paradigm shift as law has been treated as almost a science in its application.[34] But the majority of case law itself involves the regulation of all kinds of passions and emotions that encapsulate the human experience.[35]

Jones has a fascinating point when she discusses how to transform the legal curriculum for students by partnering with emotions. She defines transformation as the "action of changing in form, shape or appearance". If used in a holistic manner, this transformation of legal education would become an investment of well-being not only for the students, but for the legal practitioners they will inevitably become.[36] Jones believes we do a great disservice to our

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[28] *Ibid* at 54.
[29] *Ibid* at 55.
[30] *Ibid* at 57.
[31] *Ibid* at 60.
[32] *Ibid* at 66.
[33] *Ibid* at 79.
[34] Emma Jones, "Transforming legal education through emotions" The Society of Legal Scholars, (2018) 38:3 *Legal Studies*, online: https://www.cambridge.org/core/journals/legal-studies/article/transforming-legal-education-through-emotions/E921D338E56C9BEE47E6C4A91E626BAA at 452.
[35] *Ibid* at 451.
[36] *Ibid* at 452.

students by depriving them of the "dynamic processes that are integral to decision-making" as it is actually the misnomer of science-like reasoning that in the end disadvantages the student.[37] "Constructivist learning theories… argue that 'humans create meaning as opposed to acquiring it'. It is the learner's experience, and their perception of these experiences, which have value in an educational setting."[38] We must stop looking at emotions and reason as opposing sides of a spectrum, but in actuality in partnership for brilliance in cognitive function.[39]

Along with introducing "Love" as a principle, I believe that we need to have trust as well in having a mandatory Treaty Based Constitutional Law Course, as it would generate effective Treaty Education. Including anti-dominance training in law schools, would also go a very long way in rebuilding this trust. Trust was always there, at least for my people. It is the violation of that trust that is at issue with reconciliation. Maybe at this point in time, right now, is when we must polish the Covenant Chain. My best intention for this thesis is to add to this endeavour.

> But I am not the only author of this story. In fact, I am a very minor character. Prime ministers, Supreme Court justices, editorial boards, and corporate officers spill most of the blood and ink in this drama. Fortunately we also live in a democracy; we have some small influence over this script, at least theoretically. What kind of authors will we be? How will we practise customary law in our interactions as Indigenous and non-Indigenous people? How will we see this theme even more broadly in our societies when working beyond the Indigenous sphere? What will our judges and politicians say about the role of Indigenous law in writing section 35(1)'s story? Will they see this as a love story?[40]

C. Why a Treaty-Based Constitutional Law Course should be mandatory in all Canadian Law Schools

Attempts to change curriculum, including Constitutional law courses, to encompass more of an Indigenous perspective is not a new idea. Many law schools, especially after the TRC Final Report,[41] have stepped up to include more Indigenous content, along, with historical context, in key areas of their curriculum of Constitutional Law. Even before the TRC's Final Report was released there were reasonable attempts at my law school to address Indigenous issues, but it was from an Aboriginal Law perspective, including critiques of the *Indian Act*, which is still the Canadian common law perspective.

The Faculty of Law at the University of Victoria has made many interesting attempts at adjusting the legal curriculum. The proposition of using treaties, and including Indigenous perspectives on these treaties, has been drafted by Patricia Cochran into a first year Constitutional Law syllabus, with, for example, references to the Treaty with the Chenkonein Tribe of the Songhees Nation.[42]

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[37] *Ibid* at 453.
[38] *Ibid* at 459.
[39] *Ibid* at 460. "'[T]o think and act rationally, one must feel'. This ties in closely with the recent scientific work on emotions… which views emotions and cognition as inseparable. Allowing, or even encouraging, them to draw on these emotions to construct learning experiences could be a very powerful tool within the law degree, making it a more meaningful and engaging form of education, for example, via the use of narratives or storytelling within the curriculum."
[40] Borrows, *supra* note 15 at 49.
[41] The Truth and Reconciliation Commission of Canada, *Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Library and Archives Canada Cataloguing in Publication, 2015) at 323.
[42] Patricia Cochran, The Constitutional Law Process: Law 100 (Fall 2018) draft syllabus, University of Victoria, Faculty of Law. Although this draft syllabus is regional focused, such as including Treaty with the Chenkonein Tribe of the Songhees Nation, it is a genuine attempt at teaching a multijuridical Constitutional Law.

Most syllabi in law schools use caselaw, including seminal cases, as an authoritative canon to inform the law student. The canon is basically what the entirety of a curriculum in a law school rests on. Notably, Blackhawk clarifies that we need to be careful in how we characterize canon and what she proposes as an "anti-canon", discussed further below. She is suggesting that some classic federal Indian law cases should be equally well known as examples of the failings of United States common law, such as the ones used to examine slavery and Jim Crow. For example, although the Marshall trilogy is dense and might provide positive examples, she proposes that they remain part of the canon, and reconceptualizing these examples are not a panacea to dispelling colonized interpretations.[43]

Put another way, we cannot fix Canadian common law by simply carving out a bigger niche for Aboriginal law. We need to both denaturalize our assumptions underlying the common law ***and*** look at Indigenous legal traditions on their own terms. That is the only way to truly give equal weight and respect to both. Focusing on just the Marshall Trilogy or *Connolly v Woolrich et al* (1867), 17 RJRQ 75, although rich cases as mentioned in Chapter 3, is conceding the frame to the common law. The University of Victoria school is on an accurate track of first engaging Indigenous constitutions on their own terms and then moving on to colonial engagement.

Blackhawk, in her article mentioned above, goes into well measured detail how the evolution of a "black/white binary" is a disservice because of an inaccurate perception of not only American Constitutional history, but it is not inclusive of the reality of the treaties with Indigenous nations. In her attempt at including a canon, or what she characterizes as an "anti-canon" to the canon, there should be less of an intense focus on what makes federal Indian law in America unique to public law (or Constitutional and Administrative law), but to acknowledge the enormous potential to reconceptualize the history of the American Constitution itself. By packaging the treaty history with Indigenous nations as an anti-canon, this would indeed go far in demonstrating how the "[i]nteractions between the national government and Native Nations have shaped the warp and woof of our constitutional law from the Founding across a range of substantive areas, including vertical and horizontal separation of powers, the Treaty Clause, war powers, executive powers in times of exigency, and many others."[44]

Right now law schools in the United States of America focus on a particular canon and narrative around public law that privileges the legal issues around slavery and Jim Crow as the archetype of how to address the protection of minorities, that is through limits on state powers and rights against states. Blackhawk is suggesting that bringing federal Indian law into the mainstream can provide a very different canon or narrative that suggests minorities can be better protected through self-government and delegation of powers to them, with Indigenous sovereignty as the leading example. From my understanding, Blackhawk is saying that the way American lawyers try to solve minority protection issues for non-Indigenous minorities could learn as much from this anti-canon as from the response to Jim Crow. National powers have not helped but have

[43] Blackhawk, *supra* note 19 at 1795. The "Marshall Trilogy" refers to Chief Justice John Marshall treatment in three seminal cases: *Worcester v Georgia*, 31 US (6 Pet) 515 (1832); *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831); and *Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823), that "forms the foundation of Indian law doctrine."
[44] *Ibid* at 1789-1790.

rather hurt Indigenous peoples in the former situation, providing a counter narrative to the rights-based solution suggested by the Civil Rights Era.[45]

Although the United States model is very different than the one here in Canada, the tribal courts in the United States seem to mostly be applying regular positive law just like justices of the peace. Aboriginal Law and the typical route that it takes in the Canadian court system, almost becomes a game of who can trump with their knowledge unbeknownst due to how "arcane" treaty education is. But it is not just about treaty education. It is about how for many decades, much of what we think we know about Aboriginal Law that is touched on in a basic Constitutional Law course regarding Division of Powers, has been resolved, confused and complicated because there is no in-depth effective Treaty education from when the law students start their journey.

Patrick Macklem has a similar take as Blackhawk in his detailed book, "The Sovereignty of Human Rights". Macklem basically argues that international human rights law needs to be reconceptualized with the situation of Indigenous rights as a main paradigm rather than an ill-fitting exception. This is a legitimate idea since international law basically emerged through imperialism and colonialism,[46] whereas international human rights only came into effect after World War II.[47]

> This way of understanding the status of indigenous peoples in international law explains why they possess human rights that international law does not extend to other minorities. International indigenous rights speak to adverse consequences of the structure and operation of international law that are relatively distinct from those with which international minority rights engage. Whereas minority rights speak to the fact that the deployment of sovereignty as a legal entitlement to structure global politics produces minority communities in States and authorizes States to act in ways harmful to those communities, indigenous rights in international law recognize differences, partly denied and partly produced by the international distribution of territorial sovereignty initiated by colonization, that exist between indigenous and nonindigenous peoples. The morally suspect foundations of the sovereign power that a State exercises over

[45] *Ibid*. "Beyond simple canonization, federal Indian law offers paradigmatic lessons about the strengths and failings of our constitutional framework. Broadening the binary paradigm to include federal Indian law could allow interventions into a range of general principles of public law. It has often been said that federal Indian law is "incoherent" and in need of reform, because the doctrine does not comport with general public law principles. But perhaps it is the general principles of public law, and the incomplete paradigm of slavery and Jim Crow segregation on which those principles rest, that are in need of reform. More than simple canonization, the inclusion of federal Indian law as an additional paradigm case could lead to fundamental reformulation. A full catalogue is beyond the scope of this Article, but I offer an example here in the hope that it will invite more. As I'll show, federal Indian law leads public law to a very different set of principles in the context of minority protection, unsettling reigning theories of how best to distribute and limit power in order to prevent government abuse of minorities. Unlike slavery and Jim Crow segregation, federal Indian law teaches that nationalism is no panacea for majority tyranny, and that rights can wound as well as shield minorities."

[46] Patrick Macklem, *The Sovereignty of Human Rights* (Oxford University Press; New York, 2015) at 135. "[Q]uestions about [I]ndigenous recognition in international law ought to be approached in light of the nature and purpose of international [I]ndigenous rights. Indigenous rights in international law mitigate some of the adverse consequences of how the international legal order continues to validate what were morally suspect colonization projects by imperial powers. Indigenous peoples in international law are communities that manifest historical continuity with societies that occupied and governed territories prior to European contact and colonization. They are located in States whose claims of sovereign power possess legal validity because of an international legal refusal to recognize these peoples and their ancestors as sovereign actors. What constitutes [I]ndigenous peoples as international legal actors, in other words, is the structure and operation of international law itself."

[47] *Ibid* at 104. "[International human rights law] protects minority rights on the assumption that religious, cultural, and linguistic affiliations are essential features of what it means to be a human being. But its acceptance of this assumption is wary and partial. Minority rights might protect key features of human identity, but they possess the capacity to divide people into different communities, create insiders and outsiders, pit ethnicity against ethnicity, and threaten the universal aspirations that inform dominant moral conceptions of the mission of the field… [I]nternational minority rights speak to adverse consequences that international law itself produces by distributing sovereignty to collectivities that it recognizes as States."

> indigenous peoples residing on its territory are why indigenous rights merit recognition on the international legal register.[48]

Macklem ominously clarifies that the doctrines used in States' "morally suspect" acquisition of sovereignty over Indigenous peoples was also not "frozen in time" so to speak, and that colonialism is an "ongoing process".[49]

I believe we can interrupt this ongoing process through the acknowledgement of our multijuridical society, at the very core of the legal curriculum. Law has always been extremely complicated. I do not think we can ever ensure law graduates fully understand even Canadian common law within three years. It is not humanly possible. However, I do think we need to teach humility as a core ethical principle for lawyering along with empathy. Even as a legal professional with many years of practice under one's career, it is easy to get locked into a belief that there is not much more to learn when often it is just narrowing one's perspectives to make resolving issues go more smoothly. By embracing humility - and the humiliation that just naturally rises up at times from learning humility – the redesigning of the curriculum becomes genuinely inspiring. Maybe even one can make a difference?[50] There are so many topics that are poorly understood and need greater attention. At first learning the law for most law students feels like looking for weak spots in a brick wall. But then you start to find out just how weak the foundations of that wall are and some well-placed nudges can topple what felt immovable before.

> The Cree concept of *tapahtîmisowin*, is a form of humility roughly implying, 'to never think higher of yourself than others' or *kihciyimitowin* 'an ultimate, sacred-like respectful thought for one another'. These concepts are related to *manâcîtowin*, the animate root of this term is *manâciy* 'to have mercy, compassion or respect', and 'to protect one another'. It is a very important term very closely related to the concepts *kihciyimitowin* and *kitimâkiyimitowin*, wahkôtowin or "relatedness or interrelated".
>
> ~ James Sákéj Youngblood Henderson

D. Lived Experiences: Revolution is not scary if settlers transparently and peacefully revolutionize themselves.

I do not have the one stop solution for how to decolonize and Indigenize law schools and expedite greater Indigenous input. Coming up with the one solution to fix the issue of how we can best go forward with antidominance training would be very difficult for any one person, group or even think tank to do, especially when it involves many world views filled with countless complexities. That is precisely why I believe the legal curriculum, and in particular Constitutional Law, is a great place to start.

The power of the lived experience does much to break the spell of colonization. For example, Indigenous men have always been subverted by concepts of manliness in a settler colonial context, as it has been tied to what male is capable of being "civilized". Matthew Bentley wrote

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[48] *Ibid* at 136.
[49] *Ibid* at 140.
[50] John Borrows, (202?) "Beyond Experience?: Objectivity, Indigeneity & Freedom of Religion" (University of Victoria) at 2 (Unpublished). "This is to say that a degree of humility is necessary when considering other points of view, particularly those beyond our own experience."

about the Carlisle Industrial School's Indigenous college football players that defined and shaped American football as a professional sport today. At first, Richard Henry Pratt, the conceiver of the industrial (aka residential) school system model, was adamantly against his "Indians" playing in such a violent sport. But a group of Carlisle students continued to advocate for the school to take part. Pratt finally agreed but only if his demands were met. Such demands included that they were to win against all the Ivy League colleges, no matter the unfairness or any other such "slugging" (low blows, sucker punches and so on) that the white players committed, as they were already innately civilized. But if Indigenous men were to engage in even the least bit of "slugging" to defend themselves, it would be perceived immediately as savagery, so they were only to engage in "clean play".[51]

To American society, manliness in sports such as football, was seen to the public as an indicator of capacity for tactical development necessary for "civilization" and status promotion. It was clear that the Carlisle football players were perceived as needing to prove their capacity to be "civilized". As a reporter wrote following a football game against the University of Pennsylvania:

> These young Indians fresh from the reservation, and in a few years transformed into manly workers, industrious and devoted students, and skillful football players, are new illustrations of the possibilities of their race. If they can cope in the field with the best players of the country and win the admiration and respect of their opponents, there is a future for them.[52]

The Carlisle football players were incredibly successful and created trick plays that are now commonly used in the professional sport. Reporters went wild, whether they were overtly racist or attempted to show respect. The amount of country wide attention was unprecedented every time Carlisle played Yale, Harvard or any other Ivy League college, which legitimized Pratt's "vehicle for racial assimilation."[53] He was thrilled with this attention because, "[s]uccess on the gridiron was public and carried huge appeal: it persuaded policymakers and other patrons of the need for continued funding."[54] Learning about the Carlisle Indigenous football players was a huge surprise for me, as I can only imagine the incredible strength it took for these Indigenous men such as Jim Thorpe, to still resist such intense forces of colonization by being so distinct in their excellence of spirit.

But Thorpe did something for all of those with the privilege of dominance who watched him and his team play. He was giving them an inescapable lived experience that could continue today to break a very powerful spell. In the TRC Final Report, highlights Sports and Reconciliation and the Calls to Actions 87 to 91, encourages sports as a way to achieve reconciliation.[55]

Very similar to sports and the opportunities of equalization that can be nurtured, the Access and Empathy Project proposal is just what the title inspires. The project may be an opportunity to provide all law students with the spaces to meet Indigenous professionals, and community leaders and members in Indigenous communities. The whole premise is to create equal relationships without the power imbalance of settler harm reduction activities.

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[51] Matthew Bentley, "Playing White Men: American Football and Manhood at the Carlisle Indian School, 1893–1904." (2010) 3 *JHCY* 2 at 191.
[52] *Ibid*.
[53] *Ibid* at 192.
[54] *Ibid* at 191.
[55] TRC, *supra* note 41.

Can I guarantee this will generate an ethical space? I was asked one time by a friend how we can avoid constant colonization in any space that is not Indigenous. I think that is giving too much power to an ignorant way of life that in my opinion is rife with layers of trauma (experienced by European Canadians as much as anyone else). We have to continuously be open to new ideas, but also be open to sharing space. I think when we focus as much on what colonization is not, along with what colonization is, the clarity of where to go will evolve like human languages do. Colonization is not about sharing space. The Treaties are.

Of course dominance is rampant in every community, Indigenous and non-Indigenous. But how did it get there? Normalized dominance can be interrupted. Dominance is a form of abuse and abuse thrives in silence.[56] Power imbalance, especially in legal education and the legal profession, is a necessary component that needs to be and is regulated. But this regulation can be continuously improved upon from ethical checks and balances consulted on with communities together as we foster community partnerships. What has been necessary in maintaining ethical power imbalances in legal education and the legal profession has not been conducive for making friendships with others perceived as different or financially non-contributory. By providing access for all law students to build trust and relationships in Indigenous communities, they are given a key in building consultation and ethical skills that will serve them their whole lives as they embark on their legal journeys. My proposal is that these students are not alone, but are being accompanied by Indigenous Traditional Knowledge Keepers [TKKs"] and Elders, both in the academic setting of the university, and in the community.

Dominance thriving in silence and the idea of building relationships with communities while in law school does make good sense to me. My intuition is that a lot of people harbour racist and ethnocentric views due to lack of any experience with Indigenous people outside of a deficiency perspective when they are seeing homeless Indigenous people downtown or meeting Indigenous clients through a criminal defence practice. Honestly, I hear and read all kinds of bizarre things from well-meaning progressive "allies" who have decided to "self anoint" themselves as defenders of Indigenous rights without any mandate to do so. In short, what I am proposing in terms of humanizing Indigenous people in settlers' eyes through relationship building in communities upon their own terms of invitation. But whether there is a theoretical and/or empirical basis for expecting it to work is really beyond this thesis. However, we will never be able to generate the data needed to determine this without considering its implementation.

The Access and Empathy Project can be implemented in Treaty 6 territory to start, where we have many Indigenous communities, First Nations, Métis, and urban populations. This project would take place in both semesters in a school year, most likely the upper years, where there would be an opportunity for law students to visit three different communities, at least twice. This of course is dependent on the location of a community and if there are legal professionals who would be willing to participate with the law students in these community spaces. There could be an opportunity to ask the community to have a meal together and any other ceremony they would wish to share. At the end of the project, a potential reflection and exercise in maintaining

[56] Leslie Morgan Steiner, "Ending Domestic Violence: Crazy Love" (Corgi Press; New York, 2009). Steiner is known for her statement that "abuse only thrives in silence" in her book and live audience discussions. Although this book is a memoir on domestic violence, there are similarities to the characterization of normalized dominance when it is not openly addressed in an ethical space, especially when there is a power imbalance. These similarities to the silence of abuse, in my opinion, transcend intimate or familial relationships and are analogously useful in its ethical prevention in power imbalance dynamics.

friendships may be to organize a space in Saskatoon, possibly on campus, where the students themselves would help host a larger project, depending on the culture, which may include a Feast and Giveaway.

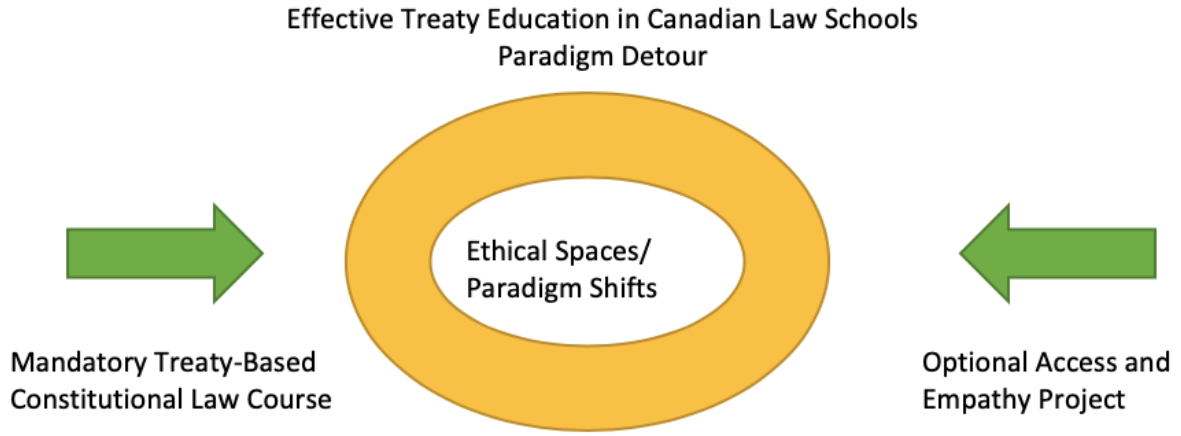

Figure 5.1: Paradigm Detour through Effective Treaty Education in Canadian Law Schools.

The purpose of this project proposal, as discussed in the above Chapter 4, would be to create ethical spaces to navigate the inevitable vulnerability that this access would potentially create for law students from an unfamiliar experience, or even familiar experience, of not being in their own element. Through self-reflective journaling, that would be anonymously numbered, the students would hand in their submissions for feedback and marks for participation. I feel there is power in anonymous reflections for students, as it lends to a more honest and less pressured participation. The self-reflective journal would be an opportunity to sort out a student's feelings and frustrations regarding the complexities surrounding their identity as their dominance in the spectrum of social hierarchy, wherever that may be, could feel relentlessly challenged in situations requiring humility. This is the importance of framing antiracism as anti-dominance, and it is in this spirit of accompaniment that we may develop an anti-colonial framework together. This may assist in developing the skills for all law students to manage their own emotional labour and release their trauma in safe, ethical spaces. Having the opportunity to keep their journals after a final marking process and copies of the content for quantitative data purposes, would also inspire in the student a feeling of trust and safety.

Just seeing both Indigenous and non-Indigenous law students' presence in Indigenous communities would be a powerful statement for wanting change and a chance to community build. There is potential for this project to aid in the modelling of Indigenous and non-Indigenous friendships for future generations, as was meant by the Treaties. It is my hope that such a project could have the potential of changing an unfortunate perception of settlers to ones of becoming legal practitioners for systemic change. Law students may not now see the law school as a place to develop skills in building mutual partnerships with Indigenous communities, but from lived experiences they may learn to build a foundation that may make them good ancestors.

Such meaningful experiences as just sitting down and having tea with someone they would never normally have a chance to meet, I feel would go a long way in creating a friendship that could later become a partnership. I really like the idea of settler law students returning to their personal lives, social networks and communities that seem culturally impenetrable and having them become ambassadors for decolonization. Their perspectives of Indigenous peoples may be transformed just by meeting as equals in Indigenous communities. The very act of meeting Indigenous peoples on their land and in their community spaces is an act of decolonizing themselves.

E. "Consultation Services": what anti-dominance training may look like in a Treaty Based Constitutional Law Course.

Along with incorporating what would be learned from the Indigenous perspectives of the Treaties in a mandatory Treaty-Based Constitutional Law curriculum, and in combination with the anti-dominance training and trauma informed accompaniment that the Access and Empathy project may provide, a potent formula could be created to involve many perspectives to imagine and implement services to communities together as we achieve powerful paradigm detours.

The creation of "consultation services" (a play on the decision making aid provided to clients of legal professionals termed "consultative services") could be a route for law students to engage in mutual partnering for reconciliation with Indigenous communities as they navigate the Access and Empathy Project, especially if such a project were to be implemented in Canadian law schools on a long term basis. The experiential is necessary and visualization is fundamental, which is the development of empathy. However, the development of empathy is rife with many unpleasant feelings, reactions and questions as law students may experience trauma when their dominance and privilege becomes challenged. By learning to shoulder that emotional labour themselves, this may also begin a process of self-decolonization for law students when they re-enter and reflect critically in their own environments.

However, this awareness and effort should be done with accompaniment, and we could provide this support through knowledge translation in ethical spaces. Law schools are just that, they are centers of learning and this era of post TRC reconciliation is a transformative time to revisit our relationships. As wonderful and necessary as the TRC was, too much assumption and focus in the public is based on the tragic circumstances that occurred post Treaties and there is not enough emphasis on the need for present and future generations to have effective Treaty education.

Both academic legal education and the legal profession will require an entire anti-colonial paradigm detour to honour these Treaties. This thesis is a small contribution to those decolonization efforts. I am hoping it could inspire law students to partner and create in the law schools spaces where various empirical evidence could be gathered from a multitude of legal community engagement projects powered and driven by law students. This may in turn inform new treaty-inspired research methodologies.

F. Indigenization is not interchangeable with decolonization.

My reasons for arranging my thesis in this way is simple. Yes we need decolonization. But as mentioned above, efforts at decolonization is not synonymous with Indigenization. International law scholars and the United Nations have not only been active in protecting Indigenous peoples around the world, but giving them a platform for their voice for the world to hear them.[57]

Indigenization is a relatively new term, and there are many perspectives as to what this term means. Borrows, in the yet unpublished article, "Beyond Experience?: Objectivity, Indigeneity & Freedom of Religion", reflected that the landscape was constantly communicating to the Indigenous peoples that inhabited the Toronto area. "Many of these spirits went quiet when European settlers moved into the Toronto area in greater numbers… I cannot help but think of the Ktunaxa people who worry that their land will change and grow quiet in similar ways as a result of their loss before the Supreme Court of Canada".[58] This resonated deeply with me, as my background before law was Anthropology and Archaeology. I remember when I was a teaching assistant in the Aboriginal Student Access Program at the University of Saskatchewan taking first year archaeology students out to Eagle Creek in Saskatchewan with Elder Mary Lee to map tipi rings. I watched the Indigenous students faces as we crossed the hills and when they touched the stones as they listened to the Elder's stories. I recognized their expressions as I had them myself when I first touched arrowheads and adzes at the digs I volunteered at. It was like the spirits spoke again and they wanted me to hear them. That is what Indigenization means to me.

Indigenization at the law school means to learn how we can go forward to do this in a good way by setting things right by including Indigenous perspectives in the law school curriculum that trains this legal profession. It is developing spaces for law students to build the skills of navigating Indigenous legal orders as Drake discussed above. My thesis, just as my legal education, is informed from the incredible sacrifices made by Indigenous legal scholars in academia and the legal warriors that have tirelessly advocated for all Indigenous people at home and internationally throughout the decades. Those scholars have Indigenized me.

We live in cruel and unpredictable times. We also live in exciting and unprecedented times. It is not that we cannot imagine world peace, we just cannot imagine a world without colonialism. So maybe it is time we do. How interesting the world could be once the transformed butterflies flap their wings and the iterations of Indigenization and decolonization begin to influence their environment?

> Seeing all this, and making connections, Nanabush remembered he couldn't escape the law, no matter how hard he tried or what form he took. Law was just like him – a peaceful, vicious being. It was all around him, continually in motion, never stable, always changing. It needed conflict and it needed resolution, so

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[57] United Nations, "Indigenous Peoples: Historical Overview" *Department of Economic and Social Affairs*, online: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples/historical-overview.html. "The efforts to draft a specific instrument dealing with the protection of indigenous peoples worldwide date back over several decades. In 1982 the Economic and Social Council (ECOSOC) established the Working Group on Indigenous Populations with the mandate to develop a set of minimum standards that would protect indigenous peoples… Finally, on 13 September 2007, the Declaration on the Rights of Indigenous Peoples was adopted by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine)… Since adoption of the Declaration, Australia, New Zealand, United States and Canada have all reversed their positions and expressed support for the Declaration. Colombia and Samoa have also endorsed the Declaration."

[58] Borrows, *supra* note 50 at 5.

new conflict could arise and devour resolution. There was no way to escape its grasp, though many tried. Transformation is the life of the law.[59]

G. Concluding Reflections: I love my settler father.

Although I've included a lot of stories about my experiences growing up with my Indigenous mother, I actually wrote this thesis in dedication to my settler father. He suffered from Bi-polar Disease and Parkinson's Disease. I did not grow up with him after my parents divorced.

Before my parents divorced, my mother attempted the Program of Legal Studies for Native People in 1984. She did not pass, but it was not until 30 years later that I found this out. I took the program in 2014, and I was stunned to see her face as I was looking at the old pictures of the incoming students hanging on the walls outside the Native Law Centre.

Thinking back, I remember that summer she was very stressed out and I stayed at many different places. I barely saw her. When I came home one day she was not the same woman I knew. Now I know what triggered her descent into insanity from the years she must have had of unresolved trauma, and what was to be the start of a terrible tale of my own story of child abuse.

After I was apprehended, I bounced around in the odd intake foster home and ended up on the crisis floor of the YWCA. It seemed Social Services forgot about me as I was there for some time, but then they remembered me just before I turned 16. I called my father up from a particularly frightening foster home and told him that he needed to take me in because I was fearing for my life. He said yes, but a week later I would have aged out of foster care. But who knows if I would have made it?

My father came to live with me while I was married as he could not afford to live on his own and needed extra care. He was there for me through my divorce, and all through law school and was there to help me raise my beautiful daughter, even though he could not do very much for very long. My law school bursaries, I will admit, went to purchasing him hearing aids, dentures and other things he could not afford on his very small living allowance.

During the time that I actually meant to finish this thesis, he developed Lewy's Dementia, which makes the sufferer aggressive and caused my father to slip in and out of manic episodes. After a terrible year, I managed to help get him placed in a care home in the city. It sounds like a very sad tale. And it is. But my father is the reason I am here in the capacity that I can be. My mother is also the reason I am here in the capacity that I can be. I am literally the bridge between two worldviews. It took losing both parents to understand who they are, and how hard they tried but systemic inequalities just didn't even give them a chance. Two people who were dealt such losing hands, still dug as deep as they could to give me some lived experiences of genuine love.

This thesis is an attempt to contribute for others to have this as well: māmawī wīcihitowin.

[59] John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press: Toronto, 2010) at 285.

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