TOWARDS IMPLEMENTING THE TRUTH AND RECONCILIATION COMMISSION'S CALLS TO ACTION IN LAW SCHOOLS: A SETTLER HARM REDUCTION APPROACH TO RACIAL STEREOTYPING AND PREJUDICE AGAINST INDIGENOUS PEOPLES AND INDIGENOUS LEGAL ORDERS IN CANADIAN LEGAL EDUCATION

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Abstract

Many Canadian law schools are in the process of implementing the Truth and Reconciliation Commission's Call to Actions #28 and #50. Promising initiatives include mandatory courses, Indigenous cultural competency, and Indigenous law intensives. However, processes of social categorization and racialization subordinate Indigenous peoples and their legal orders in Canadian legal education. These processes present a barrier to the implementation of the Calls.

To ethically and respectfully implement these Calls, faculty and administration must reduce racial stereotyping and prejudice against Indigenous peoples and Indigenous legal orders in legal education. I propose that social psychology on racial prejudice and stereotyping may offer non-Indigenous faculty and administration a familiar framework to reduce the harm caused by settler beliefs, attitudes, and behaviors to Indigenous students, professors, and staff, and to Indigenous legal orders. Although social psychology may offer a starting point for settler harm reduction, its application must remain critically oriented towards decolonization.

Acknowledgments

I have a lot of people to acknowledge. This thesis is very much a statement of who I am right now and how that sense of self has been shaped by others. Of course, I've made my own choices as to how I interpret those relationships, their impact on me, and what I should do. The direction of this thesis, its focus on interpersonal experiences and individual agency, is strongly influenced by my mother, Tiami Wheeler, and my grandmother, Doreen Rasch.

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Introduction

To varying degrees, Canadian law schools and law societies are in the process of implementing the Truth and Reconciliation Commission's Call to Actions #27, #28 and #50. These Calls attend to the need for cultural competency, and Aboriginal and Indigenous law training,[1] for law students and legal professionals, and for the creation of Indigenous law institutes.

> 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.
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> 28. We call upon law schools in Canada to require all 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.
>
> 50. In keeping with the United Nations Declaration on the Rights of Indigenous Peoples, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the

[1] For the purposes of this thesis, Aboriginal law refers to Canadian law as it relates to Indigenous peoples, whereas Indigenous law refers to the legal orders of Indigenous peoples.

development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.

Mandates for Indigenous legal education (ILE)[2] may also be inferred or found in the precedent of the Supreme Court of Canada, within federal and provincial statutes, in the rules of professional conduct of law societies, and within Indigenous epistemologies, cosmologies and ontologies (Indigenous lifeways).[3] Thus, ILE is broader than the specific content or objectives set out in the Calls.

[2] For the purposes of this thesis "Indigenous Legal Education" and "Indigenous programming" includes programming in Aboriginal or Indigenous law, and non-Indigenous and Indigenous epistemologies and pedagogies. It is not limited to law *per se*, but also includes content that might otherwise be called "policy" or "politics", "spirituality", "culture" or "history". It includes the content directed in the Calls as well as institutional policies related to funding and resourcing, facilities, community relationships, hiring and advancement, discrimination and anti-racism, and decolonization.

[3] The need for Indigenous legal education can be inferred in the Supreme Court of Canada's jurisprudence on s. 35 of the *Constitution Act, 1982*: "While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake", in *R v Sparrow*, [1990] 1 SCR 1075 at 1112; "Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment" (para. 19), "[...] the only fair and just reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective [note that Walters' says 'legal culture'] while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each" (at para. 50), in *R v Van der Peet*, [1996] 2 SCR 507 at paras 19, 31, 40–42, 50 and see also 263-264 (Justice McLachlin, dissenting, but not on this point); *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at 81, 147–148; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at para 1 (locating the federal and provincial governments' lack of respect for Indigenous peoples' difference as a source of conflict and barrier to reconciliation); "[...] what is required is a culturally sensitive approach to sufficient of occupation based on the dual perspectives of the Aboriginal group in question - its laws, practices, size, technological ability, and the character of the land claimed - and the common law notion of possession as a basis for title", in *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257 at para 41, see also paras. 34-35; *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103 at 10 (describing the importance of interpreting modern treaties generously and not as if they are ordinary commercial contracts). Indigenous legal education is essential for lawyers to assist the courts in the incorporation of Indigenous legal orders in Canadian law: see, for example, *R v Meshake*, 2007 ONCA 337 at para 33; *R v Ippak*, 2018 NUCA 3 at paras 73–77, 83–94 (Justice Berger, concurring); *Pastion v Dene Tha' First Nation*, [2018] 4 FCR 467 at paras 7–14. In addition, courts consider Indigenous peoples' history and experiences in criminal cases: *Criminal Code of Canada* RSC 1985, c C-46; *R v Ipeelee*, [2012] 1 SCR 433 at paras 59–61; *R v Gladue*, [1999] 1 SCR 688 at paras 67–69; *R v Williams*, [1998] 1 SCR 1128 at 22 (recognizing the danger of racial stereotyping and prejudice against Indigenous peoples in criminal jury trials); *R v Barton*, 2019 SCC 33 at para 201 (describing the need for specialized judicial instructions to address racial and gender stereotyping and prejudice towards Indigenous women who are victims of crime). Indigenous legal education is required for all lawyers, then, since all lawyers are potential judges-in-waiting: Karen Drake, "Finding a Path to Reconciliation: Mandatory Indigenous Law, Anishinaabe Pedagogy, and Academic Freedom" (2017) 95:1 Can B Rev 9–46 at 20–22 and 45; see also Lance Finch, *The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice* (Vancouver: Continuing Legal Education Society of British Columbia, 2012) at 47. Furthermore, the rules of professional conduct of law societies may also require Indigenous

My research responds to the following question: how may we better understand the barriers to, and opportunities for, the implementation of the Calls in Canadian law schools? I hypothesize that an interdisciplinary approach that integrates social psychology on racial prejudice and Indigenous scholarship will help identify potential barriers to, and opportunities for, the implementation of Calls. I argue that racial stereotyping and prejudice is a barrier to the implementation of Indigenous legal education in Canadian law schools. I also argue that settler-colonialism – the legalized dispossession and redistribution of material and immaterial resources to settlers through Canadian law – is a barrier to respectfully and ethically engaging with ILE in Canadian law schools. As I will argue, these two challenges – racial stereotyping and prejudice, and settler-colonialism – are connected. Despite these barriers, hope may be found in the many ILE initiatives and institutional commitments led by Indigenous students and professors (and some non-Indigenous persons) in Canadian law schools.

Implementing ILE without decolonization (a term that I will define shortly) will be challenging, if not impossible. Efforts at Indigenizing the law school curriculum, through the inclusion of stand-alone courses on Indigenous legal orders or the demographic inclusion of Indigenous law students or professors cannot, on their own, meaningfully satisfy the Calls nor the objectives of ILE.[4]

legal education as a prerequisite for competent practice related to Indigenous peoples and for the fulfillment of each lawyer's civic responsibilities: Nicholas Healey, "Ethics, Legal Professionalism and Reconciliation: Enacting Reconciliation through Civility" (2018) 26:1 Dal J Legal Stud 113–136. However, for a discussion of how professional norms and rules have excluded Indigenous peoples and their legal orders in the practice of law, see Constance Backhouse, "Gender and Race in the Construction of 'Legal Professionalism': Historical Perspectives" (2003) SSRN, online: <https://papers.ssrn.com/abstract=2273323>. Finally, on the topic of sourcing the need for Indigenous legal education in Indigenous legal orders, see John Borrows, "Outsider Education: Indigenous Law and Land-Based Learning" (2016) 33:1 Windsor YB Access Just 1–28 at 2; and, generally, John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

[4] Broadly, Indigenization refers to the inclusion of Indigenous peoples, perspectives, and legal orders in Canadian legal contexts. For a general critique of neo-liberal inclusionary policies and practices as insufficient for transformative change, see Frances Henry et al, eds, *The Equity Myth: Racialization and Indigeneity at Canadian Universities* (Vancouver: UBC Press, 2017); Devon Abbott Mihesuah & Angela Cavender Wilson, eds, *Indigenizing the Academy: Transforming Scholarship and Empowering Communities* (Lincoln: University of Nebraska Press, 2004). As Tuck

Moreover, there is a risk of harm – of distortion, severance, and misuse – to Indigenous lifeways that stems from the imposition of a Eurocentric Canadian legal education and practice.[5] In some cases, non-Indigenous professors and students may deny that Indigenous legal orders are *law*, in the same sense that Canadian law is *law*.[6] Further, many Indigenous law professors and students recall experiences of racial prejudice, stereotyping and discrimination against Indigenous peoples and their legal orders in Canadian law schools.[7] These latter experiences are my focus. In this

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and Yang note, Indigenisation, or the superficial inclusion of Indigenous peoples and knowledges in Canadian education, often operates as "enclosure of Native peoples into the politics of equity": Eve Tuck & Yang K Wayne, "Decolonization is not a Metaphor" (2012) 1:1 Decolonization: Indigeneity, Education & Society 1–40 at 23. Such enclosure is a far cry from Mihesuah and Wilson's intent in *Indigenizing the Academy*; for a discussion on the co-optation of "Indigenization", see Jeffery G Hewitt, "Decolonizing and Indigenizing: Some Considerations for Law Schools" (2016) 33:1 Windsor YB Access Just 65–84 at 70.

[5] Broadly, these risks include the internal distortion caused by the assimilation of non-Indigenous worldviews, external distortion caused by the recording of Indigenous legal orders in non-Indigenous sources, the severance of Indigenous legal orders from their epistemological, ontological and cosmological foundations, and the risk that Indigenous legal orders may be interpreted incompletely or incorrectly: Gordon Christie, "Culture, Self-Determination and Colonialism: Issues around the Revitalization of Indigenous Legal Traditions" (2007) 6:1 Indigenous LJ 13–30; Finch, *supra* note 3 at 34–35; Borrows, "Outsider Education", *supra* note 3; James Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1:1 Indigenous LJ 1–56; Drake, "Finding a Path to Reconciliation", *supra* note 3 at 20–21 (on language, interpretation and translation); Tracey Lindberg, "Critical Indigenous Legal Theory Part 1: The Dialogue Within" (2015) 27:2 Can J Women & L 224–247 at 229, 233–234, 242, 245 (on the challenge of interpreting and translating Indigenous legal orders). Some communities also oppose recording Indigenous legal orders in writing: John Borrows, *Recovering Canada: the Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 15. There is the risk that Indigenous legal orders and liberal constitutionalisms are fundamentally incommensurable: see, generally, Aaron James (Waabishki Ma'iingan) Mills, *Miinigowiziwin: All that has been Given for Living Well Together: One Vision of Anishinaabe Constitutionalism* (Thesis, University of Victoria, 2019) [unpublished]. Finally, courts currently limit Indigenous legal orders as evidence, rather than according them judicial notice as a non-domestic legal system: Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press, 2011) at 106–109 (on Indigenous legal orders as evidence of practice, customs and traditions). However, Val Napoleon and Hadley Friedland argue that Indigenous legal orders are robust enough to withstand the distorting potential of Eurocentric education and settler colonialism. Napoleon and Friedland argue, "[w]hat we do not want to do is let these critical questions paralyze us into inaction. Narratives of fragility or incommensurability related to Indigenous laws are narratives of colonialism. The stories, and the elders and communities we have learned from, all teach us that Indigenous laws are made of stronger stuff": Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2015) 61:4 McGill LJ 725–754 at 754.

[6] As Fraser Harland argues, despite the Supreme Court of Canada's statements in *Delgamuukw* and *Tsilhqot'in* on the reality of Indigenous legal orders, judges remain unable to appreciate Indigenous legal orders as anything more than evidence of practices, customs and traditions: Fraser Harland, "Taking the Aboriginal Perspective Seriously" (2018) 16–17:1 Indigenous LJ 21–50 at 25, 35–39, 41–43, 47–48.

[7] The term "Indigenous" is a non-racialized term that includes First Nations, Métis communities and Inuit. However, I refer to settler or non-Indigenous peoples' "racial" stereotypes and prejudices of Indigenous peoples. As I describe in Chapter 2, I use this language because Indigenous peoples *are racialized* in Canadian society. I argue in Chapter 2 that Indigenous peoples' *Indigeneity* – their political, social, spiritual, and legal difference – is restricted or denied through racial and settler-colonial discourse.

context of potential harm, scholars differ in their approach towards revitalizing Indigenous legal orders within a settler-colonial context.[8]

In this thesis, I argue that, given that decolonization remains limited, Canadian law schools must consider the effects of racial stereotyping and prejudice on the inclusion of Indigenous students, professors and legal orders in Canadian legal education, and on non-Indigenous[9] professors' and

[8] The decision to engage in Canadian legal contexts is perhaps one of the most confounding ethical problems facing Indigenous legal scholars and practitioners. Some scholars envision a *sui generis* relationship in which Indigenous and non-Indigenous legal orders are equally valued and respected. John Borrows locates this relationship in Indigenous Nations' historical treaty relationships with the British Crown: John Borrows, "Creating an Indigenous Legal Community" (2005) 50:1 McGill LJ 153–182 at 161–163; see also John Borrows, "Wampum at Niagara: The Royal Proclamation, Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) c. 6. James Youngblood Henderson articulates a relationship based on treaty federalism: James Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:2 Sask L Rev 241–330. "Indigenous legal warriors", Indigenous persons trained in both Indigenous and non-Indigenous legal orders, use settler-colonial law strategically for the advancement of Indigenous self-determination and sovereignty: see Henderson, "Postcolonial Indigenous Legal Consciousness", *supra* note 5 at 3; Christine Zuni Cruz, "Toward a Pedagogy and Ethic of Law/Lawyering for Indigenous Peoples: The Pedagogy of American Indian Law" (2006) 82:3 NDL Rev 863–902 at 880–881; see also the related concept of "Indigenous word warriors", described in Dale Antony Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 9, 74–75. For some, a concern remains that Indigenous legal orders cannot be constructed through Canadian law. James Sakej Henderson argues that "Indigenous peoples cannot construct Indigenous order, law, remedies and solidarity on Eurocentric foundations": Henderson, "Postcolonial Indigenous Legal Consciousness", *supra* note 5 at 44; for a further discussion on the concept of using the "master's tools", see John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) at 143. Finally, some scholars ask us whether we might be better starting with our own Indigenous intellectual and legal communities than reasoning with the "elephant" of the dominant, settler experience: see, for example, the exchange between Kerry Wilkins and Aaron Mills in Kerry Wilkins, "Reasoning with the Elephant: The Crown, Its Counsel and Aboriginal Law in Canada" (2016) 13:1 Indigenous LJ 27–74 at 73. In her writing, Patricia Monture-Angus frequently questioned her engagement with Canadian law and Canadian legal education: Patricia Monture-Angus, "Standing against Canadian Law: Naming Omissions of Race, Culture and Gender" (1998) 2:1 YB NZ Juris 7–30 at 7–9. In *Thunder in My Soul,* Monture-Angus explains, "I still believe in educational systems as a site of future change. I do not cling to the same hope for law as a vehicle for change toward Aboriginally inclusive systems": Patricia Monture-Angus, *Thunder in My Soul: a Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 69. In response, scholars like Taiaike Alfred and Glen Coulthard reject a politics of recognition and advocate for a return to Indigenous political and legal communities: Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2005); Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

[9] I use "non-Indigenous" and "settlers" at different points in this thesis. Generally, I use the term "non-Indigenous" when discussing the application of social psychology to reflect the comparators used in that literature. Instead of using racialized language, such as "White" and "Indian", I opt for non-racialized social categories of Indigenous and non-Indigenous. "Indigenous" also centres discussions around Indigeneity (rather than Eurocentricity) and "non-Indigenous" is inclusive of other racialized, non-European persons. In other cases, I have used the term "settler". I do this most often when describing the roles of non-Indigenous peoples (including other racialized persons) in settler colonialism and their impact on Indigenous peoples and their communities. As Vowel explains, the intent behind these terms is not to "put us at odds" but to assist us in talking about "a wider context than the first person and second person singular": Chelsea Vowel, *Indigenous Writes: A Guide to First Nations, Métis, and Inuit issues in Canada* (Winnipeg: Portage & Main Press, 2016) at 15.

students' ethical and respectful engagement with Indigenous peoples and their legal orders and perspectives. Based on the scholarship and my experience as an Indigenous law student and lawyer, I argue that non-Indigenous peoples cannot ethically and respectfully relate to Indigenous peoples, their perspectives, and legal orders if such engagements are rendered through a distorting fog of stereotypes and prejudices, which includes the belief that Indigenous legal orders are not part of the rule of law in Canada. Moreover, the inclusion of Indigenous peoples and their legal orders in Canadian legal education will remain less than meaningful, perhaps even harmful, until racial stereotyping and prejudice is reduced. To be clear, non-Indigenous students and professors cannot learn, and Indigenous students, professors and communities will not be meaningfully welcomed, in law schools unless racial stereotyping and prejudice against Indigenous peoples is addressed and reduced. In my view, racial stereotyping and prejudice is a barrier to ILE in Canadian legal education and practice.

Why or *how* ILE is taught is not my focus.[10] I do not believe that current ILE pedagogies are the problem. Indigenous legal educators[11] have developed programming that is consistent with Indigenous lifeways, and that facilitates the reduction of prejudice and supports Indigenous students' learning journeys.[12] It appears to me that the problem is not in ILE but rather the racial stereotypes and prejudices about Indigenous peoples and their legal orders that permeate Canadian society. Many, if not all, students and professors have, some more and some less, integrated this milieu into their beliefs, attitudes, and behaviors. Some may not like acknowledging the fact that

[10] Napoleon and Friedland argue that the "why" of Indigenous legal education has been answered, so now the work must turn to "how... we can build on the current momentum to revitalize and fully realize the potential application of Indigenous law in the world today": Napoleon & Friedland, "An Inside Job", *supra* note 5 at 733.

[11] When I refer to "Indigenous legal educators" I am referring to either Indigneous or non-Indigenous professors who engage in teaching ILE.

[12] For two recent examples of Indigenous courses that intend to follow Indigenous lifeways, see Aaron James (Waabishki Ma'iingan) Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2015) 61:4 McGill LJ 847–884 at 874–883; Drake, "Finding a Path to Reconciliation", *supra* note 3 at 22–33.

this is true for them; they may resist it. Some will be better at denying or confronting their racial stereotypes and prejudices than others. Some may even advocate for systemic change, going beyond the individual-centered focus of most prejudice reduction approaches. But this reality remains: almost every person, if not all persons, in Canada at this moment in history can access and apply a broad range of stereotypes and prejudices about Indigenous peoples and employ a host of socially and legally acceptable rhetorical and discursive strategies to deny this reality. This is the social context in which ILE is received by some students and professors.[13] Thus, the question may be reframed as: *how are non-Indigenous students able to learn about Indigenous legal orders, and how can Indigenous students be meaningfully included, in Canadian legal education and practice, in contexts that are oppositional to Indigenous peoples and their lifeways?* To respond to this question, I must consider the effects of racial stereotyping and prejudice on both Indigenous and non-Indigenous peoples' engagement with ILE.

Decolonization is not, *per se*, my focus, though I believe it is necessary for respectfully and ethically engaging with Indigenous legal orders. Tuck and Yang define decolonization as the repatriation or rematriation of Indigenous land and life and the transformation of Indigenous and non-Indigenous peoples' relationship outside of settler colonialism.[14] For Hewitt, decolonization in Canadian legal education "is the complicated work of acknowledging historic and ongoing wrongdoings along with claiming responsibility through naming, dismantling, countering and neutralizing both the collective and individual assertions and assumptions made in relation to

[13] Not all students or professors are socialized in Canada or in other settler-colonial contexts.
[14] See Tuck & K. Wayne, "Decolonization is not a Metaphor", *supra* note 4 at 21, 35. See also note **Error! Bookmark not defined.** and accompanying commentary. On decolonizing education, see Linda Tuhiwai Smith, Eve Tuck & K Wayne Yang, eds, *Indigenous and Decolonizing Studies in Education: Mapping the Long View* (New York: Routledge, 2018); Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples*, 2d ed (London: Zed Books, 2012); Marie Battiste, *Decolonizing Education: Nourishing the Learning Spirit* (Saskatoon: Purich Publishing, 2013).

Indigenous peoples."[15] I define decolonization as the dismantling of racial and settler-colonial hierarchies embedded in the rule of law.

Because I believe that racial stereotyping and prejudice is a barrier to ILE and is related to settler resistance to decolonization, I take a narrower focus: settler harm reduction. A settler harm reduction approach raises the critical consciousness of settlers and is "crucial in the resuscitation of practices and intellectual life outside of settler ontologies."[16] It seeks to "alleviate the consequences of white supremacy and colonialism – by treating their symptoms as historical inequities to be mitigated."[17] Harm reduction approaches aim to create spaces where Indigenous peoples and their lifeways are safer from the effects of settler colonialism, and racial stereotyping and prejudice.[18] Settler harm reduction is only the start of a much longer, intensive process towards decolonization.

As I explore in this thesis, in a range of contexts, settler harm reduction approaches may be necessary to prepare some non-Indigenous peoples for engaging ethically and respectfully with Indigenous peoples and their legal orders and to meaningfully include Indigenous students, professors and Indigenous legal orders in Canadian legal education. Willie Ermine proposes the

[15] Hewitt, "Decolonizing and Indigenizing", *supra* note 4 at 70.
[16] Tuck & K. Wayne, "Decolonization is not a Metaphor", *supra* note 4 at 21.
[17] Eve Tuck & K Wayne Yang, "Series Editors' Introduction" in Linda Tuhiwai Smith, Eve Tuck & K Wayne Yang, eds, *Indigenous and Decolonizing Studies in Education: Mapping the Long View* (New York: Routledge, 2018) x at xiv. Harm reduction is also a matter of what is ethical. Ermine writes, "the word ethics is… the capacity to know what harms or enhances the well-being of sentient creatures": Willie Ermine, "The Ethical Space of Engagement" (2007) 6:1 Indigenous LJ 193–203 at 195.
[18] Settler colonialism occurs when colonizers "come to stay": Lorenzo Veracini, "'Settler Colonialism': Career of a Concept" (2013) 41:2 J Imp Commonw Hist 313–333 at 313. Tuck and Yang define settler colonialism as "a form of colonization in which outsiders come to land inhabited by Indigenous peoples and claim it as their own new home": Tuck & Yang, *supra* note 17 at xii. Veracini notes that unlike earlier manifestations of settler colonialism, which exploited Indigenous peoples' labour, contemporary manifestations prefer land unpopulated by Indigenous peoples: Lorenzo Veracini, "Facing the Settler Colonial Present" in Sarah Maddison, Tom Clark & Ravi de Costa, eds, *The Limits of Settler Colonial Reconciliation: Non-Indigenous People and the Responsibility to Engage* (Singapore: Springer, 2016) 35 at 48.

concept of an "ethical space of engagement" as a "theatre for cross-cultural conversation in pursuit of ethically engaging diversity and disperses claims to the human order":[19]

> Engagement at the ethical space triggers a dialogue that begins to set the parameters for an agreement to interact modeled on appropriate, ethical, human principles. Dialogue is concerned with providing space for exploring fields of thought and attention is given to understanding how thought functions in governing our behaviours. It is a way of observing, collectively, how hidden values and interactions can control our behaviour, and how unnoticed cultural differences can clash without our realizing what is occurring.[20]

The path towards an ethical space of engagement requires that non-Indigenous peoples work through a series of complex, deeply personal processes.[21] In short, settlers must consider how their beliefs, attitudes, and behaviors reinforce settler colonialism and exclude Indigenous legal orders. If settlers have their own path to this space of ethical engagement, then settler efforts at decolonization might start from familiar western frameworks such as psychology.[22]

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[19] Ermine, *supra* note 17 at 202.
[20] *Ibid* at 202–203.
[21] For a moving account of one settler's journey through in this ongoing process, see Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: UBC Press, 2010).
[22] Do non-Indigenous epistemologies and ontologies offer settlers the tools for decolonizing their relationship to Indigenous peoples and Indigenous peoples' lifeways? Battiste seems to suggest this is possible when she writes that "[p]ostcolonialism is not about rejecting all theory or research of Western knowledge. It is about creating a new space where Indigenous peoples' knowledge, identity and future is calculated into the global and contemporary equation": Battiste, *supra* note 14 at 185.

I use law and psychology,[23] specifically the social psychology literature on racial stereotyping, prejudice, and discrimination,[24] as a starting point for understanding the effects of these phenomena on ILE in Canadian law schools. I do so for a few reasons. First, social psychology is oriented towards the reduction of prejudice and the advancement of social change in society.[25] It

[23] I used two texts to orient my understanding of this literature: Curt R Bartol & Anne M Bartol, *Psychology and Law: Research and Practice*, 2d ed (Los Angeles: SAGE, 2019); Andreas Kapardis, *Psychology and Law: A Critical Introduction*, 4th ed (Cambridge: Cambridge University Press, 2014).

[24] I started my research with Gordon Allport's seminal text on racial prejudice: Gordon W Allport, *The Nature of Prejudice*, 25th Anniversary ed (Reading, Massachusetts: Addison-Wesley Publishing, 1979). Then, I reviewed an anthology revisiting and updating Allport's work: John F Dovidio, Peter Glick & Laurie A Rudman, eds, *On The Nature of Prejudice: Fifty Years After Allport* (Malden, Massachusetts: Wiley-Blackwell, 2005). From there, I reviewed the most recent collected essays on racial stereotyping, prejudice and discrimination: Lynne M Jackson, *The Psychology of Prejudice: From Attitudes to Social Action* (Washington, DC: American Psychological Association, 2011); John Dixon & Mark Levine, eds, *Beyond Prejudice: Extending the Social Psychology of Conflict, Inequality and Social Change* (Cambridge: Cambridge University Press, 2012); Todd D Nelson, ed, *Handbook of Prejudice, Stereotyping, and Discrimination*, 2d ed (New York: Psychology Press, 2015); Chris G Sibley & Fiona Kate Barlow, eds, *The Cambridge Handbook of the Psychology of Prejudice* (Cambridge: Cambridge University Press, 2018). Because this literature is wide-ranging, I relied on a standard textbook to orient my understanding of the literature: Bernard E Whitley Jr & Mary E Kite, *The Psychology of Prejudice and Discrimination*, 3d ed (New York: Routledge, 2016). Along the way, I reviewed the relatively recent critical race realism movement, which integrates social psychology with critical race perspectives on the law: Gregory Parks, Shayne Edward Jones & W Jonathan Cardi, eds, *Critical Race Realism: Intersections of Psychology, Race and the Law* (New York: New Press, 2008). This led me to consider critical and Indigenous perspectives on the use of social psychology to explain social, political and legal phenomenon: Jonathan Kahn, *Race on the Brain: What Implicit Bias Gets Wrong About the Struggle for Racial Justice* (New York: Columbia University Press, 2018); Professor Sander L Gilman & James M Thomas, *Are Racists Crazy?: How Prejudice, Racism, and Antisemitism Became Markers of Insanity* (New York: NYU Press, 2018); Vine Deloria, *C. G. Jung and the Sioux Traditions: Dreams, Visions, Nature and the Primitive*, Philip Joseph Deloria, ed (New Orleans: Spring Journal Books, 2009); Nuria Ciofalo, ed, *Indigenous Psychologies in an Era of Decolonization* (Cham, Switzerland: Springer, 2019); Uichol Kim, Kuo-Shu Yang & Kwang-Kuo Hwang, eds, *Indigenous and Cultural Psychology: Understanding People in Context* (New York, NY: Springer US, 2006); Thomas Teo, *The Critique of Psychology: From Kant to Postcolonial Theory* (New York: Springer, 2011). In preparation for another article, I also reviewed the law and psychology literature on racial stereotyping, prejudice and discrimination in jury trials: Dennis J Devine, *Jury Decision Making: The State of the Science* (New York: University Press, 2012); Eugene Borgida & Susan T Fiske, eds, *Beyond Common Sense: Psychological Science in the Courtroom* (Malden: Blackwell Publishing, 2008).

[25] Allport's *The Nature of Prejudice* is an emblematic example of a social psychologist's commitment to social change. In this work, Allport investigates the role of personality, society, cognition, and law in the perpetuation, and perhaps "smashing" of, prejudice. He discusses a range of potential interventions, from intercultural education (264-265, 434, 485-486, 508) vicarious experiences through media (488), intercultural exchanges such as festivals and travel (484, 265, 279, 488-489), small group processes like role playing and conflict resolution (484-485, 491, 492), friendships (264-276) and even therapy (485, 495-496): Allport, *supra* note 24. Allport's work significantly informed the discipline's orientation: John F Dovidio, Peter Glick & Laurie A Rudman, "Introduction: Reflecting on the Nature of Prejudice Fifty Years After Allport" in John F Dovidio, Peter Glick & Laurie A Rudman, eds, *On The Nature of Prejudice: Fifty Years After Allport* (Malden, MA: Wiley-Blackwell, 2005) 1. Social psychologists remain aware of, and often committed to, their discipline's potential for aiding in social change. For only two examples, see Jackson, *supra* note 24 at 159–176; Fiona Kate Barlow & Chris G Sibley, "Where Do We Go from Here? Eight Hard Problems Facing the Scientific Study of Prejudice and its Reduction" in Chris G Sibley & Fiona Kate Barlow, eds, *The Cambridge Handbook of the Psychology of Prejudice* (Cambridge: Cambridge University Press, 2018) 408 at 428-

actively imagines, and sometimes prescribes, interventions for reducing prejudice; in this way, it may function as a settler harm reduction approach. These interventions may be taken up and put into practice by students, professors, and institutions, as long as we keep in mind that we are taking up these interventions as lay readers of social psychology. Second, social psychology offers a familiar epistemological framework – the scientific method – through which to understand the effects of racial stereotyping, prejudice and discrimination on the inclusion of Indigenous students, professors and legal orders in Canadian legal education, and on non-Indigenous professors' and students' ethical and respectful engagement with Indigenous peoples and their legal orders and perspectives.[26] Third, and related to the second point, social psychology aspires to the status of a "paradigmatic science" through which society may understand the objective "truths" of our social and psychological experiences of racial stereotyping and prejudice.[27] Fourth, social psychology may pivot settler resistance to the experiences of racialized and Indigenous persons presented in critical race and Whiteness, anti-racism and settler colonial studies.[28] Indigenous and racialized scholars and communities have explained many times, in many ways, their experiences of racialization and settler colonialism. In just as many ways, their experiences have been rationalized

431 et passim. For a 2009 meta-review of the literature on prejudice reduction interventions, see Elizabeth Levy Paluck & Donald P Green, "Prejudice Reduction: What Works? A Review and Assessment of Research and Practice" (2009) 60:1 Annu Rev Psychol 339–367. That said, social psychology does appear to suffer from a researcher-practitioner divide, which limits the practical application of interventions in social contexts: Walter G Stephan, "Bridging the Researcher-Practitioner Divide in Intergroup Relations" in Biren R Nagda, Linda R Tropp & Elizabeth Paluck, eds, *Reducing Prejudice and Promoting Social Inclusion: Integrating Research, Theory, and Practice on Intergroup Relations* (Malden, MA: Blackwell Synergy, 2006) 597 at 604–605.

[26] Thomas Teo, *Outline of Theoretical Psychology: Critical Investigations* (London: Palgrave Macmillan Limited, 2018) at 28.

[27] For a description of psychology's aspirations to the status of Thomas Kuhn's "paradigmatic science", see Christopher D Green, "Why Psychology Isn't Unified, and Probably Never Will Be" (2015) 19:3 Rev Gen Psychol 207–214 at 207–208. Even though psychology will likely never be a unified and paradigmatic science, "[t]his doesn't mean that we have accomplished nothing of import. It means that we are a vital bridge from the less adequate understandings of the past to the (we hope) more adequate standings of the future. That said, much of what we stand on is probably not bedrock", *ibid* at 212; see also Teo, *supra* note 26 at 28–43.

[28] In *The Trojan Horses of Race*, Kang argues that "[r]ace talk in the legal literature feels like it is at a dead end. No new philosophical argument or constitutional theory seems to persuade those sitting on one side of the fence to jump to the other. One way to break current deadlocks is to turn to new bodies of science, specifically the remarkable findings of social cognition": Jerry Kang, "Trojan Horses of Race" (2004) 118:5 Harv L Rev 1489–1593 at 1495.

away or dismissed. Fourth, there has been some uptake in Canadian courts and in the legal profession for implicit bias training, which is related to the implicit social cognition theory of racial stereotyping and prejudice.[29] Even though psychology seems a separate discipline from law, the fact is that judges and lawyers are already applying lay theories of stereotyping and prejudice, sometimes badly, sometimes selectively.[30] It makes sense, then, to test some of these lay conclusions by turning to the law and psychology literature.[31] Fifth, by illuminating the processes underlying social categorization, stereotyping and prejudice, it becomes more difficult to deny one's normative responsibility for the effects of these processes on Indigenous peoples and their legal orders.[32] In short, social psychology may provide a heuristic for making our normative choices transparent. Sixth, the neoliberal marketplace's fascination with measurement and efficiency dovetails with psychology's love of parsimony and the universal.[33] Even if not explicitly so, most institutions are drawn towards diversity, inclusion, and cultural competency training for

[29] Kang writes, "[f]or better or worse, law has turned sharply in favor of quantified and empirical analysis. Social cognition allows a phalanx of those who study race to take that same turn, instrumentally to fight fire with fire, and substantively to profit from a body of science that supports, particularizes, and checks what we intuit as the truth of our lived experiences": *Ibid* at 1497. See also Katheryn Russell-Brown, "The Academic Swoon Over Implicit Racial Bias: Costs, Benefits, and Other Considerations" (2018) 15:1 Du Bois Review 185–193 at 188–189.

[30] As Krieger argues, "[p]ast the familiar terrain of the jury or bench trial, there is a whole juridical world out there in the nation's courtrooms, where judges are doing psychology, much of it demonstrably bad psychology, and weaving it, unscrutinised and unvalidated into the law": Linda Hamilton Krieger, "Behavioral Realism in Law" in Eugene Borgida & Susan T Fiske, eds, *Beyond Common Sense: Psychological Science in the Courtroom* (Malden: Blackwell Publishing, 2008) 383 at 396. Bartol & Bartol similarly comment, "[i]t should be clear by now that a vast store of knowledge obtained by the sciences is making its way into the legal arena": Bartol & Bartol, *supra* note 23 at 21.

[31] Like Kang, Crosby and Dovidio suggest that social psychology on contemporary prejudice may test the intuitive assumptions of courts about the nature of stereotyping, prejudice and discrimination: "By documenting how, like a virus that has mutated, contemporary racism has evolved in such a way as to perpetuate racial disparities without producing unlawful behaviour, current research calls attention to the limitations of intuition - even when the intuition exists in the minds of legal scholars and practitioners", in Faye J Crosby & John F Dovidio, "Discrimination in America and Legal Strategies for Reducing It" in Eugene Borgida & Susan T Fiske, eds, *Beyond Common Sense: Psychological Science in the Courtroom* (Malden: Blackwell Publishing, 2008) 23 at 29.

[32] Parks writes that "...when individuals or institutions can no longer employ empirical uncertainty to continue to engage in conscious or unconscious racist conduct, they must ultimately state their normative preferences": Gregory Parks, "Toward a Critical Race Realism" in Gregory Parks, Shayne Edward Jones & W Jonathan Cardi, eds, *Critical Race Realism: Intersections of Psychology, Race and the Law* (New York: New Press, 2008) 1 at 5.

[33] This wave towards implicit bias training coincides with the development of implicit measures of prejudice and neo-liberal legal reforms related to workplace discrimination and harassment in the United States and Canada. For a history of these social and legal shifts in the American courts and workplaces, see Kahn, *supra* note 24 at 39–54, 146–149.

its purported ability to make workplaces more efficient and harmonious. It is reasonable to assume that, at least for some audiences, this thesis will be attractive because it offers a framework that can be used to identify and measure the progress of prejudice reduction interventions in Canadian law schools. Finally, but perhaps most importantly, social psychology may (re)affirm some Indigenous students' and professors' experiences of racial stereotyping, prejudice and discrimination, a point to which I will return shortly.[34]

Social psychology, however, is not perfect; nor is it determinative of any explanation of our collective social reality or the progress of ILE. Although social psychology is oriented towards action, its vision of "action" is limited by its historical, disciplinary, and social context.[35] Mainstream prejudice reduction theory owes its origins, for the most part, to the study of racial prejudice held by White towards Black Americans, in a country where the societal objective has shifted from racial antipathy and desegregation towards "implicit bias" and more harmonious intergroup relations.[36] Some prejudice reduction theories can sometimes miss the normative and practical significance of structural relations of power and privilege.[37] Furthermore, the practitioners and subjects of social psychology are overwhelming from western, educated,

[34] Parks and Kang each suggest that social psychology may bolster or support the experiences of racialized persons: Parks, *supra* note 32 at 5; Kang, "Trojan Horses", *supra* note 28 at 1496–1497.

[35] On the embeddedness of psychological science in history, generally, see: Teo, *supra* note 26 at 41–42; see also Thomas Teo, "Historical Thinking as a Tool for Theoretical Psychology" in *The Wiley Handbook of Theoretical and Philosophical Psychology* (John Wiley & Sons, Ltd, 2015) 133 (on the history of "objectivity" in psychological science).

[36] A brief overview of this history can be found in John Dixon & Mark Levine, "Introduction" in John Dixon & Mark Levine, eds, *Beyond Prejudice: Extending the Social Psychology of Conflict, Inequality and Social Change* (Cambridge: Cambridge University Press, 2012) 1 at 1–5. For a critical history of psychology's pathologization of racialized peoples and the shift towards pathologizing individuals as "racist", see Gilman & Thomas, *supra* note 24. As Teo notes, "[s]cience frequently serves to reinforce the ways individuals and groups in marginalized positions are constructed as social problems": Teo, *supra* note 35 at 141.

[37] Some social psychologists identify this as part of the "prejudice problematic", which includes a focus on individuals and intergroup harmony, rather than social groups and conflict: Margaret Wetherell, "The Prejudice Problematic" in John Dixon & Mark Levine, eds, *Beyond Prejudice: Extending the Social Psychology of Conflict, Inequality and Social Change* (Cambridge: Cambridge University Press, 2012) 158 at 160–168.

industrialized, rich and democratic (WEIRD) countries, like the United States.[38] Although the field of Indigenous psychology considers "psychological phenomena within [its] political, economic, historical, philosophical, religious, cultural, and ecological contexts",[39] this field remains indebted to psychology's universalising commitments.[40] Psychology's faith in universality may be held too unequivocally, sometimes harmfully so. Before pathologizing White people as racists, psychological science was complicit in colonialism and White racial supremacy; racialized peoples were pathologized as deviant and as objects of study.[41] Even with the best of intentions, social psychology cannot completely avoid the risk of pathologization.[42] For Indigenous peoples,

[38] Internationally, the United States ranked first in both general and psychology publications: Ana Teresa García-Martínez, Vicente P Guerrero-Bote & Felix de Moya-Anegón, "Produccion Cientifica de Psicologia a Nivel Mundial (World Scientific Production in Psychology)" (2012) 11:3 Universitas Psychologica 699–717 at 701–703. Among the six leading American Psychological Association journals, American populations were overwhelmingly represented: Jeffrey J Arnett, "The Neglected 95%: Why American Psychology Needs to Become Less American" (2008) 63:7 Am Psychol 602–614 at 602. Moreover, a recent comparative review found that experimental research was often limited to western, educated, industrialized, rich and democratic countries and populations (WEIRD): Joseph Henrich, Steven J Heine & Ara Norenzayan, "The Weirdest People in the World?" (2010) 33:2–3 Behav Brain Sci 61–83 at 1–4 and 62.

[39] Ciofalo, *supra* note 24 at 7.

[40] Uichol Kim, Kuo-Shu Yang & Kwang-Kuo Hwang, "Contributions to Indigenous and Cultural Psychology: Understanding People in Context" in Uichol Kim, Kuo-Shu Yang & Kwang-Kuo Hwang, eds, *Indigenous and Cultural Psychology: Understanding People in Context* (New York: Springer US, 2006) 3 at 4; Uichol Kim & Young-Shin Park, "The Scientific Foundation of Indigenous and Cultural Psychology: The Transactional Approach" in Uichol Kim, Kuo-Shu Yang & Kwang-Kuo Hwang, eds, *Indigenous and Cultural Psychology: Understanding People in Context* (New York: Springer US, 2006) 27 at 28.

[41] Eve Tuck, "Suspending Damage: A Letter to Communities" (2009) 79:3 Harv Educ Rev 409–428 at 412 (describing practices of eugenics research by White scientists in Aleut communities). An excellent example of this pathologization of Indigenous peoples can be found in the literature on the "windigo psychosis", a "culture bound syndrome" among Cree and Ojibway societies. For a review of this literature, see: Hadley Louise Friedland, *The Wetiko Legal Principles: Cree and Anishinabek Responses to Violence and Victimization* (Toronto: University of Toronto Press, 2018) at 24–38; Lou Marano et al, "Windigo Psychosis: The Anatomy of an Emic-Etic Confusion [and Comments and Reply]" (1982) 23:4 Current Anthropology 385–412. "Windigo psychosis" remains in the Penguin Dictionary of Psychology: Arthur S Reber, Rhiannon Allen & Emily S Reber, *The Penguin Dictionary of Psychology*, 4th ed (London: Penguin Books, 2009) at 875.

[42] In 1940, John Collier, the Commissioner of the United States Bureau of Indian Affairs (B.I.A), established the Indian Personality Project "to investigate the formation of Native American personalities on several reservations in the United States". As Gilman and Thomas write, the Indian Personality Project was "intended as a means whereby Collier's supporters could devise ways of helping Native American groups maintain their languages and cultures in the face of institutionalized prejudice." In this way, Collier inverted the civilizing strand in scientific discourse: "In other words, the ideology of this scientific undertaking was to prove not only that the so-called 'civilizing project' applied to Native Americans was faulty, but that the Native Americans were actually not in need of any such undertaking, as their cultures were rich and their identity not weakened, but strengthened, by their experience of 'dominant' culture." However, as Sanders and Gilman note, the Indian Personality Project applied intelligence tests to

psychological science's claim to authority and objectivity has been part of the problem. All of this calls into question *whose experience* matters in social psychology. For most of its history, prejudice reduction theory investigated the racial stereotypes and prejudices of White Americans. Critical race and Indigenous theorists, in contrast, center our understanding of settler colonialism, racialization, and racial stereotyping and prejudice in the experiences of racialized and Indigenous peoples. Fundamentally, then, ILE and social psychology hold different problematizations and objectives. For ILE, settler-colonialism is the primary barrier to engaging with Indigenous legal orders, whereas for prejudice reduction theorists, it is racial stereotyping and prejudice (keeping in mind, as well, that each theory defines "prejudice" in a different way). ILE is oriented towards ethically and respectfully engaging with Indigenous legal orders, whereas most prejudice reduction theories focus on the reduction of prejudice (the precise object depends on the theory) and harmonious intergroup relations. Thus, although we may start with racial stereotyping and prejudice, we must advance to discussions of law and psychology's settler colonial problem. This leads to my next point: conflict is not avoidable or necessarily to be avoided. Some implicit social cognition interventions, particularly implicit bias training, strive to make learning non-confrontational and easy; Jonathan Khan calls this "recreational anti-racism."[43] But Hewitt reminds us, through the story of the *Animiiki,* the thunderbirds, that important change can come from conflict.[44] Social psychological theories that explain stereotyping and prejudice as the result

demonstrate Native Americans' resiliency to colonialism, inadvertently excusing the impacts of American colonial policy, a kind of 'no harm, no foul': Gilman & Thomas, *supra* note 24 at 170–171. Joseph Gone, an Indigenous clinical community psychologist and professor of anthropology, warns that clinicians, without proper training, may "unwittingly enculturate our suffering patients into the ways of Western personhood through the subtle negotiations and transformations of self…": Joseph P Gone, "Keeping Culture in Mind: Transforming Academic Training in Professional Psychology for Indian Country" in Devon Abott Mihesuah & Angela Cavender Wilson, eds, *Indigenizing the Academy: Transforming Scholarship and Empowering Communities* (Lincoln: University of Nebraska Press, 2004) 124 at 133.

[43] Kahn, *supra* note 24 at 153.

[44] Hewitt, "Decolonizing and Indigenizing", *supra* note 4 at 65–66 and 83.

of implicit or natural processes may dismiss the social, ethical and normative commitments made by individuals, the choices we each make in unsettling, uncomfortable moments of conflict, and may obscure relations of power, domination, and subordination.[45] Such behavioralist explanations shift our focus away from the agency and responsibility of individuals as social agents.[46] Implicit social cognition theory, the proposition that stereotyping is a natural and implicit, or non-intentional, process is attractive because it avoids any unsettling discussion of power, of racialization, and of intentional behaviors that are discriminatory.[47] In contrast, racialized and Indigenous peoples' experiences challenge the idea that racial stereotyping and prejudice is largely unintentional or natural. The risk, then, is that White or non-Indigenous individuals in positions of power and decision-making, such as lawyers and judges, will prefer explanations of racial stereotyping and prejudice that minimize their personal responsibility and the need for accountability. This is the risk of what Seigel calls "preservation through transformation", the transformation of seemingly emancipatory language – of racial stereotyping and prejudice – that does little to shift inequitable relations sustained through law.[48] Finally, we must cautiously approach the evaluation of prejudice reduction interventions. Explicit measures of prejudice, such as self-reported beliefs and attitudes, can be inaccurate, and implicit measures, such as the implicit

[45] Kahn, *supra* note 24 at 129–132.
[46] Kahn argues that "[f]or the behavioral realist, ambiguity is bad because it creates space for discretion; discretion is bad because it relies on judgment; and judgment is bad because it is tainted by implicit biases. Although there is certainly a logic to this way of thinking and empirical evidence to support the idea that discretion and judgment are often tainted by bias, the logic and evidence do not necessarily mean that the best or primary way to address such problems is to eliminate ambiguity, discretion, and judgment […] This idea also threatens to obscure democratic accountability by asserting that expertly defined metrics can be used to evaluate and address bias definitively, which absolves political and legal actors of responsibility for the consequences of their actions": *Ibid* at 196–197.
[47] On the de-racination of racial stereotyping and prejudice and the obscuring of power, see *Ibid* at 111–113, 129–132.
[48] Reva B Siegel, "The Rule of Love: Wife Beating as Prerogative and Privacy" (1995) 105:8 Yale LJ 2117–2208 at 2179–2181. Kahn cautions that "… far from changing the game, [the use of social psychology to advocate for social change] may be inadvertently reinforcing some of the game's most pernicious rules": Kahn, *supra* note 24 at 64. Sears notes, for example, how American conservative have appealed to Martin Luther King Jr.'s "color-blindness" to justify policies and laws that prejudice racialized groups and maintain social inequality: David O Sears, "Inner Conflict in the Political Psychology of Racism" in John F Dovidio, Peter Glick & Laurie A Rudman, eds, *On The Nature of Prejudice: Fifty Years After Allport* (Malden, Massachusetts: Wiley-Blackwell, 2005) 343 at 354.

association test, are impractical in educational contexts.[49] If prejudice reduction interventions and ILE have different objectives, then the evaluation of prejudice cannot be used to assess the success of ILE.[50] At most, the evaluation of prejudice reduction interventions may support the experiences and knowledge of Indigenous professors and students.

For many of these reasons, I found it necessary to integrate social psychology with the experiences of Indigenous professors and students. Throughout my research, I prioritized the experiences of Indigenous educators, law professors, students, and lawyers.[51] I also considered, however, the experiences of settlers, particularly those who worked through discomfort towards an ethical space of engagement with Indigenous peoples and their legal orders.[52] Finally, I include my own

[49] Michael A Olson & Kevin L Zabel, "Measures of Prejudice" in Todd D Nelson, ed, *Handbook of Prejudice, Stereotyping, and Discrimination*, 2d ed (New York: Psychology Press, 2015) 175 at 181, 192–194 (describing the reactiveness of modern racism scales to motivations to appear non-prejudiced and some reliability concerns with the implicit bias association test).

[50] Reicher reminds us that we should also be mindful that "the way the problem is framed and the nature of its solutions are interdependent. If you misconceptualize the former, you will never arrive at the latter": Stephen Reicher, "From Perception to Mobilization: the Shifting Paradigm of Prejudice" in John Dixon & Mark Levine, eds, *Beyond Prejudice: Extending the Social Psychology of Conflict, Inequality and Social Change* (Cambridge: Cambridge University Press, 2012) 27 at 27–28.

[51] The prioritization of Indigenous persons' own stories is consistent with Indigenous methodologies and critical race theory: Jo-Ann Archibald, Jenny Bol Jun Lee-Morgan & Jason De Santolo, eds, *Decolonizing Research: Indigenous Storywork as Methodology* (London: Zed Books, 2019) Art 3; Borrows, *supra* note 8 at 62, 71, 212; Battiste, *supra* note 14 at 184; Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative" (1989) 87:8 Mich L Rev 2411–2441 at 2415–2416. Dominant cultures, too, tell stories that establish the boundaries of a *nomos*, a "normative universe": Robert M Cover, "Foreword: Nomos and Narrative" (1983) 97:1 Harv L Rev 4–68 at 4–12. In this way, Indigenous storytelling functions as counter-stories or as stories constitutive of their own *nomos*, their own lifeways. My movement between social psychology, a largely Eurocentric discipline, and Indigenous storytelling is a rhetorical move, intended to sharpen or expand our "zone of attention and field of discourse" about what is and what is not relevant to legal education and practice: James Boyd White, "Law As Rhetoric, Rhetoric As Law: The Arts of Cultural and Communal Life" (1985) 52:3 U Chicago L Rev 684–702 at 698. Finally, storytelling is an effective prejudice reduction intervention; readers may benefit from hearing the experiences of Indigneous students and professors in their own words: Paluck & Green, "Prejudice Reduction Interventions", *supra* note 25 at 353–354; see also Ifat Maoz, "Contact and Social Change in an Ongoing Asymmetrical Conflict: Four Social-Psychological Models of Reconciliation-Aimed Planned Encounters Between Israeli Jews and Palestinians" in John Dixon & Mark Levine, eds, *Beyond Prejudice: Extending the Social Psychology of Conflict, Inequality and Social Change* (Cambridge: Cambridge University Press, 2012) 269 at 278–281 (in the case of protracted, asymmetrical conflict not unlike under settler colonialism).

[52] Rupert Ross, *Dancing with a Ghost: Exploring Aboriginal Reality*, 2d ed (Toronto: Penguin Books, 2006); Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Books, 1996); John Reilly, *Bad Medicine: A Judge's Struggle for Justice in a First Nations Community* (Victoria: Rocky Mountain Books, 2010); John Reilly, *Bad Judgment: The Myths of First Nations Equality and Judicial Independence in Canada* (Victoria:

experience in Canadian legal education and practice. It can often be difficult to see the contradictions within settler colonialism. Indigenous peoples' experiences of the "obsidian quandaries", those fault lines of Indigenous legal orders in Canadian legal education, may provide relief.[53]

I cannot stress this enough: the use of social psychology is instrumental[54] for, not determinative of, understanding the effects of racial prejudice, stereotyping, and discrimination on Indigenous and non-Indigenous students and professors' engagement with ILE in Canadian law schools. Social psychology is helpful insofar as it (re)affirms Indigenous professors' and students' experiences, assists us in tailoring and justifying ILE and institutional commitments, articulates meaningful anti-prejudicial norms, and provides tools for reducing prejudice in the classroom. It is only one tool and one epistemological lens through which to understand barriers to, or opportunities for, ILE. None of these social psychological theories are, on their own or even together, a panacea.

Earlier, I said that I would come back to decolonization. As I completed this research, I concluded that social psychology offered only a preliminary and partial story of the barriers to ILE in Canadian law schools. Several theories, including contemporary theories of prejudice and social identity theory, accentuated the stories of Indigenous professors and students in Canadian law schools. I could see how the theory of "old-fashioned" prejudice described the hostility and antipathy some Indigenous professors and students face, for example in references to "dead

Rocky Mountain Books, 2014); John Reilly, *Bad Law: Rethinking Justice for a Postcolonial Canada* (Victoria: Rocky Mountain Books, 2019); Finch, *supra* note 3; Kirsten Anker, "Reconciliation in Translation: Indigenous Legal Traditions and Canada's Truth and Reconciliation Commission" (2016) 33:2 Windsor YB Access Just 15–44; Hannah Askew, "Learning from Bear-Walker: Indigenous Legal Orders and Intercultural Legal Education in Canadian Law Schools" (2016) 33:1 Windsor YB Access Just 29–46.

[53] Here, I mean relief both in a sense of resolution as well as *relevo*, "to raise", as in the sculptural technique applied to stone. A sculptural relief requires concentrated action against what appears to be a stable form.

[54] In the sense of being used as an instrument, not in the sense of "essential".

Indians" and in misogynistic fantasies of violence towards Indigenous women. Aversive racism theory illuminated why some non-Indigenous students feel uncomfortable around and avoid Indigenous peoples and their legal orders. The stories of Indigenous students and professors, who felt tokenized and patronized by the missionary-like helping behaviors of their peers, found a home in benevolent prejudice theory. But it was social identity theory, particularly intergroup threat theory, that launched my understanding of the barriers to ILE much further, towards a consideration of settler colonialism. I concluded, and conclude here, that the primary barrier to ILE is the perception by settler law students and professors that Indigenous peoples and their legal orders threaten the resources they enjoy as settlers in Canadian society, a perception associated with explicit prejudice towards Indigenous peoples. It is as James (Sákéj) Youngblood Henderson has said: "[i]n the post-colonial era, Canadians are comfortable believing Canadian federalism grew out of mystical democratic traditions, just as they are comfortable in assuming the rule of law exists. These beliefs are as much a matter of prejudice as convenience."[55]

In this thesis, there are four chapters and a conclusion. The first chapter – "We are all here to stay, but not in the same way" – and the conclusion complement each other. I begin with my story in Canadian legal education and practice as a Métis person; in a way, I hope to return the gifts given by other Indigenous professors and lawyers, who share their stories in writing. In my story, I provide examples for understanding the theories of social psychology that I introduce and explain in the chapters that follow. I have already flagged for you these theories, which are described mostly in chapter 2 and the beginning of chapter 3: social categorization, "old-fashioned" prejudice, contemporary theories of prejudice ("modern", aversive, and benevolent prejudice), and social identity theory (specifically, integrated threat theory and intergroup contact theory). In

[55] Henderson, "Treaty Federalism", *supra* note 8 at 312.

chapter 3, I identify individual and intergroup processes for reducing prejudice before inventorying current ILE initiatives (ranging from Indigenous law camps to admissions and hiring policies) and describing how these initiatives support prejudice reduction. In chapter 4, I briefly introduce measures for evaluating the success of prejudice reduction interventions. In the conclusion, I review this thesis within the framing of the first chapter, my experience. There, in the conclusion, I ask that you consider re-reading the first chapter with what you might have learned through the thesis. This thesis' roadmap forms a circle.

I structure the content of this thesis as a gradually rising topography. I intend to address different audiences, each with unique needs and prior levels of knowledge and commitment. For this reason, I start with the basics in social psychology on social categorization, and racial stereotyping and prejudice. Although the literature may appear as a relatively even terrain, it is not; social psychologists disagree about even these basic concepts. I hope to introduce successively more complex and challenging propositions, each building on the last. This stepladder approach is consistent with Monteith and Devine's models for self-regulating prejudice, which start with a high-level explanation of the processes of social categorization and of stereotyping and prejudice before asking participants to turn inward.[56] The most alarming proposition for some readers will be that settler colonialism, not just racial stereotyping and prejudice, is a barrier to ILE. By the last half of chapter two, I will have introduced two important theories, integrated threat theory and intergroup contact theory, that disclose how stereotyping and prejudice is related to group positions and threats to settler resources, in short, settler colonialism. Towards the end of Chapter 3, I also provide a critique of interventions that focus on individuals and on the fostering of intergroup harmony, and argue for interventions that sustain collective action towards social change, in short,

[56] Monteith and Devine's models will be discussed in Chapter 3.

decolonization. This progress in my argument is what moves us forward from a settler harm reduction approach to a decolonial one.

Readers who endorse decolonization may wonder why I take so long to get to an analysis of settler colonialism and decolonization. They may wonder what *my normative commitments are*. My argument is that prejudice reduction can start small and incremental, with implicit bias training and intergroup contact, but the respectful and ethical implementation of ILE will require the decolonization of Indigenous legal education and practice, which for me, is the dismantling of racial and settler-colonial hierarchies embedded in the rule of law. This thesis' incremental structure and its centering of Indigenous peoples' experiences is intended to function pedagogically as a prejudice reduction and settler harm reduction intervention.

Action-oriented readers may want to get out and do something. I do not prescribe any specific intervention. Instead, I emphasize the importance of agency and responsibility. For this reason, what you do depends on your familiarity and comfort with an intervention, the people you hope to engage, and your normative and ethical commitments. In chapter three, I explore two different prejudice reduction interventions, self-regulation and intergroup contact, consider those interventions alongside what some law schools are currently doing and mark out, in broad strokes, the scholarly conversations about these interventions. In chapter four, I briefly introduce how prejudice reduction interventions may be evaluated in Canadian law schools, while also flagging some of the limitations of these measures. Each of the theories presented in this thesis are only *an* explanation, none of which are universal or objective. They may be useful in certain situations for certain individuals. It will be important to recognize both the usefulness and limitations of a particular theory or intervention, which I will identify for you in this thesis. I intend to update my

website, www.reconcilelaw.ca, with additional resources.[57] By the end of this thesis, several theories and related interventions, and examples of ILE, will be available to you.

It is my hope that this thesis offers non-Indigenous students, professors and administrators a familiar framework through which they may continue to relate to the experiences and insights of Indigenous students and professors, and to respect Indigenous legal orders. I believe that non-Indigenous peoples' racial stereotyping, prejudice, and discrimination is a barrier to the implementation of the Calls and ILE in Canadian legal education and practice. For those who are on board with decolonization, at least theoretically, I hope that this thesis can support your engagements with colleagues, friends, and family who are starting from a different place. For those who are not on board, I hope that this thesis provides a relatively familiar framework to understand the barriers to, and opportunities for, the implementation of the Calls and ILE in Canadian law schools. Perhaps it will speak to you personally in a way that inspires you to respectfully and ethically support ILE, and perhaps even decolonization, in Canadian legal education and practice. For Indigenous students and professors, I hope that this thesis (re)affirms some of your experiences

[57] Johnson's Reconciliation Syllabus is an excellent portal for TRC-related materials for teaching law: Rebecca Johnson, "Reconciliation Syllabus", online: *reconciliationsyllabus: a TRC-inspired gathering of materials for teaching law* <https://reconciliationsyllabus.wordpress.com/>. Practical prejudice reduction interventions, both personal and intergroup, are also described in: Paluck & Green, "Prejudice Reduction Interventions", *supra* note 25; Jackson, *supra* note 24 at 159–176; Barlow & Sibley, *supra* note 25 at 428–431. There is also a well-developed literature on Indigenous cultural competency in Australia: *Indigenous Cultural Competency for Legal Academics Program: Final Report*, by Marcelle Burns, Anita Lee Hong & Asmi Wood (Armidale, Australia: University of New England, 2019). For a global review of Indigenous cultural competency in legal education, see *A Global Survey of Indigenous Legal Education and Research*, by Kerry Sloan (Victoria, B.C.: Indigenous Law Research Unit, University of Victoria, 2013). Finally, Demers' literature review on cultural competency, generally, in legal education is helpful: Annette Demers, "Cultural Competence and the Legal Profession: An Annotated Bibliography of Materials Published between 2000 and 2011" (2011) 39:1 Int'l J Legal Info 22–50. Paulette Regan and Robin DiAngelo's works are also useful introductions to settler colonialism and racism, respectively, for non-Black and non-Indigenous audiences: Regan, *supra* note 21; Robin DiAngelo, *White Fragility: Why It's So Hard for White People to Talk About Racism* (Boston: Beacon Press, 2018). Of course, my warning in this thesis – that we must consider collective action – applies to all of these resources, some of which can appear too much like the "prejudice problematic."

and functions as one tool for engaging with non-Indigenous peers and institutions towards a full implementation of the Calls and the decolonization of Canadian legal education and practice.

To recap, in the first chapter, I introduce myself and the experiences that led to this thesis and approach. In the second chapter, I integrate social psychology and the experiences of Indigenous students and professors to describe the impacts of racialization and racial stereotyping, prejudice and discrimination on Indigenous peoples, their perspectives, and legal orders in Canadian law schools. In the third chapter, I examine individual and intergroup prejudice reduction interventions, as well as social change theory, before moving on to an inventory and preliminary assessment of ILE programming and institutional commitments as settler harm reduction. In the final chapter, I briefly address how prejudice and settler harm reduction efforts may be evaluated, while also noting the importance of prioritizing Indigenous methodologies and perspectives. To conclude, I return to my experiences in legal education and practice, introduced in the first chapter and expanded upon in subsequent chapters.

What follows is my story as an Indigenous student and lawyer committed to the implementation of the Calls in Canadian legal education and practice.[58] This story not only orients my methodology in the thesis but establishes my personal relationship to ILE initiatives in Canadian legal education and practice.

[58] Some conventions require sanitizing any trace of the researcher's subjective interpretation of the literature. I think this is counterproductive to the kinds of conversation and engagement that is necessary to implement the Calls. Law and psychology's claim to universality and objectivity is part of the problem: Henderson, "Postcolonial Indigenous Legal Consciousness", *supra* note 5 at 48; Battiste, *supra* note 14 at 26, 95–96, 103, 158–159. My interpretation of my personal and professional experiences are central to this thesis. Hiding this behind more "formal" language would not respect your – the reader's – interpretation of this thesis. In addition, my "informal", personal approach is rhetorical and strategic: White, "Law As Rhetoric, Rhetoric As Law", *supra* note 51. I hope that readers can relate to my writing as if I am in speaking to them at a dinner table. Furthermore, this "informal", personal approach is consistent with indirect contact interventions through media, such as storytelling, narrative and perspective shifting: Paluck & Green, "Prejudice Reduction Interventions", *supra* note 25 at 353–354. It also reflects Indigenous and critical race storytelling methodologies: Archibald, Lee-Morgan, & De Santolo, *supra* note 51; Delgado, *supra* note 51; Borrows, *supra* note 8 at 62, 71, 212.

I. "We are all here to stay, but not in the same way"[59]

> "I remember once coming across an old white pine that had fallen in the forest. In its decayed roots a young birch and a young black spruce were growing, healthy and strong. The pine tree was returning to the earth, and two totally different species were growing out of the common earth that was forming. And none was offended in the least by the presence of the others because their own identities were intact."[60]

I am a Métis person from northern Saskatchewan. I was raised for most of my life in Treaty 6 adhesion territory, in the settler community of La Ronge, Saskatchewan. My mother traces her Métis ancestry to the Red River settlement. My maternal great-great grandparents are William Frank(s), an English ferryman, and Margaret-Harriet Sanderson, a Métis person from Fort Ellice, Manitoba. I was raised by my mother with my non-blood auntie Gloria, a Nêhiyaw woman, and her daughter – my non-blood sister or cousin – Diandra. My biological father, a member of the Prince Albert Métis society, is connected through the Red River Métis community around San Clara, Manitoba.

Growing up, I attended a settler elementary and high school. I was fortunate that the Northern Lights School Division incorporated both Nêhiyawewin (Cree language) and culture into our curriculum (though this was elective in upper years). I did not consciously know that I was choosing to learn from the experiences of both Indigenous and non-Indigenous kin and

[59] Scott Franks, *Notes on Aboriginal Peoples and Law: We are All Here to Stay, Canadian Institute for the Administration of Justice, 2015 Annual Conference* (Saskatoon, Saskatchewan, 2015) [unpublished, notes with author].
[60] Chief Gary Potts, of the Temagami Anishinaabe quoted in Borrows, "Outsider Education", *supra* note 3 at 14.

community. It seems it was just always that way. At some point, around the age of seventeen, I was told that my role was to leave La Ronge so that I could learn from others.

After an alienating experience in college and university, I moved to British Columbia. I worked with the Greater Victoria Police Victim Services in Victoria, British Columbia to improve the agency's relationship with the First Nations in the Greater Victoria region: Tsartlip, Tsawout, Tseycum, Songhees, Esquimalt, T'Sou-ke and Pauquachin. Starting with consultations, we were told that the agency should develop education and training for its victim services workers. Although there was a deep cultural competency literature in multicultural education and labour, I found these competency models insufficient and a poor fit for Indigenous-settler relationships. The next year, I worked for Reciprocal Consulting on an Indigenous cultural competency (ICC) program. These experiences introduced me to the Indigenous cultural competency and prejudice reduction literature.

I chose to attend Osgoode Hall for my Juris Doctor, rather than a law school in British Columbia, because I wanted to work with non-Indigenous students in, frankly, a less culturally safe environment. I had gotten it into my mind that a "buddy system" could be useful for reconciliation. I had some training and prior experience doing this when I attended an international college (located in Canada). I had been told as a youth that my gift or skill was my curiosity and care for others' experiences. The "buddy system" was also consistent with my understanding of Indigenous relational ethics and the cultural competency and prejudice reduction theory I learned in previous projects. I imagined the "buddy system" like a tether of relationships, a characterisation I now find as too codependent and oddly paternalistic to non-Indigenous people.[61] I was looking for

[61] I now see my relational practice as closer to what John Borrows describes in *Drawing Out Law*. According to Borrows' interpretation of Anishinaabeg pedagogical practice, the teacher models behaviour and instructs learners.

something closer to John Borrows' interpretation of the relationship between teacher and student, or, perhaps more appropriately, friendship.[62]

After listening to Senator Murray Sinclair speak at the Indigenous Bar Association Conference at Rama First Nation in 2013, I anticipated that Canadian law schools might strongly welcome Indigenous cultural competency training. However, I also worried that this momentum could be short-lived; I saw the stop-start of national support for the Truth and Reconciliation Commission. At that conference, Jeffery Hewitt spoke of the hummingbird doing all that it can to put out a fire, one drop at a time, and I wondered if the hummingbird needed a buddy too.[63]

In my second year, I joined the Osgoode Indigenous Students Association (OISA) as co-chair.[64] My experience with OISA challenged some of the assumptions I made about coming to Osgoode to work with non-Indigenous students. I thought, at the time, that the best way to create safer spaces for Indigenous students was to create relationships with non-Indigenous students. Now, I can see that I was focused on settler harm reduction. I summarised this in a vision: "My vision is to foster reciprocity between Indigenous and Canadian laws, Aboriginal and non-Aboriginal communities and within Canadian legal education."[65] Since I thought that relationships were integral to my vision, I worked to be as inclusive as possible in the organization. I knew that including settlers

There is a relationship of dependence. Yet, at the same time, learners exercise agency in choosing how and what they learns and how they apply that knowledge; see Borrows, *supra* note 8 at 44–47, 106–109. See also Battiste's description of the "learning spirit": Battiste, *supra* note 14 at 18, 106–162, 183.

[62] Borrows, *supra* note 8.

[63] Barkaskas retells this story, which originates among the Quechuan people of South American, in Patricia Barkaskas et al, "Reflecting on Clinical Legal Education at the Indigenous Community Legal Clinic" (2020) 32:1 JL & Soc Pol'y 138–157 at 156.

[64] The following is a reflection on my personal experience. Others may interpret what occurred differently. I do not intend to speak for the experiences of other students. I am only commenting on my beliefs and assumptions at the time. This is a matter of interpretation.

[65] Pearson College UWC, "Scott Franks wins York University 'this is my time' vision contest", (4 December 2013), online: *Pearson College UWC* <https://www.pearsoncollege.ca/scott-franks-wins-york-university-this-is-my-time-vision-contest/>.

within OISA could increase the risk to Indigenous members in the short-term, but I also believed that any Indigenous student who would choose to go to Osgoode – rather than the University of Victoria or the University of British Columbia – would have prepared themselves for this possibility; I had, so I made the incorrect assumption that others did too.

At an OISA executive meeting, a mature, non-Indigenous student argued that if the Indigenous students received a separate facility, so too should the mature students.[66] I was offended and so were many other Indigenous students at the table. I did not say anything within the group because I believed that as co-chair my responsibility was to listen and then to talk privately with the student. This is what I had learned from elders. I tried to remain friendly and welcoming, believing that I could be accountable for my actions, but some of my colleagues avoided me for most of the year. This destroyed me for a time. OISA later amended its constitution to create a separate honorary "ally" category for non-Indigenous students. When the mature non-Indigenous student approached me towards the end of the year to thank me for what they had learned, the experience felt like an unsettling dream.

I had assumed that other Indigenous students carried the same assumptions and expectations as me when that was not the case. I had spent so long thinking about non-Indigenous learners that I had completely missed what was happening for the Indigneous students that I had a responsibility to represent. We failed to culturally and spiritually support some of the Indigenous students. I could see, too, that my own positionality was important in all of this. I came to doubt the effectiveness of the "buddy system". One-on-one, positive, interpersonal encounters were too few, too limited

[66] On June 21, 2017, Hart House was renamed as Skennen'kó:wa Gamig, the House of Great Peace, and set aside for use by Indigenous students at York University:. York University, "York University's Hart House renamed to create safe space for Indigenous peoples – YFile", (21 June 2017), online: *York University* <https://yfile.news.yorku.ca/2017/06/21/york-universitys-hart-house-renamed-to-create-safe-space-for-indigenous-peoples/>.

in their capacity to immediately and broadly alter structural inequities and power imbalances. My approach appeared to have done nothing for the immediate needs of the Indigenous students at Osgoode and little to create structural change. It was also personally draining.

When the Truth and Reconciliation Commission released its report in 2015, I was working with the Constitutional Law Branch for the Ontario Ministry of the Attorney General (MAG). MAG's Indigenous Justice Division was established around that time as well, in order to implement the findings of the Debwewin Committee, which was responsive to Justice Frank Iacobucci's Report on First Nations Representation on Ontario Juries.[67] Quite quickly, broad based institutional support appeared for the Calls in law schools. I worried, however, that this momentum could be co-opted and processed through a neoliberalization of "reconciliation", an interpretation that favoured what Tuck and Yang describe as "settler futurity" or the status quo of settler colonialism.[68]

With this fresh momentum, the Canadian Institute for the Administration of Justice (CIAJ) held its annual conference on the banks of the South Saskatchewan river in mid-October 2015. The title of the conference, "We are all here to stay", repeated the memetic closing line of Chief Justice Lamer's reasons in *Delgamuukw v. British Columbia*.[69] No better statement of settler futurity may ever be spoken.[70] In his opening address, Saskatoon Tribal Council Chief Felix Thomas challenged

[67] Frank Iacobucci, *First Nations Representation on Ontario Juries* (Toronto: Ontario Ministry of the Attorney General, 2013).
[68] My thoughts at the time were influenced strongly by Henderson and Wakeham's collection, see Jennifer Henderson & Pauline Wakeham, eds, *Reconciling Canada: Critical Perspectives on the Culture of Redress*, 2d ed (Toronto: University of Toronto Press, 2013).
[69] *Delgamuukw v. British Columbia*, *supra* note 3 at para 186. In *R. v. Bloom*, Justice Green comments how "[t]hese final words achieved a meme-like status in the critical commentary that followed Delgamuukw": *R v Bloom*, 2016 ONCJ 8 at para 11.
[70] This theory of reconciliation is premised on the Crown's assumed sovereignty and Indigenous acquiescence to the Crown's interests. Michael Asch writes that, "what at first blush reads as an open-ended process becomes one based on this singular pre-condition: the agreement on the part of Indigenous peoples that the scope of their political rights,

the meaning of the conference's theme. For Chief Thomas, "being here to stay" meant the over-incarceration and criminalization of Indigenous peoples. "Here," Chief Thomas explained, "means in jail."[71] He offered an alternative interpretation based on treaty principles; that the conference should be about "gathering together" to reflect on not only Canadian law about Indigenous peoples, but also Indigenous realities, life and legal orders. Now, I reflect that Chief Thomas was inviting the participants into an ethical space of engagement. Justice LaForme shared Chief Thomas' concern, adding that "we are all here to stay, but not in the same way."[72] Justice LaForme was hopeful that change was possible.[73] He reflected that "we have moved on from hearing 'there is no such thing as sovereignty' [among non-Aboriginal lawyers and judges] to reconciliation and the kinds of discussions that we are having here [at this conference]."[74]

What followed at the conference was remarkable to me. Over eighty judges heard some of the most renowned Indigenous scholars in Canada chart a path towards respecting Indigenous legal orders in Canadian courts.[75] John Borrows laid out arguments for taking judicial notice of Indigenous stories as sources of law. Aimee Craft shared her community-based work on *Anishinaabe nibi inaakonigewin*, or Anishinaabe water law, in Manitoba and Northwestern Ontario. Jeffery Hewitt and Caleb Behn each tailored their presentations to incorporate Indigenous and non-Indigenous ways of understanding, explicitly in the hopes of speaking in ways familiar to

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and in particular, their right to self-determination, is circumscribed by the fact that, at the end of the day, whatever rights they may have are subordinate to the legislative authority of the Canadian state": Michael Asch, *On Being Here to Stay* (Toronto: University of Toronto Press, 2014) at 11.

[71] Franks, *supra* note 59.

[72] *Ibid*.

[73] Sean Fine, "For top Indigenous judge, the last breakthrough was beyond his reach: Retired from the Ontario Court of Appeal, Harry LaForme looks back at the many roadblocks he overcame and the one he could not - a seat on the Supreme Court", *Globe & Mail* (22 November 2018).

[74] Franks, *supra* note 59.

[75] Some of these speakers included Val Napoleon, Maria Campbell, Kimberly Murray, Jason Madden, Marilyn Poitras, and Winona Wheeler. Sylvia McAdam Saysewahum joined from the audience; her questions to Chief Justice McLachlin were, however, not answered.

non-Indigenous participants. How could the participants not come away with a greater understanding of the importance of Indigenous laws to the rule of law in Canada?

During Behn's presentation, an executive director of a province's social justice tribunals commented on how justices are sworn to uphold the rule of law. The executive director was responding to Behn's position that Indigenous peoples' resistance to extractive industries is authorized under Indigenous law. A possible subtext to the executive director's comment was Behn's relationship to George Behn, Behn's great grandfather and defendant in *Behn v. Moulton Contracting Ltd.*[76] In *Behn v. Moulton Contracting Ltd*., the Supreme Court of Canada did not consider whether the Behn family was authorised under Indigenous law to oppose Moulton Contracting's activities on their land.[77] Noting that the Behn family's actions were not authorised by the *Indian Act* band council, the Court characterised their actions as "self-help remedies" that would "bring the administration of justice into disrepute."[78] In short, the Court reasoned that the Behn family's actions were lawless. In the context of the panel's discussion, the executive director's comments implied that Indigenous legal orders were outside, or disorderly, to the Canadian rule of law. I was stunned. Were we even attending the same conference?

I held out hope that Chief Justice Beverly McLachlin would put the justices' minds at ease in her keynote speech. After all, only a few months prior the Chief Justice described Canada's colonial policies towards Indigenous peoples as "cultural genocide."[79] Justice Martel Popescul, the future

[76] *Behn v Moulton Contracting Ltd*, [2013] 2 SCR 227.
[77] Because of the nature of the litigation, the Supreme Court of Canada did not consider the Indigenous law argument to be relevant (though it did acknowledge the argument): *Ibid* at para 36. In my view, the Supreme Court's narrowing of the issue to abuse of process assumes that the Behn family's decision to rely on their rights under Indigenous law, to block Moulton's access, was not a valid legal avenue.
[78] *Ibid* at para 42.
[79] Sean Fine, "Chief Justice says Canada attempted 'cultural genocide' on aboriginals", *Globe & Mail* (28 May 2015), online: <https://www.theglobeandmail.com/news/national/chief-justice-says-canada-attempted-cultural-genocide-on-aboriginals/article24688854/>.

trial judge in Gerald Stanley's killing of Colten Boushie from Red Pheasant First Nation and former counsel for the RCMP in alleged police informant and White supremacist Carney Nerland's killing of Leo LaChance of Big River First Nation, introduced the Chief Justice.[80] The Chief Justice's speech, however, was very light on the theme of the conference. She spoke at length about the "access to justice" problem, characterised as Indigenous peoples' distrust and lack of knowledge of the Canadian justice system, and of the need for better childhood education about Indigenous peoples. I remember thinking: *you have hundreds of judges and lawyers in this room right now who can learn if you'd only tell them that it's OK.* After the conference, a judge from eastern Canada approached us – a group of Indigenous students having lunch – and told us that we were the generation that would make things right. *If you can have the foresight to see what we could do, why can't you do it yourself?* I left the conference feeling like the CIAJ's message was: *this is not your time*.

I struggled to put my thoughts together after the conference. I focused on my work with the Métis Settlements Appeal Tribunal in Edmonton, Alberta, with which I was placed through Osgoode's Aboriginal Lands, Resources and Governance Intensive. My attention shifted then to the bar exams, then to my clerkship, my wedding, and practice with Olthuis Kleer Townshend, LLP. During this period, I watched as Gerald Stanley was acquitted in the death of Colten Boushie and wondered how racial prejudice on the prairies may have affected the jury's decision.[81] I watched the circus of the "Stop-SOP"-pers, a cadre of lawyers who opposed the Law Society of Ontario's

[80] Kent Roach, *Canadian Justice, Indigenous Injustice: the Gerald Stanley and Colten Boushie Case* (Montreal & Kingston: McGill-Queen's University Press, 2019) at 60–62.
[81] Scott Franks, "Revisiting Judicial Instructions on Stereotyping and Prejudice Towards Indigenous Peoples in Canadian Criminal Trials", draft of March 29, 2020 [unpublished, with author].

Statement of Principles and Equity, Diversity and Inclusion initiatives.[82] In Ontario, at least, Jordan Peterson became something of a Jungian archetype for many of those who opposed what they called the death of free speech and thought – "Diversity, Inclusion and Equity" initiatives, or "D.I.E."[83] On Valentine's day, 2018, Justin Trudeau announced a legislative framework for the *Recognition and Implementation of Indigenous Rights*, based on some chapters from the almost two-decades old *Report of the Royal Commission on Aboriginal Peoples*, while leaving Romeo Saganash's Bill C-262 to die, which would have started the incorporation of the *United Nations Declaration on the Rights of Indigenous Peoples* into domestic legislation.[84] When the National Inquiry into Missing and Murdered Indigenous Women and Girls concluded that Canada's treatment of Indigenous women was genocide, settler editorialists chastised the Inquiry, suggesting that it would have been more pursuasive if it used lighter language.[85]

There was momentum to implement the Calls, but I worried that it would slip away as "projects" were "completed." For every year I attended the Indigenous Bar Association's Annual Conference, Kathleen Lickers and Candice Metallic reported on their efforts within the profession to implement

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[82] Anita Balakrishnan, "Group against LSO Statement of Principles to launch bencher election bloc", (13 February 2019), online: *Canadian Lawyer Magazine* <https://www.canadianlawyermag.com/resources/professional-regulation/group-against-lso-statement-of-principles-to-launch-bencher-election-bloc/275875>; Murray Klippenstein & Bruce Pardy, "How Social Justice Ideologues Hijacked a Legal Regulator", (11 February 2019), online: *Quillette* <https://quillette.com/2019/02/11/how-social-justice-ideologues-hijacked-a-legal-regulator/>.

[83] Jordan Peterson, "When the left goes too far — the dangerous doctrine of equity", *National Post* (10 May 2019), online: <https://nationalpost.com/opinion/jordan-peterson-when-the-left-goes-too-far-the-dangerous-doctrine-of-equity>.

[84] Scott Franks, "Can Canada recognize what's been in front of its face for 450 years?", (15 February 2018), online: *Olthuis Kleer Townshend LLP* <https://www.oktlaw.com/can-canada-recognize-whats-front-face-450-years/>; Justin Trudeau, "Remarks by the Prime Minister in the House of Commons on the Recognition and Implementation of Rights Framework", (14 February 2018), online: *Prime Minister of Canada* <https://pm.gc.ca/en/news/speeches/2018/02/14/remarks-prime-minister-house-commons-recognition-and-implementation-rights>; Brenda Gunn, "The Senate Halts Recognition of Indigenous Rights on National Indigenous Peoples Day", (24 June 2019), online: *Centre for International Governance Innovation* <https://www.cigionline.org/articles/senate-halts-recognition-indigenous-rights-national-indigenous-peoples-day>.

[85] Janice Dickson, "Scheer rejects inquiry's finding of 'genocide': Conservative Leader says missing, murdered Indigenous women and girls is 'its own tragedy'", *Globe & Mail* (11 June 2019); Murray Mandryk, "Word 'genocide' will distract from MMIWG report", *Star Phoenix* (June 2019) A5; John Ivison, "Uncompromising nature of report may doom it", *National Post* (4 June 2019).

the Calls. The Advocate's Society had released its *Guide for Lawyers Working with Indigenous Peoples*, which I felt was a good first step.[86] Aboriginal Legal Services of Toronto released their own guide, *Communicating Effectively with Indigenous Clients*.[87] The Ontario Ministry of the Attorney General, which had been experimenting with voluntary programs for Crown counsel at least by 2014, modified and adopted an Indigenous cultural competency program for counsel and support staff while developing its own program, *Bimickaway*, through the Indigenous Justice Division. Around this time, I developed an accredited continuing legal education course that provided a preliminary overview of the prejudice reduction literature and outlined its practical application for the profession.

I remained concerned that institutions would accept but not apply the decolonial insights of Indigenous scholars and practitioners, preferring to leave the implementation of the Calls to the marketplace. I could not imagine the Stop-SOP benchers supporting decolonization, let alone Indigenisation, initiatives. Even without such aggressive opposition, I was concerned that the neoliberalization of the profession – both in practice and academia – could undermine the long-term implementation of the Calls.[88] My experience as a policy consultant suggested to me that the

[86] *Guide for Lawyers Working with Indigenous Peoples*, by The Advocates' Society, Indigenous Bar Association & Law Society of Ontario (Toronto: The Advocates' Society, 2018).

[87] *Communicating Effectively with Indigenous Clients*, by Lorna Fadden & Aboriginal Legal Services of Toronto (Toronto: Aboriginal Legal Services, 2017).

[88] Between 2016 and 2020, I observed that many general service law firms changed the name of their practice group from Aboriginal law to Indigenous law. On January 12, 2017, I had a conversation with a leading partner of a general service law firm's Indigenous law practice group. That partner explained that the name change reflected the language used by their clients and did not necessarily indicate that the firm practiced Indigenous law. Since then, even the Lexpert Legal Directory has changed the Aboriginal law category to "Indigenous law". I am concerned that this type of change may undermine the actual reform of legal services of Indigenous peoples, a form of preservation-through-transformation as described by Reva Siegel: Siegel, "The Rule of Love", *supra* note 48 at 2184–2185. Moreover, even though greater numbers of Indigenous summer students and associates are being hired, the number of Indigenous partners remains incredibly low, only 11 out of 203 by my count. For this count, I included only those firms listed as most frequently recommended, consistently recommended, and repeatedly recommended under the "Indigenous Law" category on January 2020. These firms were: Gowlings WLG, Olthuis Kleer Townshend, Pape Salter Teillet, Bennett Jones, Borden Ladner Gervais, Fasken Martineau DuMoulin, McMillan, Dionne Schulze, Hutchins Legal, O'Reilly & Associés, McCarthy Tétrault, Lawson Lundell, Mandell Pinder, Ratcliff & Company, Donovan & Company, Grant

success of such initiatives was often dependent on long-term institutional support. If a decision-maker did not understand the *value* of Indigenisation or decolonization (though, economic *valuing* of decolonization is oxymoronic), support could vanish. We would return to the heavy burden placed on individual Indigenous educators and students.

The settler harm reduction approach influences my choice of methodology. Personal experience informs me that many non-Indigenous settlers and institutions implicitly oppose decolonial and anti-racist programs and resist engaging respectfully with Indigenous legal orders. A "stop-gap", or better yet a stepping stone, was necessary to raise settlers' critical consciousness of settler colonialism and racism in Canadian legal education.[89] I understood that the problem was not so much pedagogical technique or content but the comfort of settler colonial privilege and the unsettling experience of imaging an uncertain settler future. The idea of addressing the settler path to ethically engaging with Indigenous legal orders became clearer to me. I wanted to better understand not only my experience but also the experiences of Indigenous and non-Indigenous students, professors, and legal professionals. What could social psychology tell me about these experiences and the implementation of the Calls and ILE in Canadian law schools?

Huberman, Boughton Law Corporation, Callison & Hanna, Cassels Brock & Blackwell, Miller Thomson, Norton Rose Fulbright Canada, Blake, Cassels & Graydon, MLT Aikins, and Rae & Company. For general service firms, I limited my review to the Indigenous or Aboriginal law practice group (in some cases, the Aboriginal law practice group was located within the category of energy or resources). Miller Thomson does not list lawyers under their Aboriginal law practice group, and so was not included. I only counted an individual as an Indigenous lawyer if they publicly identified their Indigenous community; as a result, some well-known Indigenous lawyers were not included in my count (approximately 3). I have also not included Indigenous senior counsel or retired partners (approximately 3). The review was completed based on each firm's website as of January 29, 2020. My review did not include other significant law firms such as Woodward and Company, Janes Freedman Kyle, and Maurice Law because they were not listed in the Lexpert index. Of the firms I reviewed, Callison & Hanna is notable in that both of its founding partners are Indigenous.

[89] Tuck & K. Wayne, "Decolonization is not a Metaphor", *supra* note 4 at 21.

II. Racial prejudice, stereotyping and discrimination against Indigenous students, faculty, staff, and Indigenous legal education in Canadian law schools

> "It is easier, someone has said, to smash an atom than a prejudice."[90]

In this chapter, I explore the manifestation of racial prejudice, stereotyping and discrimination against Indigenous students and professors in Canadian law schools.[91] To do so, I will explain the social categorization and racialization of Indigenous peoples in Canadian legal education. Having described some of the ways that Indigenous peoples are categorized by settlers, I will then turn to key theories in social psychology to explain Indigenous students' and professors' experiences of prejudice. I propose that these theories are helpful for describing and understanding, within a non-Indigenous epistemological tradition, the experiences of Indigenous students and professors, and the beliefs, attitudes and behaviors of their non-Indigenous peers. Taking up some of these experiences, I will describe how Indigenous students and professors navigate their identities as Indigenous professionals in Canadian contexts in light of social categories negotiated by both Indigenous and non-Indigenous communities. I will expand on this through the concept of tokenism and stereotype threat, which may explain Indigenous students' and professors' responses to, and experiences of, racial prejudice in Canadian law schools. Because these concepts risk pathologizing Indigenous peoples and rendering them as passive recipients of harm, I illustrate how Indigenous students' and professors' responses to racial prejudice can be understood through the concept of *survivance*.[92] I will then reconsider two arguments against Indigenous legal

[90] Allport, *supra* note 24 at xvii.
[91] Although I focus on the experiences of Indigenous students and professors, this thesis and its insights may also apply to Indigenous staff.
[92] I also try to avoid pathologizing non-Indigenous peoples' beliefs, attitudes and behaviours. I do not endorse the medicalization or biologization of racism or racial prejudice, stereotyping and discrimination as a "disease." Such accounts threaten to undermine the agency of individuals, communities, and society, and prioritize scientific discourses of racism and prejudice. So much nuance may be lost when racism or prejudice is approached in this way.

education from a social psychology frame: opposition to inclusionary policies (affirmative action) and opposition to ILE. This framing supports my conclusion that opposition to inclusionary policies and ILE can be understood as responses to perceptions of threat to settler-colonialism. This insight is not particularly novel, since Indigenous scholars, activists and communities, and some non-Indigenous scholars, have, for decades, described this phenomenon as key to settler opposition to Indigenous peoples and their rights and interests.[93] Taken together, these theories and the experiences of Indigenous students and professors help refine our understanding of the interventions discussed in chapter 3.

Before continuing, I note that I often cite to Kite and Whitley's textbook, *Psychology of Prejudice and Discrimination*, rather than the theoretical and experimental literature.[94] To prepare for this thesis, I read several recent anthologies in social psychology, as well as some of the experimental literature, *before* reading Kite and Whitley's text.[95] For the purposes of this thesis, I use this text as my cornerstone. First, Kite and Whitley's text, in my opinion, provides an excellent and comprehensive review of the key debates and findings in the literature. I am confident that the textbook refers to much of the same literature that I reviewed. Second, because this text is an overview of the discipline, it addresses contrasting or conflicting theories in ways that some researchers, particularly those advocating for a specific theoretical approach, may not. Third, I am a lay researcher insofar as social psychology is concerned. Kite and Whitley's text was useful in orienting my understanding of the literature. I expect that many readers of this thesis will also be lay readers. Such readers may find this text more accessible than the experimental literature. Thus, I conclude that Kite and Whitley's text offers more benefits than risks for this thesis' purpose. I

[93] See, for example, Pauline Wakeham, "Reconciling 'Terror'" (2012) 36:1 Am Indian Q 1-33,117.
[94] Whitley & Kite, *supra* note 24.
[95] See note 24 and accompanying commentary for a description of my reading of the literature.

have, however, also cited to the theoretical and experimental literature when it is key to my argument, particularly with respect to theories of intergroup threat and contact.

1. Social Categorisation and Racialization

After I applied to Osgoode Hall Law School, I was invited to an admissions event at the Shangri-La Hotel in Vancouver.[96] I remember sitting at the table with the then-Dean Lorne Sossin and feeling enthused about law school. Later than evening, I met an esteemed bencher from the Law Society of British Columbia. At some point in the conversation, the bencher asked me, "Which one of your parents is Indian?" "That's not how it works," I responded frankly.[97] I explained that both of my parents are Métis, but I could see that his interest in me was quickly diminishing. He may have taken my response as aggression or felt uncomfortable in the interaction; our power differential due to the bencher's seniority in the profession may have been relevant. There was a shuffle of sorts, and like the furthest planet in orbit, I was flung back to the charcuterie. I love cheese, so I thought "this is fine."

Processes of social categorisation and racialization were afoot in my conversation with the bencher. Social psychologists define social categorisation as "the process of simplifying the environment by creating categories on the basis of characteristics… that a particular set of people appear to have in common."[98] Social identity theorists expand on this, noting how one's self-concept "derives from membership in groups that are important to the person."[99] Social

[96] This event occurred on January 29, 2013 at 6:00 p.m. at 1128 West Georgia Street in Vancouver, British Columbia.
[97] On reflection, I responded that way because I did not care about his expectations or comfort. At that time, I didn't see myself as a lawyer (that wasn't why I went to law school), and so it didn't matter to me if a bencher of the law society left with hard feelings. I can understand why other Indigenous students may have responded differently to this question. I come back to the problem of identity when discussing tokenism and stereotype threat.
[98] Whitley & Kite, *supra* note 24 at 87.
[99] *Ibid* at 303.

categorisation is an intergroup process; it involves negotiation about the boundaries between group identities.[100] This does not mean, however, that such processes are equitable or inevitable in their outcomes. Racism, for example, is an ideology of subordination on the basis of perceived group differences.[101] Sociologists Omi and Winant define racialization as "the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed."[102] Even some cognitive and evolutionary social psychologists concede that, though social categorisation may be a "natural" part of human cognition and behaviour, it manifests in social context and action.[103]

In the law school context, some Indigenous students report being identified by their non-Indigenous peers and on the basis of race. One Indigenous woman who was a law student recalls:

> I overheard two women in the back of Torts discussing who was and was not Indian in the classroom. The assessment was based purely on physical attributes. More distressing and painful than that was the fact that we were objectified and examined like some foreign entity in "their" class. I was hurt, alone and labelled

[100] Katherine J Reynolds, S Alexander Haslam & John C Turner, "Prejudice, Social Identity and Social Change: Resolving the Prejudice Problematic" in John Dixon & Mark Levine, eds, *Beyond Prejudice: Extending the Social Psychology of Conflict, Inequality and Social Change* (Cambridge: Cambridge University Press, 2012) 48 at 50–59.
[101] For a definition of racism as ideology, see Robert Miles & Malcolm Brown, *Racism*, 2d ed (New York: Routledge, 2003) cs 1–2.
[102] Michael Omi & Howard Winant, *Racial Formation in the United States: from the 1960s to the 1990s*, 2d ed (New York: Routledge, 1994) at 55–56. For a recent literature review on racial formation, see Aliya Saperstein, Andrew M Penner & Ryan Light, "Racial Formation in Perspective: Connecting Individuals, Institutions, and Power Relations" (2013) 39:1 Ann Rev Soc 359–378.
[103] Susan T Fiske, "Social Cognition and the Normality of Prejudgment" in John F Dovidio, Peter Glick & Laurie A Rudman, eds, *On The Nature of Prejudice: Fifty Years After Allport* (Malden, Massachusetts: Wiley-Blackwell, 2005) 36 at 37–38; Oliver Sng, Keelah EG Williams & Steven L Neuberg, "Evolutionary Approaches to Stereotyping and Prejudice" in Chris G Sibley & Fiona Kate Barlow, eds, *The Cambridge Handbook of the Psychology of Prejudice* (Cambridge: Cambridge University Press, 2018) 40 at 44, 47; for a critical perspective, see Charles Stangor, "The Study of Stereotyping, Prejudice, and Discrimination within Social Psychology: A Quick History of Theory and Research" in Todd D Nelson, ed, *Handbook of Prejudice, Stereotyping, and Discrimination*, 2d ed (New York: Psychology Press, 2015) 3 at 13.

by women I was to spend the next three years with. I remember that every time I speak with either of them.[104]

Processes of social categorisation and racialization obscure personal, professional, and intersecting identities[105] in favour of a perceived homogenous outgroup identity.[106] Indigenous women, because of their intersecting identities, may be perceived to be representative neither of gender nor Indigeneity, a phenomenon described by some social psychologists as "intersectional invisibility."[107] Where physical appearance of race is observed as relevant, light skin Indigenous

[104] Tracey Lindberg, "What Do You Call an Indian Woman with a Law Degree - Nine Aboriginal Women at the University of Saskatchewan College of Law Speak Out" (1997) 9:2 Can J Women & L 301–335 at 303.

[105] On the concept of intersectionality, see Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1990) 43:6 Stan L Rev 1241–1300; Whitley & Kite, *supra* note 24 at 24. Indigenous students and professors negotiate many different personal and professional identities, as an Indigenous person, as a man or woman, as a lawyer or legal professional working in Indigenous or non-Indigneous legal orders. For an overview of the literature on how Indigenous legal professionals negotiate their personal and professional identities, see Sonia Lawrence & Signa Daum Shanks, "Indigenous Lawyers in Canada: Identity, Professionalization, Law" (2015) 38:2 Dalhousie LJ 503–524; Monture-Angus recounts the challenges facing Indigenous women who are professors in classes that address race and gender, Monture-Angus, *supra* note 8 at 67; Nine Indigenous women share their different perspectives on gender, and their Indigenous and professional identities in Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 307–309, 312, 315–317, 319, 324; In Vampire's Anonymous, Robert Williams Jr., describes the life draining experience of being an Lumbee person in the American legal academy and how he returned from the undead to tell his story: Robert A Jr Williams, "Vampires Anonymous" (1996) 95:4 Mich L Rev 741–765; In the United States, Christine Zuni Cruz tells us how she and others may return to practice law in and for their Indigenous Nations: Christine Zuni Cruz, "On the Road Back In: Community Lawyering in Indigenous Communities" (1999) 24:1 Am Indian L Rev 229–274. For a perspective of an Indigenous person in Australia, see Loretta Kelly, "A Personal Reflection on being an Indigenous Academic" (2005) 6:8 Indigenous L Bull 19; Irene Watson, "Some Reflections on Teaching Law: Whose Law, Yours or Mine?" (2005) 6:8 Indigenous L Bull (Racism in Legal Education Special) 23; Hannah McGlade, "The Day of the Minstrel Show" (2005) 6:8 Indigenous L Bull 16.

[106] "There is no differentiation amongst Aboriginal students in terms of gender or individualism. We are lumped together": quoted in Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 315. For a description of the outgroup homogeneity effect, the tendency to "underestimate the differences among members of other groups", see Whitley & Kite, *supra* note 24 at 100–101. In my experience, the outgroup homogeneity effect is common. When the bencher asked me "which one of your parents is Indian?" he was collapsing meaningful legal and social categories – Indigenous, First Nations, status Indian, mixed-ancestry, and Métis – into one broader racial category – Indian. For a sociological description of how a single racial category undermines distinct Indigenous identities, see Chris Andersen, *"Métis": Race, Recognition, and the Struggle for Indigenous Peoplehood* (Vancouver: UBC Press, 2014) at 26–58; For a primer on the language used to describe First Nations, Métis and Inuit, and on collective categories based on race or self-determination (Indigenous peoples), and the language used to describe non-Indigenous Canadians (settlers), see Vowel, *supra* note 9 at 5–22.

[107] Another Indigenous woman who was a law student recalls: "[…] I find the Aboriginal men have found their voices a lot easier than Aboriginal women in the college. I have only been present during one incident of an Aboriginal woman speaking out in class. It seems like we are the first to be asked for our opinions on Aboriginal issues and dismissed in many other situations": quoted in Lindberg, "What Do You Call an Indian Woman with a Law Degree?",

students and professors may experience tensions in how they are included or excluded from, or identify with, Indigneous and non-Indigneous groups. Indigenous students who are "White-passing" or coded as "White" may experience tension between their sense of identity as an Indigenous person and their White-coded privilege,[108] and/or struggle to associate with their Indigenous and non-Indigenous peers.[109] Indigenous persons who "conceal" their identities may be less likely to identify with stereotypes held about their group membership and may be reluctant to perceive discrimination against them as harmful.[110] Social categories are also important to non-Indigenous peoples. Non-Indigenous judges and lawyers reflect on how their social identities – as professionals, as European or White, as non-Indigenous – are relevant to their respectful engagement with Indigenous peoples and Indigenous legal orders.[111]

supra note 104 at 308. Process of prototypicality (the extent to which an individual is perceived to be typical of his or her group) appear to render racialized women's intersectional identities invisible: Whitley & Kite, *supra* note 24 at 131–133.

[108] See, for example, the experience of Jennifer Mackie as quoted in Barkaskas et al, "Indigenous Community Legal Clinic Reflections", *supra* note 63 at 143–145.

[109] For intersectional and White-coded individuals, their perceived outgroup membership (Indigenous) by White observers is dependent on the boundaries created through externally determined social categorisation and racialization. At the same time, these same individuals may feel alienated from their own felt ingroup – as an Indigenous person – on the basis of internally defined boundaries – such as Indigenous nation, kinship, or language – or boundaries appropriated from the White outgroup (such as race or genetics). Some Indigenous students will "pass" as White to avoid the consequences of identifying as an Indigenous person; others may employ rhetorical and behavioural strategies to – or simply *be* – Indigenous. All of this depends on social context. As a young person in northern Saskatchewan, I was racialized and identified as a Métis person. When I moved south, I found that I was identified by others as White more often than as Indigenous or Métis. Since my Métis identity has always been important to me, I would emphasize my background whenever relevant. As a result, I experienced, at times, pushback from both Indigenous and non-Indigenous individuals that I was either not Indigenous or not really White.

[110] For a discussion of "concealable stigmas" such as the physical appearance of race, see Whitley & Kite, *supra* note 24 at 395, 406–409.

[111] Rupert Ross, a former Crown prosecutor in Northern Ontario, retired Justice John Reilly, and Justice Lance Finch recall their experiences learning about Indigenous legal orders and from Indigenous communities; see Ross, *supra* note 52; Ross, *supra* note 52; Reilly, *supra* note 52; Reilly, *supra* note 52; Reilly, *supra* note 52; Finch, *supra* note 3. In a personal reflection, lawyer Hannah Askew describes how humbly engaging with Indigenous stories broadened her understanding of law and community lawyering: Askew, "Learning from Bear-Walker", *supra* note 52. Shin Imai describes his experience as a community lawyer in six First Nations communities and how this experience informed his clinical teaching: Shin Imai, "A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering" (2002) 9:1 Clinical L Rev 195–228.

Even though *Indigeneity* is not a racial category, Indigenous peoples *are racialized* in Canadian society. For example, the Federal government has exercised its legislative authority under s. 91(24) of the *Constitution Act, 1867* to define and narrow its obligations to those Indigenous peoples who are eligible for "status" under the *Indian Act*.[112] Chris Andersen writes that the *Indian Act* is "[p]erhaps the most notorious instance of Canadian racial categorization..."[113] As legal historian Bhandar argues, "[Indian] status has become a racialized designation that is determined by an individual's gender and marital status and upon which access to one's land depends…"[114] Eva Mackey illustrates how *racialized* difference is re-coded as *cultural* difference through Canadian multiculturalism: "A settler colony with official policies of multiculturalism and bilingualism, Canada has an official national culture which is not 'homogeneous in its whiteness' but rather replete with images of Aboriginal people and people of colour. The state-sanctioned proliferation of cultural difference (albeit limited to specific forms of allowable difference) seems to be the defining characteristic of Canada."[115] Indigenous peoples' racial or cultural difference is juxtaposed against "Whiteness", which "refuses categorisation other than just 'normal' and 'human'", and against the "ordinary Canadian."[116]

In this way, Indigenous peoples' political, social, spiritual, and legal differences – their *Indigeneity* – are denied through processes of social categorisation based on race and culture. Indigenous peoples hold rights and responsibilities that are vastly different from other groups or individuals. For example, s. 35 of the *Constitution Act, 1982* affirms and recognizes the collective rights of

[112] *The Constitution Act, 1867* 30 & 31 Vict, c 3; *Indian Act* RSC 1985, c I-5.
[113] Andersen, *supra* note 106 at 31.
[114] Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham: Duke University Press, 2018) c 4.
[115] Eva Mackey, *The House of Difference: Cultural Politics and National Identity in Canada* (Toronto: University of Toronto Press, 2002) at 21.
[116] *Ibid* at 35.

Indigenous peoples.[117] The Canadian state also has a unique political relationship with Indigenous peoples through s. 91(24) of the *Constitution Act, 1867* and through, in some areas, treaties.[118] Indigenous peoples root their relationship to the land and to each other through lifeways that include Indigenous legal orders.[119] However, as Glen Coulthard argues, "over the last thirty years, the Supreme Court of Canada has consistently refused to recognize Aboriginal peoples' equal and self-determining status based on its adherence to legal precedent founded on the white supremacist myth that Indigenous societies were too primitive to bear political rights when they first encountered European powers. Thus, even though courts have secured an unprecedented degree of protection for certain 'cultural' practices within the state, they have nonetheless repeatedly refused to challenge the racist origins of Canada's assumed sovereign authority over Indigenous peoples and their territories."[120] For these reasons, it makes sense to describe how non-Indigenous peoples or settlers socially categorise Indigenous peoples on bases other than their *Indigeneity*.

2. Stereotypes and Prejudice

Gendered and racialized difference is not natural or inevitable; it is a function of social categorisation and racialization in a particular social context. Stereotypes are the "beliefs and opinions about the characteristics, attributes, and behaviours of members of various groups."[121]

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[117] *Constitution Act, 1982* being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 35.
[118] *The Constitution Act, 1867*, *supra* note 112.
[119] Borrows, *supra* note 3 at 23–24; Mills, *supra* note 5 at 68–97.
[120] Coulthard, *supra* note 8 at 41; Borrows, *supra* note 3 at 199–201 (arguing for the recognition of Indigenous peoples political jurisdiction in Canadian federalism); see also Robert A Jr Williams, "Columbus's Legacy: Law as an Instrument of Racial Discrimination against Indigenous Peoples' Rights of Self-Determination" (1991) 8:2 Ariz J Int'l & Comp L 51–76.
[121] *Ibid* at 13. The *Penguin Dictionary of Psychology* defines "stereotyping" as "(1) a set of relatively fixed, simplistic overgeneralizations about a group or class of people. Here, negative, unfavourable characteristics are emphasized, although some authorities regard positive but biased and inaccurate beliefs as components of a stereotype. Given the ubiquity of this meaning it is of interest that empirical studies of people's attitudes towards social groups and classes other than their own have not supported the theory invited by this definition, particularly with regard to the notions of rigidity and inaccuracy. Hence: (2), within a culture, a set of widely shared generalizations about the psychological characteristics of a group or class of people. This rather more neutral definition is preferred, as it (a) allows for

Generally, social psychologists find that stereotypes may be "positive" or "negative" (in my view, a problematic and artificial distinction),[122] be descriptive or prescriptive,[123] change over time and differ within cultures or subgroups,[124] and differ in their (in)accuracy (which is also a controversial matter).[125]

Stereotypes about Indigenous people include assumptions about Indigenous peoples, and their cultures, traditions, and laws. Tracey Lindberg writes how these stereotypes alienate Indigenous law students:

> The traditional image of the Indian is prevalent in the college. True, there are values, cultural understandings, and historical learnings that we always carry with us. But we drive cars, use fax machines, and are computer literate. Somehow, the traditional image of the Indian woman pervades the minds of some of our colleagues and all of their casebooks. There is a sense that others

stereotypes to change, as we know they do, (b) permits the inclusion of positive and accurate characteristics, and (c) emphasizes that stereotypes are widely shared – somehow, when a set of beliefs is held by only a few the term hardly seems justified; (3) to form or utilize such beliefs, to classify or categorize an individual on the basis of them.": Reber, Allen & Reber, *supra* note 41 at 773.

[122] To say that stereotypes may be "positive" does not mean they are desirable or without harmful effect. Rather, this distinction describes the valence, the "goodness" or "badness", applied to different stereotypes by the people who use and study them. In my view, it is an artificial distinction, helpful for conceptual clarity in social psychology, but collapsed in a social reality where stereotypes function to stigmatize racialized and Indigenous peoples. For a discussion of "positive" and "negative" stereotypes in the context of ambivalent prejudice, the holding of both sorts of stereotypes at the same time, see John F Dovidio, Samuel L Gaertner & Adam R Pearson, "Aversive Racism and Contemporary Bias" in Chris G Sibley & Fiona Kate Barlow, eds, *The Cambridge Handbook of the Psychology of Prejudice* (Cambridge, United Kingdom: Cambridge University Press, 2018) 251 at 275.

[123] Whitley & Kite, *supra* note 56 at 14.

[124] A point made by Stangor, *supra* note 55 at 14–15.

[125] Some social psychologists, such as Lee Jussim, argue that stereotypes may differ in the accuracy of their content or application to a social group: Lee Jussim et al, "Stereotype Accuracy: One of the Largest and Most Replicable Effects in All of Social Psychology" in Todd D Nelson, ed, *Handbook of Prejudice, Stereotyping, and Discrimination*, 2d ed (New York: Psychology Press, 2015) 29 at 29. Stangor cautions that it may be difficult, if not impossible, to know whether the content of a stereotype is accurate: Charles Stangor, "Content and Application Inaccuracy in Social Stereotyping" in Yueh-Ting Lee, ed, *Stereotype Accuracy: Toward Appreciating Group Differences* (Washington: American Psychological Association, 1995) 275 at 277–279, 282–284. Who, after all, will catalogue and interpret the accuracy of stereotype content for a social group? Moreover, even though stereotypes may be accurate, there are morally defensible reasons why society might choose to prohibit the specific application of stereotypes: Daniel Kahneman, *Thinking, Fast and Slow* (London: Penguin Books, 2012) at 168–169.

> possess a right not to know about the actualities of Aboriginal lifestyles and thought. We are not so enabled. […] It is disturbing when any person feels that she is not taken seriously or is dismissed because of her race.[126]

Stereotypes may be expressed as beliefs about Indigenous peoples as lazy, as trouble-makers or militant, as angry, or as unintelligent.[127] Indigenous students recall hearing opinions that: "[i]f [Indigenous students] take their degree a little more seriously they wouldn't get into trouble while they were here"[128] and that "[t]he part-time [law] program wouldn't be in trouble if there weren't so many Indians in it."[129] Indigenous peoples and their laws may be stereotyped as inferior or unsophisticated.[130] Even stereotypes that appear as "positive", such as the stereotype that Indigenous peoples are connected to the environment, obscure or ignore the agency and experiences of Indigenous individuals and their communities.[131] I posit that stereotypes, whether "positive" or "negative", pathologize Indigenous students or professors, inoculate the non-

[126] quoted in Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 313.
[127] Monture-Angus, *supra* note 8 at 35. These stereotypes are discussed in the Canadian social psychology literature: see Marlene Mackie, "Ethnic Stereotypes and Prejudice: Alberta Indians, Hutterites, and Ukrainians" (1974) 6:1 Can Ethnic Stud 39. Although dated, Mackie's review of stereotypes held about Indigenous peoples in Alberta remains relevant to understanding stereotypes about Indigenous peoples in Canada, see Geoffrey Haddock, Mark P Zanna & Victoria M Esses, "The (Limited) Role of Trait-Laden Stereotypes in Predicting Attitudes Toward Native Peoples" (1994) 33:1 Brit J Soc Psych 83–106. Stereotypes end up informing how settlers interpret Indigenous peoples' exercise of their rights: see, for example, how Canadian law criminalizes Indigenous rights holders and land protectors, in Shiri Pasternak, Sue Collis & Tia Dafnos, "Criminalization at Tyendinaga: Securing Canada's Colonial Property Regime through Specific Land Claims" (2013) 28:1 CJLS 65–82.
[128] quoted in Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 325.
[129] quoted in *ibid*.
[130] Ronald Niezen, "Culture and the Judiciary: The Meaning of the Culture Concept as a Source of Aboriginal Rights in Canada" (2003) 18:2 CJLS 1–26.
[131] Niezen describes how the Supreme Court of Canada's understanding of Indigenous cultures relies on positive associations with "unadulterated Paleolithic wisdom". This positive conceptualization, however, hides the more questionable, negative assumptions about Indigenous inferiority and the boundaries placed on Indigenous rights and title: *Ibid* at 23. Although seemingly unaware of, or unwilling to address, the insidiousness of "positive" stereotypes on their jurisprudence, the Supreme Court of Canada has identified "negative" stereotypes about Indigenous peoples, particularly Indigenous women, as a problem in criminal law and procedure: *R. v. Ipeelee*, *supra* note 3 at 59–61; *R v Barton*, *supra* note 3 at 201; *R. v. Williams*, *supra* note 3 at 22.

Indigenous persons against critical self-reflection and accepting responsibility,[132] and shape how courts and lawyers rend law from Indigenous peoples' experiences and legal orders.[133]

In contrast to stereotypes, social psychologists define "prejudices" as attitudes, or "evaluations or emotional responses", "directed toward people because they are members of a specific social group."[134] Prejudices include not only out-group antipathy, but also in-group favoritism,[135] and may also be expressed not only as hostility, but also as beneficence or paternalism.[136] Some distinguish intentional or explicit and unintentional or implicit prejudices on the basis of whether such prejudices are consciously or unconsciously, respectively, endorsed by the individual as normatively acceptable.[137] In another sense, "prejudice" describes an attitude, evaluation or

[132] Emma LaRocque Hill describes the irony of non-Indigenous peoples' characterisation of Indigenous peoples' advocacy as angry or militant: "To call Native writers "bitter", "angry", or any number of related labels is to imply there is something emotionally or psychologically wrong with them. Labelling or psychologizing them discredits the basis of their resistance or their research. Such ad hominem tactics reflect the colonizer's wish to neutralize the "negative" or "accusatory" tones that *they* hear. It is their wish to sidestep the uncomfortable truths that the anger, in oppressed peoples mirrors": Emma LaRocque, *When the Other is Me: Native Resistance Discourse, 1850-1990* (Winnipeg: University of Manitoba Press, 2010) at 70.

[133] I expand on this argument further below in II.2(e) Social Identities: Intergroup Threat and Contact and II.2(f) Indigenous-Settler Incommensurabilities: Beyond Prejudice Reduction Theories.

[134] Whitley & Kite, *supra* note 24 at 15. The *Penguin Dictionary of Psychology* defines "prejudice" as: "(1) a prejudgement, an attitude formed on the basis of insufficient information, a preconception. In this literal sense, a prejudice can be either positive or negative in evaluative terms; it can be about any particular thing, event, person, idea, etc.; and it can even be an aspect of coherent scientific work, for a hypothesis formulated on little evidence can legitimately be called a prejudice; (2) a negative attitude toward a particular group of persons based on negative traits assumed to be uniformly displayed by all members of that group; and (3) a failure to react toward a person as an individual with individual qualities and a tendency instead to treat him or her as possessing the presumed stereotypes of his or her socially or racially defined groups. Meanings 2 and 3 are connotatively different from meaning 1; they are also the more commonly intended ones. Prejudice (2 and 3) is often popularly thought of as being characteristic of the members of the majority group in a society with respect to that society's minority groups. In fact, it tends to be an endemic attitude in many (all?) areas of social life. It should be differentiated from the notion of a preconception (see 1, above) largely because of the connotative element, the evaluative aspect. Contrast also with discrimination, which tends to be reserved for behaviours while *prejudice* is more clearly reserved for attitudes – which may or may not have behavioural components.": Reber, Allen & Reber, *supra* note 41 at 608.

[135] Rupert Brown & Hanna Zagefka, "Ingroup Affiliation and Prejudice" in John F Dovidio, Peter Glick & Laurie A Rudman, eds, *On The Nature of Prejudice: Fifty Years After Allport* (Malden, MA: Wiley-Blackwell, 2005) 54 at 59–60.

[136] Mary R Jackman, "Rejection or Inclusion of Outgroups?" in John F Dovidio, Peter Glick & Laurie A Rudman, eds, *On The Nature of Prejudice: Fifty Years After Allport* (Malden, MA: Wiley-Blackwell, 2005) 89 at 95–99.

[137] I find the distinction made by Kang et al., helpful: Jerry Kang et al, "Implicit Bias in the Courtroom" (2011) 59:5 UCLA L Rev 1124–1187; see also Whitley & Kite, *supra* note 24 at 177..

emotion towards an outgroup member that is understood by the perceiver's ingroup *or* the outgroup to be non-normative or inappropriate.[138] This latter definition is helpful, as it allows us to track how social context and ingroup or outgroup norms function to define behaviour as prejudicial or non-prejudicial over time.[139]

From its origins in the eighteenth century to its manifestation in early twentieth century eugenics, scientific racism normalized European, or "Caucasian*"*, racial superiority and pathologized non-Europeans as deviant and inferior.[140] Alongside the advent of psychoanalytic theory and in the wake of the first and second world wars, the holocaust, and the American civil rights movements, scientific, social, political and legal norms shifted to condemn the overt racial hostility of a quickly

[138] Whether the normative source is from the in or outgroup is important for social sanction. An ingroup member may be more motivated to act in accordance with ingroup, rather than outgroup, social norms. At the same time, an ingroup and outgroup may not share the same understanding as to "prejudice." This makes the term "prejudice" particularly slippery. Reynolds explains that "[w]hen we condemn particular attitudes as prejudiced or biased this is a basic reflection of the fact that there are a range of groups in the world... whose vantage point we find not only hard to comprehend but also sometimes extremely objectionable. Very definitely, this does not mean that we are wrong to do so": Reynolds, Haslam & Turner, *supra* note 100 at 62.

[139] The foregoing analysis draws upon research I completed for a directed reading, which I intend to submit for publishing: "Revisiting Judicial Instructions on Stereotyping and Prejudice Towards Indigenous Peoples in Canadian Criminal Trials" Scott Franks, (29 March 2020) [unpublished draft with author].

[140] For an overview of the history of scientific racism in philosophy and psychology, and its relationship to colonialism, see Thomas Teo, "The Postcolonial Critique" in *The Critique of Psychology: From Kant to Postcolonial Theory* (New York: Springer, 2011) 155 at 155–158, 164–167. For a discussion of the history of scientific racism in psychological science and its relationship to eugenics, see: Gilman & Thomas, *supra* note 24 at 28–29, 88, et passim. Gilman and Thomas argue that "[w]hat social scientific thought had begun to recognize as a social problem in the early twentieth century gradually became absorbed through [a] form of mental health governmentality, and over time, and like other social problems, became reclassified as an individual and pathological problem": *ibid* at 18-19. A shift towards genomics has also occurred. TallBear's critique of the genomics project in Indigenous communities provides a useful reminder of science's relationship to colonization and settler colonialism: Kim TallBear, "Genomic Articulations of Indigeneity" (2013) 43:4 Soc Stud Sci 509–533. Echoing the eugenics project, Indigenous women in Canada continue to report non-consensual sterilization: National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls: Part B* (Ottawa: Privy Council Office, 2019) at 141; Avery Zingel, "Indigenous women come forward with accounts of forced sterilization, says lawyer", *CBC* (18 April 2019), online: <https://www.cbc.ca/news/canada/north/forced-sterilization-lawsuit-could-expand-1.5102981>.

distanced past; racial prejudice and its effects on racialized persons, not race itself, became *pathologized*.[141] Despite these shifts, racial inequality persisted.

Social psychologists turned toward theories of contemporary prejudice to explain the persistence of racial inequality between Black and White Americans. In the next section, I consider "modern" or "symbolic" racism, aversive racism, benevolent racism, and social identity theory alongside the experiences of Indigenous students and professors in Canadian law schools. Together, these contemporary theories of prejudice may help us further engage with Indigenous students' and professors' experiences of racial stereotyping, prejudice, and discrimination in Canadian law schools. These theories, however, are not mutually exclusive of each other nor determinative of our understanding of racial stereotyping and prejudice.

a) Old-Fashioned and Modern Prejudice

In the 1970s, social psychologists David Sears and John McConahay distinguished "old-fashioned" and "modern" prejudices towards Black Americans in the United States.[142] Sears defines "old-fashioned" prejudice as "(a) a belief in the biological inferiority of African Americans; (b) support for formal discrimination against Blacks in many domains of life…; and (c) racial segregation of Blacks in those domains, as well as in private domains such as marriage."[143] Sears proposes that when White Americans lost "the active support of the political and legal systems" for legal segregation, the "nature of prejudice" in American society shifted.[144] The concept of "modern" or "symbolic" racism is intended to describe how White Americans

[141] For a critical history of the pathologization of race and of racial prejudice and its effects, see Gilman & Thomas, *supra* note 24; For a contemporary (1950s) account of racial prejudice as a psychological phenomenon, see Allport, *supra* note 24.
[142] David O Sears & John B McConahay, *The Politics of Violence: The New Urban Blacks and the Watts Riot* (Boston: Houghton Mifflin, 1973).
[143] Sears, *supra* note 48 at 346.
[144] *Ibid* at 345.

justify persisting racial inequality through a set of race-neutral discourses, including the belief that racism and discrimination no longer exists, that racial inequality is the result of lifestyle or personal choice, and that efforts to address racial inequality are unfair to White Americans.[145]

Adapting "old-fashioned" and "modern racism" theory from the United States, Morrison *et al*., distinguish between "old-fashioned" and "modern" prejudicial attitudes towards Indigenous peoples in Canada.[146] In my view, which I will come to, although these distinctions may be helpful in certain cases, they are largely artificial for understanding anti-Indigenous prejudice in Canada. According to Morrison *et al*., "old-fashioned" prejudice against Indigenous peoples is associated with attitudes and beliefs about Indigenous child abuse and poor parenting, alcohol and drug use, welfarism, tardiness, uncleanliness, disease, poverty, and appearance, either as innate or as a result of Indigenous peoples' lifestyle or personal choices. These stereotypes persist in Canadian legal education and require critical reflection.

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[145] *Ibid* at 349; Whitley & Kite, *supra* note 24 at 181. Some conservatives argue that their rejection of policies intended to ameliorate racial prejudice reflect *bona fide* political positions and not racial animus: John F Dovidio, Samuel L Gaertner & Adam R Pearson, "Aversive Racism and Contemporary Bias" in Chris G Sibley & Fiona Kate Barlow, eds, *The Cambridge Handbook of the Psychology of Prejudice* (Cambridge: Cambridge University Press, 2018) 251 at 275. I would add that in some cases an individual may oppose affirmative action for progressive or critical purposes. For example, one may believe that inclusionary policies should not be endorsed because Indigenous peoples should focus their energy on Indigenous legal orders in Indigenous epistemological contexts. Although I am not sympathetic to the argument of political conservatives, I do acknowledge that modern prejudice theory may be inaccurate in some cases. This does not take away from the utility of identifying common, contemporary prejudicial attitudes.

[146] Melanie A Morrison et al, "Old-Fashioned and Modern Prejudice Toward Aboriginals in Canada" in Melanie A Morrison & Todd G Morrison, eds, *The Psychology of Modern Prejudice* (Hauppauge, New York: Nova Science Publishers, 2008) 277. The O-TAPAS and M-TAPAS scales have since been confirmed as psychometrically valid measures of old-fashioned and modern prejudice held by undergraduate students and community members against Indigenous peoples in Canada. Nesdole et al., found that the O-TAPAS and M-TAPAS correlate with both the SDO5 and RWA measures, as well as political conservativism. These findings suggest that the O-TAPAS and M-TAPAS are valid measures of prejudice, according to the generalized theory of prejudice: Robert Nesdole et al, "Psychometric properties of the Old-Fashioned and Modern Prejudiced Attitudes Toward Aboriginals Scale" (2015) 47:1 Can J Behav Sci 29–36 at 33; Todd G Morrison, Melanie A Morrison & Tomas Borsa, "A Legacy of Derogation: Prejudice toward Aboriginal Persons in Canada" (2014) 5:9 Psychol 1001–1010 at 1005–1008 (finding that the O-TAPAS and M-TAPAS scales also predicted prejudice among general undergraduate students and community members). Further research is required to determine the validity of the O-TAPAS and M-TAPAS for members of the legal profession (including law students, law professors, clerks, lawyers, and judges).

In 2019, a law professor at the University of Toronto assigned a fact pattern involving the apprehension of an Indigenous child from their family.[147] The context of the apprehension involved parental drug and alcohol use, the failure of the parents to attend programs, and the grandmother's positive engagement with the child. The assignment asked students to compare how courts would have decided such a case in the past, and how they might decide it under the current law. In this way, the assignment asked the students to contextualize the Canadian law on apprehensions of Indigenous children. However, the assignment also received criticism from law students, who found that the assignment perpetuated stereotypes about Indigenous peoples. The assignment recalled stereotypes and "old-fashioned" prejudices about Indigenous families. At the same time, it asked students to apply the law to a fact scenario that appears in practice. In response, the Dean apologised.[148]

The take-away from the Indigenous child welfare assignment is clear: "old-fashioned" prejudice does not exist only in the past and is not isolated from law in its social context. One Indigenous law student reflects on her experience of "old-fashioned" prejudice in law school:

[147] A copy of this assignment is with the author. Lindberg describes how Canadian legal education disembodies the law from Indigenous peoples' social reality through fact patterns: "This is my personhood, and we are dismembering it. Its main organs are taken out: the facts, the issues, and the ratio" in Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 318.

[148] Joe Friesen, "University of Toronto law school dean apologizes for assignment that used 'troubling' Indigenous stereotypes", *Globe & Mail* (11 December 2019), online: <https://www.theglobeandmail.com/canada/article-university-of-toronto-law-school-dean-apologizes-for-assignment-that/>. Cindy Blackstock suggests that "… if students don't learn about how to respond to these cases in university, I would be concerned about their capacity to do so when they graduate from a school of law … The reality is that First Nations kids are overrepresented among children in child welfare and that the leading drivers of it are poverty, poor housing and substance misuse linked to multigenerational trauma arising from colonialism writ large and residential schools in particular." The challenge, however, is that these fact patterns may also reinforce stereotypes about Indigenous peoples and distress Indigenous (and some non-Indigenous students). Although professors should not avoid topics that carry these risks, they have an obligation to ethically, respectfully and safely facilitate Indigenous students' learning. For this reason, professors should contextualize cases, such as by encouraging discussion on the impact of settler colonialism and racism on Indigenous communities and individuals and by critically challenging the racial and cultural assumptions underlying Canadian law. In addition, to reduce the disproportionate impact of these types of cases on Indigenous students, such cases should be facilitated in class with institutional resourcing and support and not used as an evaluation tool.

> I heard one male student jokingly saying that he was from [an urban centre with a very high Aboriginal population] and that because he was from that town it was okay if he transgressed the limits of the law because it was all relative. He stated that he could not be penalized because "he only shot one or two Indians". I did not say a word. It is too scary to approach someone who feels confident enough about that belief to say it in a normal tone of voice. [149]

Another law student recalls overhearing fantasies[150] of sexualised violence against Indigenous and other racialized women:[151]

> The story we were told is that one of the paying guests at the stag had, upon hearing there was to be a prostitute in attendance, asked to ensure that the prostitute was, and I don't believe he was this polite, a Black woman or an Indian woman. My interpretation of that story was this: at least one member of this college thought that it was acceptable to objectify a woman and also felt that this degradation would be more effective if it took place with a woman of colour. That person is or will be a lawyer; that person will represent women; that person will represent Indians; and that person will represent Indian women. Every woman in this college had to attend classes with this person.[152]

In contrast to "old-fashioned" prejudice, Morrison *et al*., describe "modern" prejudice against Indigenous peoples as the opposition to policies that are intended to ameliorate the conditions of

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[149] quoted in Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 325.
[150] One hopes.
[151] On the relationship between negative stereotypes about and violence toward Indigenous women, see: Sherene H Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" in Sherene Razack, ed, *Race, Space, and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002); Sherene H Razack, "Gendering Disposability" (2016) 28:2 Can J Women & L 285–307.
[152] quoted in Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 324.

Indigenous peoples. These attitudes and beliefs include: a refusal to apologize for colonialism; the characterization of Indigenous rights advocacy as "complaining", as victimhood, as "special" interest, or as unfair to Canadians; and opposition to affirmative action, equitable hiring, on-reserve tax exemptions, and treaties. In contrast to the American experience, where "old-fashioned" prejudice has decreased and "modern" prejudice against Black Americans has increased,[153] Morrison *et al*. found that "old-fashioned" prejudicial attitudes and stereotypes about Indigenous people remain high and relatively unchanged from two decades ago;[154] the only change is that "modern" prejudice against Indigenous peoples appears to have also increased.[155]

How can we account for the social reality that "old-fashioned" and "modern" prejudice against Indigenous peoples persists to the degree that it does? I agree with Pehrson and Leach, who challenge the view that there is any real difference between "old-fashioned" and "modern" prejudice in the context of settler colonialism. They argue that the experience of settler colonialism

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[153] Whitley & Kite, *supra* note 24 at 169–170.

[154] Morrison et al, *supra* note 146 at 21.

[155] Morrison, Morrison & Borsa, "A Legacy of Derogation", *supra* note 146. Similar findings have been observed throughout Canada, in workplace, rural and urban, and university environments: Darrell W Donakowski & Victoria M Esses, "Native Canadians, First Nations, or Aboriginals: The Effect of Labels on Attitudes Toward Native Peoples" (1996) 28:2 Can J Behav Sci 86–91 at 89–90 (at the University of Western Ontario, finding that participants' attitudes, symbolic beliefs, perceptions of threat, and negative affect were impacted by the label used to describe Indigenous peoples [ie., as "Aboriginal peoples", "Native peoples", "Native Indians", "First Nations peoples" and "Native Canadians"); Erin Lashta, Loleen Berdahl & Ryan Walker, "Interpersonal Contact and Attitudes Towards Indigenous Peoples in Canada's Prairie Cities" (2016) 39:7 Ethnic & Racial Stud 1242–1260 at 1254–1256 (among residents of Saskatchewan where the opportunity for intergroup contact is high); Melanie A Brockman & Todd G Morrison, "Exploring the Roots of Prejudice Toward Aboriginal Peoples in Canada" (2016) 36:2 Can J Native Stud 13–42 (among undergraduates at the University of Saskatchewan); Jeffrey S Denis, "Contact Theory in a Small-Town Settler-Colonial Context: The Reproduction of Laissez-Faire Racism in Indigenous-White Canadian Relations" (2015) 80:1 Am Sociol Rev 218–242 (at Fort Frances, Ontario); Jeffrey S Denis, "Transforming Meanings and Group Positions: Tactics and Framing in Anishinaabe–White Relations in Northwestern Ontario, Canada" (2012) 35:3 Ethnic & Racial Stud 453–470 (at Alberton Ontario); Haddock, Zanna & Esses, *supra* note 127 (Ontario university students); B Corenblum & Walter G Stephan, "White Fears and Native Apprehensions: An Integrated Threat Theory Approach to Intergroup Attitudes" (2001) 33:4 Can J Behav Sci 251–268 (Ontario university students); Kerry A Bailey, "Racism within the Canadian University: Indigenous Students' Experiences" (2016) 39:7 Ethnic & Racial Stud 1261–1279 (Ontario university students); Stephen Claxton-Oldfield & Sheila Keefe, "Assessing Stereotypes about the Innu of Davis Inlet, Labrador" (1999) 31:2 Can J Behav Sci 86–91 (towards the Innu of Labrador among Newfoundland college students); Cherie D Werhun & April J Penner, "The Effects of Stereotyping and Implicit Theory on Benevolent Prejudice Toward Aboriginal Canadians" (2010) 40:4 J Appl Soc Psychol 899–916 (in a mock workplace setting with undergraduates at the University of Winnipeg).

"should call into question any straightforward view that cultural racism has come into existence recently as a way of evading the egalitarian norms that have gained ground over the past few decades. Rather, they can be seen as a continuation of discourses of civilizing missions that were present throughout the 'golden age' of European imperialism. *Not only do 'new' racisms have a long history, but supposedly antiquated elements are still expressed directly and continue to be influential.*"[156] Teo echoes this point, noting that "scientific racism is to colonialism as hidden culture-centrism is to neo-colonialism"[157] In either form, "old-fashioned" or "modern", prejudice facilitates the aim of settler colonialism, which is the denial of Indigenous peoples' rights, their political, social and legal difference – most importantly, their *Indigeneity* –, and the displacement of Indigenous peoples' relationship to land.[158] However, applied critically, these concepts may help us identify contemporary prejudicial attitudes towards Indigenous peoples.

b) Aversive Racism

Not all prejudice is explicitly endorsed or expressed as "old-fashioned" or "modern" prejudice. It can also be implicit, observable through physiological or behavioural responses and alongside endorsements of equality. In *Thunder in my Soul*, Patricia Monture-Angus describes the aversive racism of non-racialized participants at a legal conference. After a presentation by a racialized woman, Monture-Angus observed a White participant become "quite defensive. He took great pains to explain that he did not intend to harm anyone, that he was very concerned about 'minority'

[156] Samuel Pehrson & Colin Wayne Leach, "Beyond 'Old' and 'New': For a Social Psychology of Racism" in John Dixon & Mark Levine, eds, *Beyond Prejudice: Extending the Social Psychology of Conflict, Inequality and Social Change* (Cambridge: Cambridge University Press, 2012) 120 at 124–125 (emphasis added). For an example of the manifestation of paternalism and benevolence in settler colonialism in the late nineteenth century in Toronto, see: Victoria Freeman, "'Toronto Has No History!': Indigeneity, Settler Colonialism, and Historical Memory in Canada's Largest City" (2010) 38:2 Urb His Rev 21–35 at 27. After all, the missionization of Indigenous communities was a key component of settler colonialism, existing alongside practices of dispossession.
[157] Teo, *supra* note 140 at 165.
[158] Veracini, *supra* note 18 at 48.

issues and helped 'minorities' whenever he could, but that he was seriously questioning whether the conference was accomplishing anything."[159] As a rhetorical strategy, the participant dismissed the racialized presenter's (and Monture-Angus') opinions as "experiential" and not academic; "Let's make this academic and stop feeling for awhile,"[160] he demanded. In an aversive flourish, the participant explained that "[t]he pain of minority people is like television, we can turn it on and off as we want to."[161]

In Monture-Angus' account, the participant's response is typical of aversive racism. Aversive racism theory proposes that some individuals may hold anti-prejudicial attitudes and values alongside implicit racial stereotypes and negative affective responses. In the American context, social psychologists Dovidio and Gartner define aversive racism as:

> a form of contemporary bias that characterizes the racial attitudes of well-intentioned people, who genuinely endorse egalitarian values and believe that they are not prejudiced, but at the same time possess conflicting, often non-conscious, negative feelings and beliefs about Blacks that are rooted in basic psychological processes (e.g., social categorization) that promote racial bias.[162]

Where anti-prejudicial norms are explicit and authoritative, individuals may self-regulate their behaviour to appear non-prejudiced. For example, an Indigenous student reports observing or being aware of aversive behaviours: "[t]he classroom atmosphere at law school is very cautious - no one wants to sound racist, sexist, or stupid."[163]

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[159] Monture-Angus, *supra* note 8 at 18–19.
[160] *Ibid* at 19.
[161] *Ibid*.
[162] Dovidio, Gaertner & Pearson, *supra* note 145 at 272 see also pp. 276-279.
[163] quoted in Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 319.

However, where the normative structure is weak or ambiguous, individuals may act according to their implicitly held racial stereotypes or prejudices.[164] At a more complex level, the tension between one's non-prejudiced and prejudiced norms and beliefs may be experienced as discomfort, anxiety, or threat, either to one's self or group identity as a non-prejudiced person, or to one's status.[165] This can lead to behaviours ranging from avoidance to self-regulation.[166] In addition, individuals may experience cognitive fatigue when self-regulating, which can result in the rebound of implicit or unconscious stereotypes and prejudices.[167] However, for Keith James, an Onondaga professor of organizational psychology, "[p]rofessing one set of policies and procedures while actually operating under another is the essence of corruption."[168] Echoing the proposition that normative ambiguity facilitates the expression of prejudice, James writes that "many people who consider themselves to be tolerant of group differences and who would be horrified to have to acknowledge racist behaviour will still engage in discriminatory behaviour and prejudicial thinking when circumstances allow them to justify those actions as unrelated to group membership."[169]

c) Benevolent Prejudice

In addition to aversive prejudice, settler prejudice towards Indigenous students and professors may appear as benevolence. In Monture-Angus' account, after the conference participant proposed that the experience of racism was "like television", the other non-racialized conference participants

[164] For a discussion of the empirical literature on normative structure and aversive racism, see Dovidio, Gaertner & Pearson, *supra* note 145 at 277.
[165] Whitley & Kite, *supra* note 24 at 191.
[166] *Ibid* at 186–196.
[167] *Ibid* at 529–531.
[168] Keith James, "Corrupt State University: The Organizational Psychology of Native Experience in Higher Education" in Devon Abott Mihesuah & Angela Cavender Wilson, eds, *Indigenizing the Academy: Transforming Scholarship and Empowering Communities* (Lincoln: University of Nebraska Press, 2004) 48 at 49.
[169] *Ibid* at 53.

censored their discussions of the encounter from the racialized and Indigenous participants: "[t]he White people there had already decided that I was not supposed to hear about that [television] comment," Monture-Angus recalls.[170]

Benevolent prejudice challenges our assumption that prejudice is merely the manifestation of negative beliefs and attitudes. Social psychologists Kite and Whitley define benevolent prejudice as "a form of prejudice that is expressed in terms of apparently positive beliefs and emotional responses to targets of prejudice."[171] Developing the concept in the context of gender and sex, Peter Glick and Susan Fiske argue that ambivalence (the ability to access both "positive" and "negative" racial stereotypes) sustains both hostile and benevolent forms of prejudice. Glick and Fiske explain that "[p]rejudice can manifest itself not only in unalloyed hostility but also in sweet, yet patronizing, guises that may be insidiously effective at maintaining social inequalities."[172]

Canadian social psychologists Cherie Werhun and April Penner observed benevolent prejudice towards Indigenous students at the University of Winnipeg.[173] They found that benevolent prejudice undermines Indigenous students' competency, increases their anxiety or self-doubt about confirming stereotypes about their group (stereotype threat), and strengthens negative stereotypes held about Indigenous peoples as a group.[174] Peers may perceive an Indigenous student's success to be the result of affirmative-action-based policies or the additional help provided by the non-Indigenous peer or authority; in turn, this can undermine an Indigenous student's relationship to his or her peers.[175] Whether out of benevolent concern or aversion, Monture-Angus' and the

[170] Monture-Angus, *supra* note 8 at 20.
[171] Whitley & Kite, *supra* note 24 at 580 see also pp. 202-204.
[172] Peter Glick & Susan T Fiske, "An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality" in John Dixon & Mark Levine, eds, *Beyond Prejudice: Extending the Social Psychology of Conflict, Inequality and Social Change* (Cambridge: Cambridge University Press, 2012) 70 at 83.
[173] Werhun & Penner, "Benevolent Prejudice Toward Aboriginal Canadians", *supra* note 155.
[174] *Ibid* at 910–911.
[175] *Ibid* at 911.

racialized person's agency was undermined when the non-Indigenous participants decided to exclude them from discussions about the "television" comment.

Although benevolent prejudice may manifest between peers, it is also present in social hierarchies. The relationship between professor and student, or professor and administration, are two such hierarchies. Some Indigenous law students report feeling patronized[176] or ignored when they offer perspectives in class.[177] Like Black Americans in the United States,[178] Indigenous law students are keenly aware of their peers' and professors' attempts to appear non-prejudiced: "There are faculty who are "perceived" to be "sympathetic", and there are faculty who are "actually" responsive to Aboriginal concerns. Some faculty are patronizing to us. Some are helpful, accommodating, and encouraging."[179] In some cases, benevolent prejudice manifests in seemingly helpful, inclusive practices, which nevertheless assign greater workloads and responsibilities to Indigenous students. Harold Johnson explains:

> Law schools, in their arrogance, in their perpetuation of the myth that law is a complex body of thought, continue to assign exaggerated workloads, continue their abuse of students by elevating stress levels unnecessarily and continue to insultingly assign extra work to Indigenous and disadvantaged students and insinuate that the problem is that the students are not smart enough and require remedial assistance.[180]

[176] Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 314.
[177] *Ibid* at 319.
[178] Whitley & Kite, *supra* note 24 at 193.
[179] quoted in Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 314.
[180] Harold Johnson, *Peace and Good Order: The Case for Indigenous Justice in Canada* (Toronto: Penguin Random House, McClelland and Stewart, 2019) at 27.

Indigenous professors may also experience benevolent prejudice from their peers and administration. An administrator may, for example, place Indigenous law professors "under quality control" by assigning non-Indigenous faculty supervision.[181] Non-Indigenous professors may make overtures in support of Indigenization and decolonization activities while doing little to change their own teaching content or methods. For example, some constitutional law professors oppose teaching section 35 of the *Constitution Act, 1982*, instead leaving it to upper-year, topic-specific courses.[182] Administrations may tie Indigenous program resources to a discrete fund that, once depleted, shifts the burden of fundraising to Indigenous faculty.[183] Monture-Angus argues that when White people ask "What can I do to help?", this perpetuates paternalism and the missionary role.[184] This framing, of benevolence and help, may also obfuscate the increased labour undertaken by Indigenous professors, who may be asked, for example, to provide Indigenous-related resources or guest lecture for their non-Indigenous peers. These ideologies subordinate Indigenous students and professors and reassign responsibility for the effects of settler colonialism onto their shoulders.

d) Effects of Stereotyping and Prejudice on Indigenous Students and Professors

Whether "old-fashioned", "modern", aversive, or benevolent, racial prejudice takes its toll on Indigenous students and professors. Lindberg tells us:

> If you think that it is easy to come here the day, week, or month after you hear these statements, you are mistaken. If you think that these statements do not

[181] Borrows, *supra* note 8 at 158.
[182] Mills, "The Lifeworlds of Law", *supra* note 12 at 870.
[183] I remain concerned that Indigenous professors will be increasingly expected to secure funding for intensives, law camps, and community relationship building activities that benefit institutions through enhanced prestige and reputation, and go towards fulfilling their reconciliation objectives.
[184] Monture-Angus, *supra* note 8 at 22.

> affect how a person gets a legal education, you are mistaken. If you think that these are not legal issues, you are mistaken. It is a part of the clothing that we put on every morning when we get dressed to come to school. There are not many days when we don't notice the additional weight. It colours our perception, understandings, and interaction in many situations. The chronic pain of a hatred-ache is time consuming, nagging, and aggravating.[185]

Such encounters may take the form of microinsults, such as stereotypes of primitiveness or behaviours of unconstrained voyeurism ("Which one of your parents is Indian?"), or microinvalidations, such as jealous accusations, misrepresentation, or invisibility.[186] In *R. v. Van der Peet*, for example, the Supreme Court of Canada cites Mark Walters for a proposition that Walters properly attributes to Patricia Monture-Angus; in this way, the Court renders Monture-Angus' contribution as an Indigenous academic invisible in the jurisprudence.[187] These chronic encounters with racial prejudice can result in adverse mental and physical health outcomes for Indigenous students and professors.[188]

Some Indigenous students and professors report experiencing tokenization. Social psychologists Kite and Whitley define tokenism as the "preponderance of one group over another."[189] According to social psychologists, a racialized person's visibility, the perception of them as novel in the social

[185] Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 325–326.
[186] D Anthony Clark et al, "'Do you Live in a Teepee?' Aboriginal Students' Experiences with Racial Microaggressions in Canada" (2014) 7:2 J Diversity Higher Ed 112–125 at 116–120.
[187] See *R. v. Van der Peet*, *supra* note 3 at para 42; Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia" (1992) 17:2 Queen's LJ 350–413 at 350–352, and 412; Patricia A Monture, "Now That the Door Is Open: First Nations and the Law School Experience" (1990) 15:2 Queen's LJ 179–216 at 191.
[188] Whitley & Kite, *supra* note 24 at 422–424. In *Drawing Out Law*, Borrows' storyteller recounts the death of an Indigenous law student who experienced racial prejudice and animosity in law school: Borrows, *supra* note 8 at 79–80.
[189] Whitley & Kite, *supra* note 24 at 397.

context, and contrast, the exaggeration of group differences, may result in stigmatization by dominant group members.[190] For example, Indigenous students or professors may be singled out as experts on Aboriginal or Indigneous law, or on Indigenous communities and legal issues.[191] Indigenous professors, in particular, may be expected to be experts in all areas of the law that affect Indigenous peoples including criminal, tort, property, constitutional, child and family, wills and estates, and administrative law.[192] Whether perceived or real, Indigenous students and professors, particularly those who are women, encounter a greater workload and greater or different emotional and physical demands than their non-Indigenous peers.[193]

Tokenism also obscures the complex choices and realities faced by Indigenous students. Some Indigenous students attend law school after many years of education outside of their communities. Others may have been further alienated from their communities and legal traditions through legal dispossession or dislocation (for example, by way of adoption, out-marriage, or expropriation of land).[194] Indigenous students may be learning about Indigenous protocols related to tobacco, gifts, pipe ceremonies, and teachings for the first time alongside their non-Indigenous peers.[195] Moreover, not all Indigenous students aspire to a career in Aboriginal or Indigenous law.[196]

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[190] *Ibid* at 397–398 (describing visibility, contrast and assimilation); Bailey, "Racism within the Canadian University", *supra* note 155 at 1270.
[191] Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 307, 319.
[192] Monture-Angus, *supra* note 8 at 60, 64.
[193] See also John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2015) 61:4 McGill LJ 795–846 at 806.
[194] Aaron Mills, for example, documents how colonial violence impacted his parents and, in turn, his connection to his community. He describes his return to his community in its teachings. See Aaron James (Waabishki Ma'iingan) Mills, "Driving the Gift Home" (2016) 33:1 Windsor YB Access Just 167–186 at 168–169. Colonial violence is not determinative of Indigenous students' experiences of their laws or Canadian law. Indigenous students - and their families - resist these acts of dispossession and dislocation.
[195] *Ibid* at 170.
[196] For a discussion of some of the complexity underlying an Indigenous law students' decision to enter the profession, see Lawrence & Shanks, "Indigenous Lawyers in Canada", *supra* note 105.

Indigenous professors may be expected to teach Indigenous legal orders, regardless of their interest or ability. To be seen, then, as a representative of an Indigenous community can be alienating.

The insidious nature of tokenism and stereotyping places Indigenous professors and students in a double bind: their actions are perceived to either confirm or disconfirm the stereotypes held about their group membership.[197] According to social psychologists, "stereotype threat" describes a racialized person's motivation to disconfirm stereotypes held about his or her group membership.[198] In academic settings, stereotype threat can impact the performance of racialized students and professors.[199] Individuals may overperform compared to their non-racialized counterparts or experience cognitive fatigue, anxiety, and burnout. Paradoxically, stereotype threat may impact the racialized student or professor's performance.[200]

Indigenous students and professors' experiences of stereotype threat is not just about academic performance. It is also about the incommensurabilities between Indigenous and non-Indigenous lifeways. Indigenous students and professors are expected to understand Canadian law, despite not sharing its cultural assumptions or worldview. Indigenous students must contort their thinking and accept Eurocentric assumptions underlying Canadian law or risk failing.[201] Failure brings with it the possibility of confirming negative racial stereotypes and prejudices about Indigenous peoples. As Aaron Mills explains, this is a monumental burden on Indigenous students:

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[197] When an Indigenous person assimilates to the stereotypes held about their group, dominant group members may perceive these stereotypes as accurately held. But when an Indigenous person acts in counter-stereotypic ways, dominant group members are unlikely to recognize these stereotypes as inaccurate. Moreover, when confronted with counter stereotypic responses, dominant group members may heighten their scrutiny of Indigenous persons. For a description of the literature on tokenism, see Whitley & Kite, *supra* note 24 at 397–398. In a study at McMaster University, Bailey describes the effects of stereotype threat on Indigenous students: Bailey, "Racism within the Canadian University", *supra* note 155 at 1272–1273.
[198] Whitley & Kite, *supra* note 24 at 410–420.
[199] Bailey, "Racism within the Canadian University", *supra* note 155 at 1274–1276.
[200] Jenessa R Shapiro, Joshua Aronson & Matthew S McGlone, "Stereotype Threat" in Todd D Nelson, ed, *Handbook of Prejudice, Stereotyping, and Discrimination*, 2d ed (New York: Psychology Press, 2015) 87 at 89–97.
[201] Johnson, *supra* note 180 at 20.

> I'm one of the many who found law school extraordinarily challenging. As dawning slowly rolled over my peers that first year, I fumbled clumsily in the dark. I waited for my light bulb to appear. I waited and waited, but it never came. I just couldn't get it. And I didn't understand why; I'd been a strong student until then. Many of my professors were excellent too; in most instances, I couldn't tell myself the problem was their teaching. As clarity set over my friends, I slipped further into a cloud of confusion and I began to question if I belonged. As I listened to their brilliant questions-which not only synthesized but creatively applied the material in new ways - I felt stupid.[202]

In response, Indigenous law students may work unnecessarily harder in their classes to counter inaccurate stereotypes about Indigenous students' lack of merit: "I try really hard to make sure I am prepared. This whole "lazy Indian" image really is alive and at work in this college. It is especially evident in the statements I have heard regarding Aboriginal people in the part-time program."[203] As an Indigenous student, Lindberg similarly reflects that "… we were studying three times (which I was later able to reduce to two steps). The first time we studied the cases to pass the test. The second time we studied to understand Canadian law. The third time we studied it to give it Nêhiyawak context and de-mystify it."[204] Johnson similarly struggled, but found that adopting a White man's perspective made it easier: "When I started looking at law the way I imagined a white male would look at it, it became much simpler. Law is deeply rooted in white Western thought."[205]

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[202] Mills, "The Lifeworlds of Law", *supra* note 12 at 849.
[203] quoted in Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 320.
[204] Lindberg, "Critical Indigenous Legal Theory Part 1", *supra* note 5 at 233.
[205] Johnson, *supra* note 180 at 20.

Stereotype threat also impacts Indigenous students' and professors' determination of their personal and professional identities.[206] In order to advance their careers (or even have one), Indigenous law students may choose to take non-ILE courses to distinguish themselves from stereotypes that may be applied to them by potential employers.[207] Some students, like Johnson, may assimilate to non-Indigenous norms in order to survive law school. Similarly, Indigenous law professors may self-police or regulate their outward behaviour and dress to insulate themselves from stigmatization by their non-Indigenous peers or students.[208] White students, particularly those who are cis-men, do not have to navigate these sorts of externally imposed racial stereotypes and prejudices in their personal and professional journeys in Canadian law. The profession, after all, was built for their advancement.[209]

Applied uncritically, the concept of "stereotype threat" and "tokenism" pathologizes the effects of racial prejudice on racialized persons.[210] Monture-Angus rejects the pathologization of Indigenous students and professors as disadvantaged by racial prejudice; "Disadvantage is a nice, soft, comfortable word to describe dispossession, to describe a situation of force whereby our very existence, our histories, are erased continuously right before our eyes. Words like disadvantage conceal racism."[211] Concepts like stereotype threat risk shifting accountability from the institution to the racialized individual. For example, it is counterproductive and prejudicial to suggest to Indigenous professors and students that they engage in self-help remedies, such as meditation or

[206] Henderson, "Postcolonial Indigenous Legal Consciousness", *supra* note 5 at 7 and 13; see also Christie's discussion of the impact of settler-colonial culture on Indigenous law students' and professors' determination and reinvigoration of their Indigenous identities, Christie, "Culture, Self-Determination and Colonialism", *supra* note 5 at 22–28.
[207] Borrows, "Heroes, Tricksters, Monsters, and Caretakers", *supra* note 193 at 806.
[208] Monture-Angus, *supra* note 8 at 66.
[209] See, for example, Backhouse's description of the origins of the legal profession in Ontario, in Backhouse, "Gender and Race in the Construction of 'Legal Professionalism'", *supra* note 3.
[210] Discussing the pathologisation of the effects of racism on racialized individuals, Gilman & Thomas, *supra* note 24 at 217, 282.
[211] Monture-Angus, *supra* note 8 at 14 see also p. 21. A deficit or disadvantage-centred narrative casts Indigenous persons as passive victims of settler colonialism. See also Tuck, "Suspending Damage", *supra* note 41.

ceremony, "lower their expectations", reduce their workload (usually by reducing Indigenous-specific content) or submit to supervision by a non-Indigenous authority figure. Institutions can reduce stereotype threat by articulating clear policies and procedures for academic evaluation and discrimination complaints and by working to reduce stereotyping and prejudice.[212]

The concept of "stereotype threat" can also flatten the personal, professional, and ethical choices made by Indigenous students and professors. One Indigenous law student asks, "How can I be both Indian and attorney? How can I be true to myself and true to my people? How can I be prosperous and proud? How can I be loyal to my tribal heritage as an Indian and faithful to my own as an attorney? This is quite a challenge."[213] Some Indigenous students and professors may choose to participate in ways that are inconsistent with their traditional teachings. This can lead to pain for the student or professor, and isolate them from other students, their Indigenous professors, and their community.[214] Others aspire to fluency in both Indigenous and non-Indigenous legal orders.[215] Indigenous students and professors may also accept additional responsibilities as role models, caretakers, liaisons, advocates, and friends in accordance with Indigenous legal orders. These choices are complex and meaningful.

The concept of "survivance" is helpful for understanding Indigenous agency in Canadian legal spaces.[216] Gerald Vizenor describes "survivance" as "moving beyond our basic survival in the face of overwhelming cultural genocide to create spaces of synthesis and renewal."[217] Viewed from

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[212] Whitley & Kite, *supra* note 24 at 418–419.
[213] quoted in Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 322. For a review of the literature on Indigenous peoples' personal and professional identities in legal education and practice, see Lawrence & Shanks, "Indigenous Lawyers in Canada", *supra* note 105.
[214] Borrows, *supra* note 8 at 79, 89–90.
[215] Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 306; Lindberg, "Critical Indigenous Legal Theory Part 1", *supra* note 5 at 236.
[216] Borrows reflects on the resiliency of Indigenous agency in Canadian legal contexts, see Borrows, *supra* note 8.
[217] Gerald Vizenor quoted in Tuck, "Suspending Damage", *supra* note 41 at 422; see Gerald Robert Vizenor, *Manifest Manners: Postindian Warriors of Survivance* (Hanover: University Press of New England, 1994) at 53.

the outside, however, these choices may appear to confirm stereotypes, particularly cultural ones, about Indigenous peoples. To pathologize professors and students as experiencing the paradoxical effects of stereotype threat is to fail to recognize the *resiliency and agency* of Indigenous peoples and their legal orders and the full range of personal and professional choices available to them.

e) Social Identities: Intergroup Threat and Contact

Going back to the concept of social categorisation, we can see how our social identities are important to our experience of the world and others. According to social identity theory, individuals receive psychological benefits from identifying with a group or groups.[218] The social identity theory of integrated or intergroup threat proposes that the perception of intergroup threats predict expressions of prejudice. Stephan, Ybarra and Rios explain that "an intergroup threat is experienced when members of one group perceive that another group wishes to, or is in a position to, cause them harm."[219] Threats may be "symbolic", for example, as a threat to a group or individual's values, morals, norms, beliefs, status, worldview, or legal order, or they may be "realistic", as corporeal, political, or economic threats to an individual or group.

In this thesis, I flatten the distinction between these two types of "resources" (the "symbolic" and the "realistic"). In the settler-colonial context, the division between "realistic" and "symbolic" resources is permeable, or perhaps even artificial. For example, the rule of law, a "symbolic resource", is intimately connected to settler property, a "realistic" resource. In *Ktunaxa*, the First Nation sought religious protection for Qat'muk, a mountainous area subject to a ski-resort proposal.[220] For the Ktunaxa Nation, Qat'muk is a spiritually important site as it is the location of

[218] Henri Tajfel & John Turner, "The Social Identity Theory of Intergroup Behaviour" in *Psychology of Intergroup Relations* (Chicago: Nelson-Hall, 1986) 7.
[219] Walter G Stephan, Oscar Ybarra & Kimberly Rios, "Intergroup Threat Theory" in Todd D Nelson, ed, *Handbook of prejudice, stereotyping, and discrimination* (New York: Psychology Press, 2009) 255 at 256.
[220] *Ktunaxa Nation v British Columbia*, [2017] 2 SCR 386.

Kławła Tukłułakʔis, the Grizzy Bear Spirit. In response to the ski-resort proposal, the Ktunaxa Nation argued that permanent human habitation would drive Kławła Tukłułakʔis from Qat'muk.[221] On appeal, a majority of the Supreme Court of Canada distinguished between the First Nations' *Charter* right to carry on a religious practice, for example, to dance or engage in ceremony, from the "object" of that practice, Kławła Tukłułakʔis.[222] According to the Court, s. 2(a) does not protect the object of a spiritual or religious belief system. In *Ktunaxa*, then, we see the majority of the Court impose a distinction between "realistic" resources – the corporeal practices connected to spirituality – and the "symbolic", the intangible or immaterial nature of the "spirit" itself. Senwung Luk and Howard Kislowicz propose that the Court's concern, that Indigenous spiritual rights may manifest as property rights, belies the property rights afforded by the state to some Christian denominations in Canada.[223] For the Ktunaxa, Qat'muk, Kławła Tukłułakʔis, and their spiritual practices are interwoven. As Mills argues, "In transcendent religions, such as the Abrahamic religious traditions, the object of religious belief is by definition at some remove from the belief itself. Indigenous spiritual traditions, however, are immanently rooted in earth […]."[224] Finally, these terms, "realistic" and "symbolic" also carry imprecise connotations. To say that a resource is "realistic" may imply a certain corporeal priority or importance compared to "symbolic" resources. For these reasons, I do not distinguish between "realistic" and "symbolic" resources, but rather, describe the specific "resource" that is of concern, such as the "rule of law", or "property", though even these two examples are partners.

[221] *Ibid* at para 6.
[222] *Ibid* at 71.
[223] Howard Kislowicz & Senwung Luk, "Ktunaxa Nation: On the 'Spiritual Focal Point of Worship' Test", (7 November 2017), online: *Ablawg* <https://ablawg.ca/2017/11/07/ktunaxa-nation-on-the-spiritual-focal-point-of-worship-test/>. Kislowicz and Luk add that even in Christian traditions, the division between the material and immaterial is ambiguous, describing the role of the Eucharist in Catholicism.
[224] Mills, *supra* note 5 at 258–259 at note 1427.

According to integrated threat theory, a range of individual and group-level behaviours may follow from the perception of threat ranging from avoidance (consistent with aversive prejudice theory) to aggression.[225] The *perception* of threat – whether actual or not – depends on various antecedent factors, including individual-level personality, attitudes and cognitions, prior negative intergroup contact and relations, and situational factors. In an unfortunate move, intergroup threat is circular; the perception of threat may lead to negative affective responses, which in turn may predict the perception of threat where there is none.[226] There is some empirical support for the proposition that the perception of material or immaterial threat is a predictor of prejudice.[227]

Recall that at the 2015 CIAJ conference some non-Indigenous participants implied that Indigenous legal orders are inconsistent with the rule of law.[228] This view reflects a perceived material threat of Indigenous rights and title to settler colonialism and its private property regime, and a perceived immaterial threat to a settler colonial interpretation of the "rule of law".[229] This argument of threat

[225] Stephan, Ybarra & Rios, *supra* note 219 at 256–257.
[226] *Ibid* at 258–259.
[227] For a review of this literature, see Whitley & Kite, *supra* note 24 at 311–325.
[228] In the winter of 2019 and 2020, the RCMP entered the Wet'suwet'en Nation's territory to enforce a BC Supreme Court injunction in favour of Coastal Gaslink. In response to the Wet'suwet'en Nation's exercise of its jurisdiction, BC Premier John Horgan declared that the "rule of law applies" and that the Supreme Court's injunction must be enforced: Katie Hyslop, "Wet'suwet'en Crisis: Whose Rule of Law?", (14 February 2020), online: *The Tyee* <https://thetyee.ca/News/2020/02/14/Wetsuweten-Crisis-Whose-Rule-Law/>. In a national study of injunctions, Marc Kruse and Carrie Robinson note that courts grant injunctions in favour of proponents more often than First Nations: *Land Back: A Yellowhead Institute Red Paper*, by Yellowhead Institute, Shiri Pasternak & Hayden King (Toronto: Yellowhead Institute, Ryerson University, 2019) at 30.
[229] Threats to private property loom large for settlers. In 2014, Frank Newbould, a judge and cottager at Sauble Beach, told South Bruce Peninsula that it should not accept a land claim settlement with the Saugeen First Nation for Sauble beach. Newbould retired before the Canadian Judicial Council could complete an inquiry into his conduct: Graeme Hamilton, "Ontario judge faces possible removal for speaking against land claim near family cottage", *National Post* (15 February 2017), online: <https://nationalpost.com/news/canada/ontario-judge-faces-possible-removal-for-speaking-against-land-claim-near-family-cottage>; David Helwig, "Judge Newbould is no longer a judge, misconduct proceedings are stayed", (5 June 2017), online: *SooToday.com* <https://www.sootoday.com/local-news/judge-newbould-is-no-longer-a-judge-misconduct-proceedings-are-stayed-635106>. Gerald Stanley's killing of Colten Boushie must also be understood with an appreciation to settler perceptions of threat to private property: Roach, *supra* note 80; Estair Van Wagner & Alexander Flynn, "How property and place were key issues in the Stanley trial", (26 September 2018), online: *Policy Options* <https://policyoptions.irpp.org/magazines/september-2018/how-property-and-place-were-key-issues-in-the-stanley-trial/>; see also Leslie Thielen-Wilson, "Feeling Property: Settler Violence in the Time of Reconciliation" (2018) 30:3 Can J Women & L 494–521 (describing other cases involving settler

is legally available, in part, because of the perceived incommensurability between some collective Indigenous rights under s. 35 and the priority provided to private property rights. This incommensurability flows from the Crown's assertion of its sovereignty over Indigenous territories. Without ever having to go so far as to apply a sovereign incompatibility analysis,[230] the Supreme Court of Canada has effectively limited Indigenous rights and title from encroaching on key state and private property interests through a series of internal or inherent limits,[231] an essentialist interpretation of Indigenous culture,[232] a framework for justified infringement,[233] an

violence to Indigenous peoples in cases of the perception of threat to settler property). First Nations that want to charge reasonable rents to settlers on reserve face strong opposition from settlers, see, for example, the response of cottagers at Crooked Lake to Sakimay First Nation, Geoff Leo, "Sask. cottagers face up to 700% rent increase, could be evicted by First Nation", (28 February 2018), online: *CBC* <https://www.cbc.ca/news/canada/saskatchewan/crooked-lake-cottagers-rent-increase-1.4533569>. Other cases include the conflicts over: the Mohawk territory at Oka and Kahnawake in 1990, the Caledonia land dispute at the Haldimand Tract in Six Nations' territory, and the Culbertson Tract in Tyendinaga Mohawk Territory, see Pasternak, Collis & Dafnos, "Criminalization at Tyendinaga", *supra* note 127. Pauline Wakeham proposes that Canadian discourse delegitimizes Indigenous self-determination through discourses of terror, while casting the Canadian state as a beneficent apologizer: Wakeham, "Reconciling 'Terror'", *supra* note 93. Ultimately, the perception of Indigenous threat to private property is used to legitimize, sometimes legally, sometimes in extra-legal forms, state and settler violence against Indigenous peoples.

[230] In *Mitchell v. M.N.R.*, Justice Binnie (dissenting) reasoned that Akwesasn'e's right to international trade or mobility across borders was incompatible with the Crown's sovereign jurisdiction over international borders: *Mitchell v MNR*, [2001] 1 SCR 911 at paras 155–164.

[231] For example, Aboriginal title is subject to the inherent limit that the land cannot be used in a manner that would deprive future generations of the benefit of the land, a use that might otherwise be justifiable by the Crown with the First Nations' consent: *Tsilhqot'in Nation v. British Columbia*, *supra* note 3 at para 74.

[232] The Supreme Court of Canada's harvesting decisions seem to place an inherent limit on the ability of First Nations to exercise Aboriginal rights in ways that would appear to be commercial, or in short, that would compete with non-Aboriginal commercial interests. The Court's reasoning in these cases is often based on its interpretation of the anthropological and historical evidence of the First Nations' harvesting practices, and an implicit comparison with European market economies. In *Sappier*, a majority of the Supreme Court of Canada found that the Woodstock First Nation had an Aboriginal right to harvest logs for "domestic use"; the majority explains, "[t]he word "domestic" qualifies the uses to which the harvested timber can be put. The right so characterized has no commercial dimension": *R v Sappier; R v Gray*, [2006] 2 SCR 686 at 25. In *Marshall; Bernard*, the Supreme Court of Canada explicitly rejected the Mi'kmaq's asserted right to harvest logs for commercial purposes: *R v Marshall; R v Bernard*, [2005] 2 SCR 220 at para 6. Furthermore, in *Lax'Kwallams*, the Supreme Court of Canada reasoned that the First Nation's trade in eulachon grease was historically limited by their seasonal harvesting and that such a practice could not establish either a commercial right to trade in eulachon grease or other fisheries products. In this way, the Court imposed an inherent limit on the nature of the Aboriginal right, limiting it to its historical form: *Lax Kw'alaams Indian Band v Canada (Attorney General)*, [2011] 3 SCR 535 at paras 48–59.

[233] In *Delgamuukw*, the Supreme Court of Canada provides a shopping list of justifications for infringing Aboriginal rights and title, including "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations": *Delgamuukw v. British Columbia*, *supra* note 3 at 165.

interpretation of Canada's legislative and executive branches that excludes Indigenous peoples from being consulted on legislation that may affect their Indigenous rights,[234] and through framing the observance of Indigenous protocols as an "abuse of process."[235] In some cases, lawyers and judges may restrict the status of Indigenous legal orders to evidence of Indigenous culture, rather than respectfully engage with it as law. For example, legal historian Hamar Foster describes how Crown counsel for Canada argued at trial in *Tsilhqot'in Nation* that the Tsilhqot'in legal order was akin to a cultural "elevator etiquette."[236] At trial in *Delgamuukw,* Chief Justice McEachern dismissed Antugulilibix's (Mary Johnston) presentation of Gitxsan *adaawk* (law) through song, reportedly opining, "It's not going to do any good to sing to me… I have a tin ear."[237] This prejudice, that some Indigenous societies were too primitive or unsophisticated to have legal orders, is also found in the colonial jurisprudence.[238] Canadian law's adversarial stance – not necessarily lost within a duty to consult and accommodate framework that privileges the Crown as decision-maker[239] – further structures the perception of threat in legal issues related to Indigenous peoples and their rights and laws. In the end, what is legally recognizable is limited to what is tolerable to settler colonialism. Rather than reconcile, Aboriginal law establishes points of conflict between Indigenous and non-Indigenous peoples. At any juncture, there is a risk that an Indigenous Nation will say no, though the Court has made sure that this is unlikely to be effectual.[240] Regardless of how well the law is aligned with settler interests, Indigenous rights

[234] *Mikisew Cree First Nation v Canada (Governor General in Council)*, [2018] 2 SCR 765 at paras 50–53.
[235] *Behn v. Moulton Contracting Ltd.*, *supra* note 76 at para 36.
[236] Hamar Foster, "One Good Thing: Law, Elevator Etiquette and Litigating Aboriginal Rights in Canada" (2010) 37:1 Advoc Q 66–86 at 80–81; Hamar Foster, "Another Good Thing: Ross River Dena Council v Canada in the Yukon Court of Appeal, Or: Indigenous Title, Presentism in Law and History, and a Judge Begbie Puzzle Revisited" (2017) 50:2 UBC L Rev 293–320 at 293–296.
[237] Drake, "Finding a Path to Reconciliation", *supra* note 3 at 16 at note 29.
[238] *In Re Southern Rhodesia*, [1919] AC 211 at 233–235.
[239] *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at paras 60–63.
[240] In *Haida*, the Court states that the duty to consult and accommodate "does not give Aboriginal groups a veto over what can be done with land pending final proof of [a title] claim": *Ibid* at para 48.

retain their threatening quality to settler normalcy. Leslie Hall Pinder, counsel for the plaintiffs in *Delgamuukw*, recalls warning a community member, who had come to hear about Justice McEachern's trial decision, to step back from the courthouse because a sniper had been placed on the roof.[241] Even the presence of Indigenous legal orders, which offer a *sui generis* relationship of respect and reciprocity founded on treaty, are perceived as threats to the Canadian rule of law. For example, when Enbridge received the peaceful welcome of eagle down from a Wet'suwet'en elder in 2012, the company interpreted it as an act of hostility.[242] Integrated threat theory offers a different lens from which to understand these "legal" conflicts.

We can also apply contemporary theories of prejudice and integrated threat to our understanding of opposition to inclusionary admissions policies and to ILE. Taking the first, inclusionary admissions policies, a pernicious stereotype exists that Indigenous law students are admitted to law school on the basis of their race through affirmative action programs rather than intellectual merit.[243] One Indigenous law student describes her experience of non-Indigenous opposition to inclusionary policies such as affirmative action:

> …We are all affirmative action, we are all from reserves, we are all paid to come to school. I am an urban Indian who receives a scholarship, who had a great GPA. I feel proud of how I look but I am distressed at being a brown page in their [other law students'] previously written book of experiences. I sometimes feel like I am on the outside looking in.[244]

[241] Leslie Hall Pinder, "The Carriers of No: After the Land Claims Trial" (2007) 31:Supplement Legal Stud F 1113–1120 at 1114.
[242] Nathan Vanderklippe, "The language of eagle feathers trips up a pipeline promoter", *The Globe and Mail* (8 August 2012) A1.
[243] Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 307.
[244] *Ibid*.

Non-Indigenous students, staff and professors may express opinions that affirmative action programs come at the cost of rejecting deserving non-Indigenous students.[245] A related stereotype is the belief that all Indigenous law students receive funding to attend law school from the Federal government; this stereotype is connected to the belief that Indigenous peoples do not pay tax and receive public benefits at the cost of non-Indigenous taxpayers.[246] More broadly, this stereotype correlates with "modern" prejudicial attitudes that Indigenous peoples receive special, unfair benefits that non-Indigenous peoples do not[247] and the perception that inclusionary admissions policies threaten non-Indigenous students' education, status and access to the profession.

Non-Indigenous students, staff and faculty may also resist and oppose ILE. Non-Indigenous students may intentionally avoid or ignore Indigenous perspectives[248] or reject critical reflections on racism and colonialism in Canadian law and policy.[249] When non-Indigenous students oppose learning ILE, they may rely on liberal and jurisprudential sources to support their arguments. This makes it difficult for Indigenous professors to teach and appropriately evaluate non-Indigenous law students.[250] In some cases, non-Indigenous students may respond to either the content of ILE or to their professor's evaluation of their progress by filing a discrimination complaint.[251] A non-Indigenous student may complain that the professor was not objective, or that they were biased or politically opinionated, thus recalling stereotypes of Indigenous militance and hostility.[252] These

[245] *Ibid*; Monture-Angus, *supra* note 8 at 102–117.
[246] Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 325.
[247] see Morrison et al, *supra* note 146.
[248] Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 311.
[249] *Ibid* at 312.
[250] Monture-Angus, *supra* note 8 at 62.
[251] *Ibid*.

[252] *Ibid* at 66. In *Drawing Out Law*, Borrows tells us a story of an Indigenous professor who received a student complaint related to class content on settlers and settler colonialism. The Indigenous professor explains his reasoning to the Dean and his surprise that the student's "reverse racism" complaint is being validated. In this story, the Dean

"reverse racism" complaints function to delegitimize the Indigenous law professor's pedagogical role and content as well as to secure the non-Indigenous student or professor's resources.

In some cases, non-Indigenous students, and sometimes professors, may oppose ILE as a matter of "academic freedom." Karen Drake describes this opposition as a claim that "certain universities have become beholden to a political agenda, and that this agenda is the driving force behind the push for required Indigenous content."[253] Drake writes:

> […] The implication is that non-Indigenous content requirements are neutral, unbiased, and impartial, while Indigenous content requirements are the result of pandering to social and political agendas. The problem with this line of thought is that non-Indigenous content requirements are not neutral; they reflect a privileging of non-Indigenous worldviews, non-Indigenous epistemologies, non-Indigenous ontologies, and non-Indigenous normative principles […].[254]

Drake suggests that the reason why some oppose mandatory Indigenous legal training is because of a "misapprehension about the rationale" underlying calls for such content. [255] To this claim, Drake responds that mandatory Indigenous law courses are not about a particular viewpoint, but rather that "the goal is to teach content and skills to students... so that they can properly interpret and apply section 35."[256] Another way to understand opposition to ILE is through a lens of threat.

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responds by assigning the Indigenous professor a supervisor: Borrows, *supra* note 8 at 154–158. Though Borrows' story is not intended to be taken as a factual record of an event, it illustrates some of the conflicts that may occur when Indigenous professors deliver ILE.

[253] Drake, "Finding a Path to Reconciliation", *supra* note 3 at 33.
[254] *Ibid* at 35.
[255] *Ibid* at 13.
[256] *Ibid* at 33.

Non-Indigenous peoples may perceive ILE as a threat to the dominance of Canadian law and its inequitable distribution of resources to settlers. Integrated threat theory suggests that opposition to mandatory ILE and the incorporation of Indigenous legal orders may reflect an affective and behavioural response to the perceived threat to settler resources, such as professional privileges or the belief in a normative order that excludes Indigenous legal orders. This discomfort, whether an expression of aversive prejudice or the perception of threat, becomes legitimated through legal argument and discourse.

f) Indigenous-Settler Incommensurabilities: Beyond Prejudice Reduction Theories

In some ways, social psychology cannot adequately explain the impact of Canadian legal education on Indigenous peoples, their perspectives, and legal orders. Lindberg reflects:

> You teach your ownership, your history, your rules in schools. We are forced to attend and continue to learn our ways, try to acknowledge yours, and continue to live ours. We wonder if you are able to hear voices that do not sound like yours.[257]

The expression of prejudice, whether "old-fashioned", "modern", aversive, or benevolent, is certainly an important barrier to the implementation of the Calls and ILE in Canadian law schools. However, the challenge is much deeper than implicit or explicit prejudice; it is also about the structure of Canadian law, which presents Indigenous peoples and their legal orders as incommensurable with the rule of law.

[257] Lindberg, "Critical Indigenous Legal Theory Part 1", *supra* note 5 at 228.

Despite jurisprudential support for ILE,[258] Indigenous students and professors continue to experience the marginalization of their perspectives and laws in Canadian legal education. Echoing Marie Battiste's concept of cognitive imperialism in Canadian education,[259] Lindberg argues that Canadian law's "imperial legal determinism" reinforces bias and inequity against Indigenous peoples.[260] Henderson describes how European assumptions of universality attempt to enclose or reject Indigenous peoples' perspectives and legal orders.[261] Johnson illustrates the invisible dominance of European culture on Canadian legal education: "If the people who write the law and the people who interpret the law and the people who teach the law are all from the same culture and share the same values, as they were when I went to law school, they do not have to fully explain their reasoning or even question it."[262] Canadian law's "imperial legal determinism" ensures that Indigenous students, professors, and Indigenous legal orders, remain marginalized in Canadian legal education and practice.[263]

g) Summary

Racial prejudice, stereotyping and discrimination against Indigenous peoples in Canadian law schools is not always obvious. It can sometimes be difficult to put one's fingers on, especially when expressed through ostensibly neutral and objective legal argument. Aversive racism theory can help us explain why non-Indigenous peoples may avoid discussions related to Indigenous-settler relations, including ILE, settler colonialism, and racism. Aversive behavior may manifest in rhetorical strategies that distance Indigenous peoples' experiences as "not academic" enough, as in Monture-Angus' experience. Integrated threat theory may explain some non-Indigenous

[258] See footnote 3 and accompanying commentary.
[259] Battiste, *supra* note 14 at 122, 159.
[260] Lindberg, "Critical Indigenous Legal Theory Part 1", *supra* note 5 at 237.
[261] Henderson, "Postcolonial Indigenous Legal Consciousness", *supra* note 5.
[262] Johnson, *supra* note 180 at 21.
[263] *Ibid* at 21, 23, 27.

peoples' opposition to ILE and inclusionary admissions or hiring policies. Such a theory may explain why some non-Indigenous students believe that inclusionary admissions policies come at the cost of their own professional advancement, or why some legal scholars and lawyers continue to believe that Indigenous legal orders are akin to a cultural "elevator etiquette."[264] Indigenous students and professors also navigate the effects of racial prejudice, stereotyping and discrimination in Canadian law schools. Some may get the sense that they are "tokens" and either resist or assimilate to stereotypes held about their group. Those who resist stereotyping may find themselves overworked and overextended, fighting a shadow cast through another's eyes. Even if students succeed in adapting to the "imperial legal determinism" of Canadian legal education, there are countless ways that Indigenous law students can fail. Affirmative action programs cement bureaucratic and procedural barriers – forms for financial assistance, mandatory academic support sessions, and micromanagement by non-Indigenous administrative staff – that increase Indigenous students' fatigue, burnout, and overload. Moreover, Indigneous law students and professors experience the effects of prejudice and racism from their non-Indigenous peers and administrators. Reflecting on his time in law school, Johnson reflects, "we needed *life* support", not academic support.[265] In the end, Indigenous diversity and inclusion may be more likely to transform the Indigenous student than legal education or the practice of law, *inclusion* operating as *enclosure*.[266] Johnson concludes, "[b]y the time we enter the courtroom, most of us will have spent almost twenty years outside of our culture and much of that time will have been spent outside our communities. We will be changed."[267]

[264] Foster, "One Good Thing", *supra* note 236 at 81.
[265] Johnson, *supra* note 180 at 25.
[266] Tuck & K. Wayne, "Decolonization is not a Metaphor", *supra* note 4 at 23.
[267] Johnson, *supra* note 180 at 39.

The preceding is one description of how racial prejudice, stereotyping and discrimination may function as a barrier to the implementation of the Calls in law schools. In the next section, I will provide a brief overview of the literature on prejudice reduction interventions before turning to an inventory of current ILE initiatives in Canadian law schools.

III. Interventions for reducing anti-Indigenous stereotyping and prejudice in Canadian Law Schools

> "I invite you to reflect for a moment on a time when you too were completely out of your comfort zone. How did you arrive at that uncomfortable place? What made it so uncomfortable? What did you do to adapt or adjust? How did it shape who you are today?"[268]

In 1946, social psychologists Ronald Lippitt and Marian Radke wrote that, in regards to racial prejudice, "[i]n no other aspects of interpersonal and intergroup relations is there a more urgent need for social scientists to get out and do something."[269] Generally, social psychologists consider two processes for reducing prejudice: individual and intergroup.[270] Individual processes include the self-regulation of stereotypes and prejudices, a mainstay of many implicit bias training programs. Intergroup contact processes include direct and indirect contact, and the recategorization of social identities (changing how we think of each other and ourselves with respect to social groups). In addition, there is a wide range of specific interventions that may be employed, such as perspective-taking, narrative and storytelling, intergroup dialogue, and media portrayals, to name

[268] Lindsay Borrows, "Dabaadendiziwin: Practices of Humility in a Multi-Juridical Legal Landscape" (2016) 33:1 Windsor YB Access Just 149–166 at 150–151.
[269] Ronald Lippitt & Marian Radke, "New Trends in the Investigation of Prejudice" (1946) 244:1 The Annals of the American Academy of Political and Social Science 167–176 at 167.
[270] I use Kite and Whitley's taxonomy: Whitley & Kite, *supra* note 24 at 527–528.

only a few. Meta-analyses and reviews of these interventions suggest that some may be more successful than others at reducing "prejudice" in the short, medium, or long term.[271] Although these approaches may reduce intergroup prejudice, they may not necessarily reduce social inequality. Interventions that prioritize intergroup harmony or understanding may come at the cost of undermining collective action. For example, it is entirely possible for an individual to report greater liking for Indigenous peoples and still oppose policies intended to ameliorate the effects of settler colonialism (or to decolonize). For that reason, I also consider collective action for social change to be a distinct process with its own interventions. Intergroup contact and the self-regulation of prejudice is a start, but to implement the Calls, institutional commitment and reform is also necessary.

i. Individual-level Processes

Individual-level processes leverage the non-prejudiced attitudes and norms of individuals to self-regulate against racial stereotypes and attitudes. Implicit social cognition and cognitive psychologists distinguish between explicit and implicit cognitive processes.[272] According to implicit social cognition theory, most racial stereotyping and prejudice is the result of implicit

[271] In 2009, Paluck and Green completed a comprehensive review of existing prejudice reduction interventions and the experimental support for those interventions. Their findings are reflected in Table 1 located in the Appendix. Paluck & Green, "Prejudice Reduction Interventions", *supra* note 25; Betsy Levy Paluck, "RefWorks RefShare - Prejudice and Conflict Reduction Database - Princeton University", online: *Prejudice and Conflict Reduction Database* <http://refworks.com/refshare/?site=010141135929600000/RWWS5A1333317/Prejudice%20reduction>. Paluck and Green found experimental support for cooperative learning, "entertainment", peer discussion or dialogue, contact, value consistency and self-worth, and cross-cultural or intercultural training as interventions that may reduce prejudice. There was less support for social categorisation – creating common ingroup or dual identities, or personalizing (de-categorisation) outgroup members – and cognitive training (the approach suggested by ISC) through counter-stereotypes or information. Finally, despite the rapid proliferation of diversity, cultural competency, multiculturalism, and conflict resolution training, there was almost no experimental support for these interventions. In this thesis, I will be using Paluck and Green's 2009 meta-analysis of prejudice reduction interventions (both their classification system and evaluations) as well as select meta-analyses since this comprehensive review.

[272] There is some debate as to whether there is a real separation between these processes. In any case, the implicit/explicit distinction is helpful for understanding social categorisation and stereotyping.

cognitive processes.[273] These implicit processes facilitate efficient decision-making in social contexts. Unfortunately, our reliance on these processes can sometimes be misplaced. In such cases, we may benefit from monitoring and regulating these implicit processes. Implicit bias training is structured on the assumption that most racial bias is the result of implicit processes that can be regulated through intentional retraining.[274]

Counter-stereotypes are one way that individuals may regulate against the application of stereotypes or prejudices.[275] For example, a common stereotype of older individuals is that they are "bad with technology." When this association becomes relevant to an individual, they may remind themselves of counter-stereotypical exemplars like Bill Gates, an older man who is most assuredly "good with computers." However, this kind of intervention requires concentration and appropriate motivation. An individual who is monitoring and countering stereotypes may experience fatigue. It takes mental effort to monitor and then think of counter-stereotypes. For some individuals, thinking about the stereotype may actually result in the activation and application of the stereotype, a phenomenon known as "stereotype rebound."[276] In short, when you concentrate on "not thinking about the elephant", you may very well end up thinking about an "elephant."

As noted above, one's motivations and ability to self-regulate against stereotyping and prejudice is important. Self-regulation models describe a process of monitoring and retraining implicit cognitive processes in accordance with one's non-prejudiced attitudes and norms. As discussed

[273] Kahneman, *supra* note 125 at 24–25. However, Kahneman does not use the language of "prejudice" or "stereotyping", preferring a more neutral-sounding language of "bias" or "cognitive illusion".
[274] For a sustained critique of implicit bias approaches, see Kahn, *supra* note 24.
[275] Whitley & Kite, *supra* note 24 at 528–531.
[276] On the challenges of the rebound effect, see Margo J Monteith, Laura R Parker & Mason D Burns, "The Self-Regulation of Prejudice" in Todd D Nelson, ed, *Handbook of Prejudice, Stereotyping, and Discrimination*, 2d ed (New York: Psychology Press, 2015) 409 at 420–421.

previously, aversive racism theory proposes that some individuals are motivated to appear or to act in accordance with their anti-prejudicial norms. Jody Armour cautions against an interpretation of aversive racism that "characterize[s] people who report nonprejudiced personal beliefs as either hypocritical, sub rosa racists or unconscious, aversive racists."[277] As Armour notes, individuals who report non-prejudiced beliefs may be genuinely committed to those beliefs.[278] For Armour, the challenge is in breaking the prejudice habit between one's genuine non-prejudiced beliefs and his or her behaviour.

According to Margo Monteith's Self-Regulation model, an individual monitors herself for the accessibility and activation of stereotypes when social categories (such as "old" or "young" person) are present in a situation.[279] To take up the "old person bad with computers" example, if she is aware of her prior stereotypes of older individuals, she may watch out for implicit stereotypes related to computer savviness. If she activates and applies the stereotype, she can then reflect on her prejudiced response and on her motivations to appear as non-prejudiced or act in accordance with her non-prejudiced norms. She may think to herself, "Bill Gates is good with computers," or "I do not believe in or value discrimination based on age." In some cases, she might be reminded of her non-prejudiced beliefs by others, such as a friend or someone she respects.[280] Consciously aware of this contradiction, she can then establish cues for control, reminders, that can be used to interrupt her application of that stereotypes in a future encounter. These cues for control may be affectively felt, as guilt or compunction, or thoughtfully considered. In future

[277] Jody Armour, "Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit" in Gregory Parks, Shayne Edward Jones & W Jonathan Cardi, eds, *Critical Race Realism: Intersections of Psychology, Race and the Law* (New York: New Press, 2008) 11 at 15.
[278] *Ibid* at 13.
[279] Monteith, Parker & Burns, *supra* note 276.
[280] Patricia Devine, "Breaking the Prejudice Habit: Allport's 'Inner Conflict' Revisited" in John F Dovidio, Peter Glick & Laurie A Rudman, eds, *On The Nature of Prejudice: Fifty Years After Allport* (Malden, Massachusetts: Wiley-Blackwell, 2005) 327 at 339.

encounters, she can rely on, and reinforce, her cues for control to interrupt, and hopefully dismantle, the activation and application of those stereotypes of which she has become aware. Patricia Devine's Breaking the Prejudice Habit model is a similar self-regulation model that has been successful at reducing prejudice in the short to long term.[281] Although these models may not work as well, or at all, for individuals who are low in internal motivation to self-regulate or high in explicit prejudice,[282] these models demonstrate that prejudice reduction interventions can be learned and successfully applied by some individuals outside of the original intervention context, such as a workshop or training session. Implicit social psychologists like Monteith and Devine propose that through practice, implicit cognitive processes may become retrained, such that stereotypes are less accessible and prejudiced responses are less likely.

In the American context, "egalitarianism" has been suggested as one possible norm for self-regulating against prejudice and stereotyping. However, Morrison *et al.*'s findings that "old-fashioned" prejudice (characterised by antipathy and hostility, and essentialist understandings of race) persists and co-exists with "modern" prejudice towards Indigenous peoples in Canada, suggests that multicultural and egalitarian norms that function to suppress racial prejudice against Black Americans may not operate in the same way for Indigenous peoples in Canada.[283] That is not to say that such norms are not helpful at all, but rather, that they are likely too ambiguous to function as anti-prejudicial norms in the settler-colonial context. I suggest that this ambiguity

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[281] The "Breaking the Prejudice Habit" model is empirically supported as an effective medium to long-term mechanism for the reduction of prejudice and the developing of anti-prejudicial attitudes and behaviours: E Ashby Plant & Patricia G Devine, "Internal and External Motivation to Respond Without Prejudice" (1998) 75:3 J Pers Soc Psychol 811–832; Devine, *supra* note 280; Patricia G Devine et al, "Long-term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention" (2012) 48:6 J Exp Soc Psychol 1267–1278; Patrick S Forscher & Patricia G Devine, "The Role of Intentions in Conceptions of Prejudice: An Historical Perspective" in Todd D Nelson, ed, *Handbook of Prejudice, Stereotyping, and Discrimination*, 2d ed (New York: Psychology Press, 2015) 241.

[282] Plant & Devine, "Motivations to Respond Without Prejudice", *supra* note 281 at 824–828.

[283] Brockman and Morrison similarly found that internalized values of egalitarianism and individualism reinforced their old-fashioned and modern prejudicial attitudes towards Indigenous peoples: Brockman & Morrison, "Roots of Indigenous Prejudice", *supra* note 155 at 32.

arises from the conflict between liberal norms and the recognition of Indigenous peoples' political, social, and legal difference – their *Indigeneity*. As Monture-Angus notes, "[n]ot only is inequality as sameness simplistic but such a notion of equality can create situations of grave injustice."[284] Even "reconciliation" may be too ambiguous, or perhaps biased in favour of the settler state, to function as an effective anti-prejudicial norm. In a study of non-Indigenous Truth and Reconciliation Commission event volunteers, Jeffery Denis and Kerry Bailey found that some volunteers rejected "reconciliation" as too ambiguous or contextually contingent to endorse. Volunteers preferred integrationist, incremental and inclusive definitions of "reconciliation" rather than one that respects Indigenous peoples' autonomy and self-determination.[285] Indeed, even some Indigenous scholars question whether "reconciliation" has become co-opted within a state-centred and neoliberal discourse.[286] This ambiguity, which can be employed in favour of the state or individual interests, is what makes "reconciliation" questionable as an anti-prejudicial norm.

Although *guilt* may motivate some individuals to self-regulate, acknowledgement of *responsibility* is perhaps more appropriate from an Indigenous perspective. Monture-Angus describes how non-Indigenous peoples shift affective feelings of guilt onto Indigenous and other racialized individuals; she asks, "[h]ow can you continue to look to me to carry what is your responsibility? And when I speak and the brutality of my experience hurts you, you hide behind your hurt. You point the finger at me and you claim I hurt you. I will not carry your responsibility any more. Your

[284] Monture-Angus, *supra* note 8 at 49–50.
[285] Jeffrey S Denis & Kerry A Bailey, "'You Can't Have Reconciliation Without Justice': How Non-Indigenous Participants in Canada's Truth and Reconciliation Process Understand Their Roles and Goals" in Sarah Maddison, Tom Clark & Ravi de Costa, eds, *The Limits of Settler Colonial Reconciliation: Non-Indigenous People and the Responsibility to Engage* (Singapore: Springer, 2016) 137 at 148.
[286] For an Indigenous perspective, see Dale Turner, "On the Idea of Reconciliation in Contemporary Aboriginal Politics" in Jennifer Henderson & Pauline Wakeham, eds, *Reconciling Canada: Critical Perspectives on the Culture of Redress*, 2d ed (Toronto: University of Toronto Press, 2013) 100; James (Sa'ke'j) Youngblood Henderson, "Incomprehensible Canada" in Jennifer Henderson & Pauline Wakeham, eds, *Reconciling Canada: Critical Perspectives on the Culture of Redress*, 2d ed (Toronto: University of Toronto Press, 2013) 115.

pain is unfortunate. But do not look to me to soften it. Look to yourself."[287] Lindberg proposes that the objective of ILE is not to inspire settler guilt, but to deconstruct and challenge settler colonialism and detail settler responsibility:

> "The time when we can expect guilt to motivate non-Aboriginal people is over. We have to get over it and move on or we will continue to live lives of despair." I wrote it down and have been thinking about that since. I think that there is a profound difference between inspiring guilt and requiring that people take responsibility for their actions and for perpetuating the actions initiated by their forefathers. My reason for writing, for speaking, and for requiring people to examine White supremacy in the guise of law is not to inspire guilt. It is painful to address it and discuss it, but if we do not raise the veil on the actions, words, and intent of White supremacists and White supremacy, then our silence renders us complicit. We need to examine it because the impact and the entrenchment of that supremacy are so ingrained in the language of Canadian law that we may not even see it. Identifying it, naming it, and translating it defuses its power and gives us a voice and lets us participate in establishing anti-colonial and anti-racist strategies and agendas. We cannot talk about nation building in the absence of identifying the source of damage to our nations. Similarly, we cannot identify rebuilding strategies without determining the nature of the damage. In this carefully woven braid of rejuvenation, reclamation, and rebuilding, we have

[287] Monture-Angus, *supra* note 8 at 21.

> to make sure we identify the rot that has infected and affected the ancient fibers.[288]

According to Lindberg, allies should act "not [out of] curiosity, for classroom purposes, or to settle their fears" but because "they respect Aboriginal people and accept that the responsibility for keeping Aboriginal peoples and issues alive is their concern as well."[289] Thus, although social psychologists identify *guilt* as an affective response in self-regulation, we should also consider feelings associated with responsibility. We may also consider other individual-level processes that may support the reduction of prejudice. For example, a high level of empathy is associated with reduced prejudice.[290] Some of these individual level processes may complement Indigenous legal principles that inform social interactions, such as the Anishinaabeg principles of *dabaadendiziwin* (humility)[291] and *debwewin* (truth),[292] and the centrality of agency and responsibility in some legal orders.[293]

To return to a point made in the introduction, individual-focused interventions are helpful insofar as they provide individuals the tools for taking responsibility for their racial stereotyping and prejudice. As Jonathan Kahn argues, much implicit bias training has become a form of "recreational anti-racism", an activity taken up from time to time to make relationships just a bit less confrontational.[294] When "implicit" biases are seen as "natural" or "unintentional", the effects of racial stereotyping may become easier to minimize or rationalize away. Rather than ensure accountability, the language of "implicit" stereotyping and prejudice may obscure the social

[288] Lindberg, "Critical Indigenous Legal Theory Part 1", *supra* note 5 at 245.
[289] Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 311.
[290] Whitley & Kite, *supra* note 24 at 252–253.
[291] Borrows, "Dabaadendiziwin", *supra* note 268 at 152–157.
[292] Jeffery G Hewitt, "Indigenous Restorative Justice: Approaches, Meaning & Possibility" (2016) 67:1 UNBLJ 313–335 at 320–321.
[293] Borrows, *supra* note 8 at 46–47, 106–109.
[294] Kahn, *supra* note 24 at 153–168.

agency of individuals. Even worse, this language may be co-opted and prioritized in legal discourse, thereby advancing a view that *intent* distinguishes those who are and are not "prejudiced." Thus, it is important that we maintain focus on the *social* and *situational* side of racial stereotyping and prejudice.

ii. Intergroup-level Processes

"We are all here to stay" is a phrase that conjures up harmonious intergroup relations. Intergroup contact theory proposes that positive encounters may reduce prejudice and promote intergroup harmony under certain conditions.[295] These conditions for positive intergroup contact are equal status between groups, common goals, intergroup cooperation, institutional support, and the potential for cross-group friendship.[296] Other conditions may facilitate the reduction of prejudice,

[295] Allport theorised that under certain conditions intergroup contact could reduce intergroup prejudice. This has become known as contact theory Allport, *supra* note 24 at 227, 276, 281, 489; for an overview of the history of the contact theory and intergroup contact research Thomas F Pettigrew & Linda R Tropp, "Allport's Intergroup Contact Hypothesis: Its History and Influence" in John F Dovidio, Peter Glick & Laurie A Rudman, eds, *On The Nature of Prejudice: Fifty Years After Allport* (Malden, Massachusetts: Wiley-Blackwell, 2005) 262.

[296] Although not originally one of Allport's contact conditions, the potential for cross-group friendship also appears to promote positive intergroup attitudes: Thomas F Pettigrew, "Intergroup Contact Theory" (1998) 49:1 Ann Rev Psychol 65–85 at 76; Self-disclosure and time-spent in activities with outgroup friends is strongly associated with positive intergroup attitudes: Kristin Davies et al, "Cross-Group Friendships and Intergroup Attitudes: A Meta-Analytic Review" (2011) 15:4 Pers Soc Psychol Rev 332–351 at 340–345; Recent meta-analyses suggest that the contact conditions act more as "facilitating conditions that enhance the tendency for positive contact outcomes to emerge" than as separate factors. That said, authority sanction stands out as one of the strongest of Allport's original conditions for facilitating positive contact effects. See Thomas F Pettigrew & Linda R Tropp, "A Meta-Analytic Test of Intergroup Contact Theory" (2006) 90:5 J Pers & Soc Psychol 751–783 at 766. Recent intergroup contact research now considers the underlying processes associated with intergroup contact and prejudice reduction. These processes include cognitive, motivational and affective processes, as well mediating effects such as increased or decreased warmth or liking, anxiety and threat, and the relationship between intergroup contact and social identity and categorisation. Pettigrew, "Intergroup Contact Theory", *supra* note at 71–75 (describing cognitive processes such as counterstereotypic information, affective processes such as reduced anxiety, increased empathy, and friendship, motivational processes such as more inclusive ingroup norms, and processes social recategorisation , whereby the ingroup is redefined so as to include outgroup members, either situationally or more generally). Pettigrew proposes a three-stage longitudinal model for intergroup contact. On initial contact, participants engage in a process of decategorization, coming to see themselves as individuals. Under optimal conditions, this contact leads to increased interpersonal warmth and reduces anxiety. On established contact, ingroup and outgroup characteristics are rendered salient. Under optimal conditions, established contact leads to reduced intergroup prejudice with generalization to non-participant outgroup members. At the final stage, the groups are unified and recategorized. Under optimal conditions, Pettrigrew predicts this leads to the maximum reduction in intergroup prejudice. This process may retain ingroup and outgroup dual identities. See *Ibid* at 76–77. Kenworthy and Turner propose "a combination of positive contact and group salience during contact" that promote positive affective process such as decreased anxiety and

including the successful completion of a group task (failing the task may leave a negative impression), self-disclosure, voluntary contact, equal numbers of members from each group, application over an extended period and in a variety of contexts and situations, individuation, and ideological homophily. Intergroup contact may reduce prejudice by providing individuals with individuating knowledge about members of outgroups or cultural knowledge about outgroups, reducing negative affective responses towards outgroups or its members (such as through reducing perceptions of threat and intergroup anxiety or increasing empathy), and by developing and/or maintaining norms that support individual and intergroup processes.[297] Meta-analyses suggest that intergroup contact holds promise for reducing prejudice between groups.[298] Many of the ILE programs discussed in chapter 3 satisfy the conditions for intergroup contact, a point to which I return.

Intergroup contact may not be feasible or successful in every contact situation. Some forms of intergroup contact may be less effective, or even detrimental, in cases of protracted, asymmetrical conflict like that of settler colonialism in Canada.[299] For example, a shared joint project, such as

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increased empathy, and cognitive processes such as increased knowledge about the outgroup and its individual members through intergroup dialogue and self-disclosure: Jared B Kenworthy & Rhiannon N Turner, "Intergroup Contact: When Does it Work, and Why?" in John F Dovidio, Peter Glick & Laurie A Rudman, eds, *On The Nature of Prejudice: Fifty Years After Allport* (Malden, Massachusetts: Wiley-Blackwell, 2005) 278 at 285–290.

[297] Whitley & Kite, *supra* note 24 at 536–548.

[298] Meta-analyses suggest that intergroup contact is generally associated with reduced intergroup prejudice. Even participants who would ordinarily avoid intergroup encounters experience reduced prejudice when they actually engage in such an encounter. The effects of intergroup contact also tend to be generalizable outside the context of the intergroup encounter. These findings suggest that intergroup contact may be an effective intervention for reducing prejudice among high avoidance individuals and for improving relationships between the ingroup and outgroup more generally. See Pettigrew & Tropp, "A Meta-Analytic Test of Intergroup Contact Theory", *supra* note 296 at 766; for an additional summary of key laboratory and field research, see Paluck & Green, "Prejudice Reduction Interventions", *supra* note 25 at 345–346, 355.

[299] Maoz, *supra* note 51. Maoz identifies four contact models: (1) coexistence; (2) joint projects; (3) confrontational; and (4) narrative or storytelling. Coexistence models are exemplified by the phrase "we are all here to stay." Co-existence models are attractive to advantaged group members, particularly those high in prejudice, because they do not challenge underlying structural conditions or social hierarchies. Like co-existence models, joint project models do not challenge underlying conditions or hierarchies, but may create symbolic examples of intergroup cooperation; Canada's National Aboriginal Day Celebrations may be an example of a joint-project model. Confrontational models

Impact Benefit Agreement (an agreement between a First Nation and a proponent that may address procedural components of the Crown's duty to consult and accommodate and that establishes a contractual relationship between the First Nation and proponent related to a resource development project, for example, in the form of an agreement to receive revenue from a mine or forestry operation), may not necessarily engender respectful and ethical relationships, especially where the proponent or Crown exercises significantly greater resources. Moreover, establishing conditions of cooperation, equal status, and common goals can be difficult where Indigenous and non-Indigenous worldviews are incommensurable. In some cases, individuals high in prejudice, particularly its aversive variant, may avoid intergroup encounters entirely.[300] I imagine that some cottagers in northern Ontario may avoid travelling through reserve or attending summer pow-wows. Although high prejudiced individuals may experience a significant change in their beliefs, attitudes, and behaviors after intergroup contact, frequent intergroup contact is usually required for this to occur. Moreover, intergroup encounters that are perceived to end negatively may increase or maintain perceptions of threat, negative outgroup stereotypes, and prejudices. Similarly, prior negative contact experiences may prime participants to perceive an intergroup encounter as negative. I will return to these limitations shortly, in a discussion of intergroup contact and perceptions of threat in northern Ontario.

So far, I have discussed direct intergroup contact. Extended contact – for example, a friend-of-a-friend – may also reduce prejudice.[301] When we know about successful intergroup friendships, we may be more likely to see intergroup encounters positively and to fear rejection less. Intermarriage,

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emphasize group conflict and seek to empower disadvantaged groups towards collective action for social change. Though confrontational models may result in change, they can also result in backlash. Finally, narrative models engage both advantaged and disadvantaged group members in intergroup dialogue. The Truth and Reconciliation Commission's methodology, particularly settler involvement as witnesses, exemplifies the narrative model.

[300] Whitley & Kite, *supra* note 24 at 534–544.

[301] *Ibid* at 544–545.

for example, may function as a form of indirect contact, though I will discuss the limitations of this below. For those who are aversive to intergroup encounters, extended contact may prepare them for closer engagements. In addition to extended contact, individuals may imagine contact encounters, either in contemplation alone or through group rehearsals. Imagined contact is helpful because it prepares individuals for either negative or positive encounters; this can take the sting out of negative encounters and prepare individuals for engaging in positive intergroup behaviors.[302] Finally, media contact – reading Thomas King's *An Inconvenient Indian,*[303] or hearing the music and advocacy of *A Tribe Called Red* – may also facilitate the reduction of prejudice.

Intergroup contact theory is closely related to the social identity theory of self-categorization. Self-categorization theory describes how individuals come to see themselves as members of groups (it is related to social categorization theory, which is how groups are socially categorized). Social identity theorists propose at least three categorization interventions for reducing prejudice between groups: decategorization (personalization/individuation), mutual intergroup differentiation, and recategorization.[304] Decategorization interventions individuate members from their outgroup identity and may help participants develop empathy and reduce intergroup anxiety.[305] The humanization of racialized victims of police or state violence, for example, may function to personalize these individuals separate from their group identity. However, like color-blind

[302] *Ibid* at 545–546.
[303] Thomas King, *The Inconvenient Indian: A Curious Account of Native People in North America* (Toronto: Doubleday, 2017).
[304] Samuel L Gaertner & John F Dovidio, "Categorization, Recategorization, and Intergroup Bias" in John F Dovidio, Peter Glick & Laurie A Rudman, eds, *On The Nature of Prejudice: Fifty Years After Allport* (Malden, Massachusetts: Wiley-Blackwell, 2005) 71 at 76–85; Samuel L Gaertner et al, "The Common Ingroup Identity: Categorization, Identity, and Intergroup Relations" in Todd D Nelson, ed, *Handbook of Prejudice, Stereotyping, and Discrimination*, 2d ed (New York: Psychology Press, 2015) 433 at 437–446.
[305] Whitley & Kite, *supra* note 24 at 549.

ideologies, which purport to treat racialized individuals *qua* individuals,[306] decategorization interventions see group differences as less meaningful, even when real and relevant. In contrast, mutual intergroup differentiation interventions emphasize the positive and real, though different, characteristics of groups.[307] In this way, group identity remains salient in the intergroup encounter, which can assist in generalizing the effects of positive intergroup contact to other outgroups or in future encounters.[308] Finally, recategorization interventions, of which there are two variants, expand the contours of the ingroup to include formerly excluded outgroup members.

The first variant, the Common Ingroup Identity model, recategorizes outgroup members within a broader, more inclusive ingroup.[309] This more inclusive ingroup identity often takes its starting point from the dominant or advantaged group identity. For example, the extension of citizenship rights to Indigenous peoples, such as the right to vote and hire a lawyer, marked a turning point towards a common ingroup identity as Canadians. However, this turn, exemplified by Pierre Trudeau and Jean Chretien's 1969 White Paper, may come at the expense of an outgroup's social (and in this case, legal) identity.[310] It can, in short, advance an assimilationist ideology, one that requires the assimilation of outgroup members to a common ingroup identity defined by the values, norms, attitudes, and beliefs of the dominant, advantaged group. This is the "darker side" of intergroup contact.[311] Where intergroup contact leads to the formation of common ingroup identities (drawing a more inclusive boundary around the ingroup, such as by saying that

[306] *Ibid* at 561–563.
[307] Gaertner & Dovidio, *supra* note 304 at 76–77.
[308] Whitley & Kite, *supra* note 24 at 550–551.
[309] Gaertner & Dovidio, *supra* note 304 at 78–79.
[310] *Statement of the Government of Canada on Indian Policy*, by Jean Chrétien & Indian Affairs and Northern Development, Presented to the First Session of the Twenty-Eighth Parliament (Ottawa: Parliament of Canada, 1969); see also Harold Cardinal's response to the 1969 Whitepaper, Harold Cardinal, *The Unjust Society* (Vancouver: Douglas and McIntyre, 2013).
[311] John F Dividio et al, "From Attitudes to (in)action: the Darker Side of 'We'" in John Dixon & Mark Levine, eds, *Beyond Prejudice: Extending the Social Psychology of Conflict, Inequality and Social Change* (Cambridge: Cambridge University Press, 2012) 248.

Indigenous peoples are "Canadians too"), individuals – both advantaged and disadvantaged – may be less likely to advocate for social change.[312]

The second variant, the Dual Identity model, most resembles a multicultural or polycultural ideology.[313] This model restructures a more inclusive common ingroup identity while respecting intergroup differences and outgroup members' distinct identities. As discussed earlier, many Indigenous law students desire to retain their identity as Indigenous peoples as they negotiate their identities – and careers – in Canadian legal practice and education.[314] Gordon Christie challenges the assumption that Indigenous peoples, who arguably lead a "hybridized existence", must "accommodate themselves to the fact of an existence embedded within a liberal democratic state."[315] Instead, we may apply the "dual identity" model in a way that prioritizes Indigenous peoples' identities. Mill's rooted constitutionalism or Henderson's treaty federalism models provide frameworks through which non-Indigenous persons can imagine a dual identity based on a more inclusive *sui generis* identity rooted in Indigenous legal orders.[316] Either of these Indigenous models may permit non-Indigenous peoples' involvement as kin within this *sui generis* identity, and, if necessary, respects non-Indigenous peoples' non-involvement.

As I mentioned earlier, it is unclear whether intergroup contact and self-categorisation reduces settler prejudice towards Indigenous peoples and supports collective action toward social change.

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[312] *Ibid*.
[313] Whitley & Kite, *supra* note 24 at 564–566.
[314] See also Lawrence & Shanks, "Indigenous Lawyers in Canada", *supra* note 105. Recall as well the discussion of Indigenous legal and word warriors, in Henderson, "Postcolonial Indigenous Legal Consciousness", *supra* note 5 at 7 and 13; Cruz, *supra* note 8; see also Christie's discussion of the impact of settler-colonial culture on Indigenous law students' and professors' determination and reinvigoration of their Indigenous identities, Christie, "Culture, Self-Determination and Colonialism", *supra* note 5 at 22–28.
[315] Christie, "Culture, Self-Determination and Colonialism", *supra* note 5 at 28.
[316] Henderson, "Treaty Federalism", *supra* note 8 at 329; Aaron James (Waabishki Ma'iingan) Mills, "Rooted Constitutionalism: Growing Political Community" in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) 133 at 159–161.

In a 2014 study of seven Canadian prairie cities, social psychologists Lashta, Berdahl and Walker found that familial or friendship-based intergroup contact correlated with lower levels of "old-fashioned" (characterised by antipathy and hostility, and essentialist understandings of race) and "modern" prejudice, but that general contact only correlated with reduced old-fashioned prejudice towards Indigenous peoples.[317] In contrast, in a series of studies in northwestern Ontario, Jeffery Denis found that although intergroup contact was associated with less "old-fashioned" prejudice, it was not necessarily associated with reducing the superior group position of White individuals relative to Indigenous (First Nations and Métis) residents.[318] Echoing my arguments on intergroup threat and settler incommensurabilities in the previous chapter, Denis concludes that anti-Indigenous prejudice "is not defined by an absence of intergroup friendships; it is a defensive reaction to perceived group threat."[319]

In one study, Denis describes the municipality of Alberton's opposition to the construction of the Weechi-it-te-win Family Services (WFN)'s Training and Learning Centre for Indigenous children.[320] Denis describes how the municipality employed a series of strategies to oppose the project without disclosing any explicit racial animus. The municipality delayed its decision constantly, offered race-neutral justifications and unsolicited, self-serving, and paternalistic advice, denied any racial motives, played the victim, created new rules for WFN to satisfy, and

[317] Lashta, Berdahl & Walker, "Prejudice in Canada's Prairie Cities", *supra* note 155.
[318] Denis, "Small Town Settler Colonialism", *supra* note 155 at 231.
[319] Denis, "Transforming Meanings", *supra* note 155 at 458. Corenblum and Stephan similarly found that White Canadians perceived Indigenous peoples' advocacy for Indigenous rights and title and Indigenous students access to affirmative action programming as a symbolic (political power and status) and material (economic, land) threat to White people's dominance: Corenblum & Stephan, "White Fears and Native Apprehensions", *supra* note 155 at 255, 258. See also Donakowski & Esses, "Native Canadians, First Nations, or Aboriginals", *supra* note 155 at 90 (describing how the term "First Nations" evokes perceptions of political threat, as identified in the example of the Assembly of First Nations).
[320] Non-Indigenous residents referred to the children's society as "we-cheat-to-win", reflecting the stereotype that Indigenous peoples receive special privileges: Denis, "Transforming Meanings", *supra* note 155 at 460.

censored non-Indigenous supporters of WFN's proposal as "traitors."[321] In response to the Alberton residents' strategies, WFN avoided the topic of race. Instead, WFN provided "neutral" information to counter stereotypes and prejudices, emphasized common interests (*à la* an intergroup contact approach), expressed positive affect ('stayed positive') and avoided explicit conversations about racism, consistent with traditional Indigenous decision-making processes and implicit social cognition theory.[322] Even though the municipality's decision was likely unreasonable and incorrect, WFN chose not to appeal the municipality's decision, possibly recognizing that they would have to fund their appeal and that even if successful, they would continue to face resistance from the municipality's residents (which would not be safe for the Indigenous children in care).[323] WFN's experience casts considerable doubt on the efficacy of intergroup contact in settler colonial contexts, where Indigenous peoples' rights and interests are perceived as threats to settlers' resources.

In a second study involving 18 months of fieldwork and 160 interviews with Indigenous and non-Indigenous residents of a town in northern Ontario, Denis investigated the resiliency of anti-Indigenous prejudice despite the prevalence of cross-group friendship and intermarriage in that community. Denis found that although intergroup contact was associated with less "old-fashioned" prejudice, it was not necessarily associated with reducing settler residents' superior group position relative to Indigenous (First Nations and Métis) residents.[324] Denis argues that three social processes reinforce the settler residents' superior group position relative to Indigenous peoples and justify racial inequality. First, settler residents subtype their Indigenous friends as exceptions to

[321] *Ibid* at 459–462; Recall, as well, Werhun and Penner's study of benevolent prejudice against Indigenous peoples, which involves the offering of unsolicited, paternalistic advice and the subordination of Indigenous individuals into a "helping" position: Werhun & Penner, "Benevolent Prejudice Toward Aboriginal Canadians", *supra* note 155.
[322] Denis, "Transforming Meanings", *supra* note 155 at 459, 462.
[323] *Ibid* at 464.
[324] Denis, "Small Town Settler Colonialism", *supra* note 155 at 231.

their otherwise prejudicial norms. Second, settler residents lean towards friendship with Indigenous peoples who share their settler ideology, making the experience limited in its generalizability. Finally, settlers, and to some extent Indigenous residents, avoid discussing race and Indigenous peoples' political rights or interests with their friends. Furthermore, Denis argues that the local context – particularly the history of Indigenous subordination through colonial processes and the recent trend towards greater political and legal status for Indigenous peoples – informs the reproduction of racism in that town, particularly non-Indigenous persons' strategies for maintaining group dominance.[325] In short, residents generally avoid meaningful conflict in favour of harmonious relationships that do not challenge settler colonial dominance. Denis's research challenges the viability of intergroup contact in the Indigenous-settler context and the implications of the study of Lashta, Berndahl and Walker.

iii. Collective Action Towards Social Change

Prejudice reduction approaches, such as self-regulation and intergroup contact, rest on a series of assumptions about social change that may be insufficient in a settler-colonial context. Social psychologists John Dixon and Mark Levine summarise these assumptions as part of the "prejudice problematic", a focus on individual rather than collective action and change, irrationality and error as the source of contemporary prejudice, affective negativity (fear, disgust) rather than seemingly positive affects (such as those that accompany paternalistic forms of prejudice), and an

[325] *Ibid* at 236. One study found that the terms used to describe Indigenous peoples are associated with varying levels of prejudice. Terms that emphasize Indigenous peoples' political and social difference, such as "First Nations" and "Native Canadians", were associated with more negative evaluations than "Aboriginal peoples", "Native Indians", and "Native Peoples": Donakowski & Esses, "Native Canadians, First Nations, or Aboriginals", *supra* note 155 at 88–90. Donokowski and Esses suggest that these results may reflect non-Indigenous peoples' perception of immaterial threat from the increasing political role and advocacy of First Nations. Corenblum and Stephan similarly posit that recent advances in Indigenous peoples' rights and social position may increase White people's perception of material and immaterial threat, thus predicting intergroup anxiety and prejudice: Corenblum & Stephan, "White Fears and Native Apprehensions", *supra* note 155 at 264–265.

overreliance on the prejudice reduction model as a model for social change.[326] Margaret Wetherell, who coined the term "prejudice problematic", notes that lay and academic discourses of prejudice "draw attention away from immediate social reform", "provide a logic and method for justifying individual conduct", and "establish a positive identity and a benevolent 'vocabulary of motives' vis a vis other, supposedly less enlightened individuals."[327] As Stephen Wright and Gamze Baray argue, it is not enough that ingroup members feel better or enjoy more harmonious relations with subordinated group members:[328]

> Although it is clear efforts to reduce rampant antipathy, overt expressions of hostility, and active denigration of other groups would need to be part of a scheme to improve many intergroup relations, it also appears reasonable to consider the limitations of a focus on prejudice reduction, and recognize that it may actually directly conflict with another important means by which positive social change occurs - collective action. Failure to recognize these limitations will very likely lead us into the trap that many members of the advantaged group seem to fall into - assuming that because interpersonal interactions across groups

[326] Dixon & Levine, *supra* note 36 at 5–12.
[327] Wetherell, *supra* note 37 at 158.
[328] Intergroup contact and social categorisation theory proposes that ingroup recategorization (the creation of a common ingroup identity, or dual identities) may improve intergroup relations and reduce prejudice. This theory reflects the "prejudice problematics" assumption that the absence of prejudice is the intergroup harmony. John Dixon et al, "'Let Them Eat Harmony': Prejudice-Reduction Strategies and Attitudes of Historically Disadvantaged Groups" (2010) 19:2 Curr Dir Psychol Sci 76–80; "Niceness... leaves the power of racist mobilization relatively untouched": Reicher, *supra* note 50 at 42. Dovidio and Gaertner acknowledge these limits as the "darker side of 'we'"; "We note, though, that commonality, positive intergroup contact and intergroup harmony do not necessarily undermine efforts towards equality, but it is important to recognize that commonality and intergroup harmony per se do not necessarily lead to intergroup equality. The challenge, both theoretically and practically, is thus to extend the analyses of intergroup relations to understand more fully the dynamics not just about feeling good about others but also doing good for them": Dividio et al, *supra* note 311 at 264.

> are convivial and warm that intergroup inequalities are either gone or are acceptable.[329]

Social change theory reminds us that "[c]onflict is […] the fire that fuels social change rather than a threat to extinguish at the point of conflagration."[330] Stephen Reicher adds that we "need to direct our practical attention from changing the views of dominant group members to sustaining the collective actions of subordinate group members" because "prejudice is a practice relating to ingroup authority and ingroup power."[331] As such, social change theory is tailored towards countermobilization and the support of collective action by subordinated groups, their members, and allies.[332] This does not mean that prejudice reduction approaches are not helpful, but rather, that the focus must remain on collective action towards social change and the anti-subordination of Indigenous peoples and their legal orders.

In chapter 1, I described why intergroup contact theory appealed to me. Its central proposition – that relationships are key to change – resonated with my ethics and sensibilities as a Métis person from northern Saskatchewan. Although my own experiences in La Ronge, Saskatchewan echo

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[329] Stephen C Wright & Gamze Baray, "Models of Social Change in Social Psychology: Collective Action or Prejudice Reduction? Conflict or Harmony?" in John Dixon & Mark Levine, eds, *Beyond Prejudice: Extending the Social Psychology of Conflict, Inequality and Social Change* (Cambridge: Cambridge University Press, 2012) 225 at 242.
[330] John Dixon & Mark Levine, "Conclusions and Future Directions: the Nature, Significance and Inherent Limitations of the Concept of Prejudice in Social Psychology" in John Dixon & Mark Levine, eds, *Beyond Prejudice: Extending the Social Psychology of Conflict, Inequality and Social Change* (Cambridge: Cambridge University Press, 2012) 304 at 317.
[331] Reicher, *supra* note 50 at 13.
[332] *Ibid* at 30–42. On the topic of dominant group members as allies of social change, see John Dixon et al, "From Prejudice Reduction to Collective Action: Two Psychological Models of Social Change (and How to Reconcile Them)" in Chris G Sibley & Fiona Kate Barlow, eds, *The Cambridge Handbook of the Psychology of Prejudice* (Cambridge: Cambridge University Press, 2018) 225 at 229, 241. Recent empirical literature on intergroup contact suggests that some of the "darker side of we" (the tendency for intergroup contact to undermine collective action toward social change by disadvantaged groups) may be avoided when ingroup members – allies - denounce persisting intergroup inequalities: Julia C Becker et al, "Friend or Ally: Whether Cross-Group Contact Undermines Collective Action Depends on What Advantaged Group Members Say (or Don't Say)" (2013) 39:4 Pers Soc Psychol Bull 442–455 at 450–452; Lisa Droogendyk et al, "Acting in Solidarity: Cross-Group Contact between Disadvantaged Group Members and Advantaged Group Allies" (2016) 72:2 J Social Issues 315–334 at 319–320, 330 (reviewing potential pitfalls of advantaged group allies' participation in advocacy by disadvantaged group members).

Denis' insights from northern Ontario, I hope that relationality, as an Indigenous legal principle, may be a key to change. Chief Thomas' request to "gather together" at the 2015 CIAJ reflected this hope. However, as I note in the previous section, intergroup contact may not always result in any meaningful change in social positions and may undermine collective action. Moreover, especially in the settler-colonial context, Indigenous peoples' differences may be perceived as a threat to settler normalcy and futurity. When I reflect on the role of "threat", I feel uncomfortable. This is not because threat itself makes me uncomfortable, but that seeing the world through a lens of threat feels inconsistent with my commitment to relationality. But as Hewitt and Borrows remind us, conflict and disagreement are an important part of change; and this conflict, or *contradiction,* is valuable within Nêhiyawak and Anishinaabeg lifeways.[333] I argue that a commitment to social change – ultimately, decolonization – must be a part of any individual or intergroup approach. This will be uncomfortable and unsettling.

None of the theories presented in Chapter 2 or 3 are determinative. They offer explanations for understanding the manifestation and effects of racial stereotyping and prejudice against Indigenous peoples and their legal orders in Canadian law schools. Implicit social cognition theory and individual-level interventions may be helpful as starting points for individuals who are resistant to taking accountability for their beliefs, attitudes, and behaviours. However, to the extent that these approaches undermine accountability, they may be counterproductive as pedagogical interventions. Contemporary theories of prejudice, such as "modern", "symbolic", "aversive", and "benevolent" prejudice are not mutually exclusive. They are useful insofar as they (re)affirm Indigenous peoples' experiences of racial stereotyping and prejudice and assist non-Indigenous

[333] See note 44 and accompanying commentary on Hewitt's interpretation of the story of the *aniimiki*. See also Borrows description of conflict and disagreement in his interpretation of the *animikeek* and *mishi-bizheu* in Borrows, *supra* note 8 at 100–112.

persons understanding of these experiences. These theories may not be accurate in a settler-colonial context, owing to their development in the American context of White and Black intergroup relations. Although intergroup contact theory is attractive for its relational focus, its prioritization of intergroup harmony may undermine the kinds of social change that are required for settlers' ethical and respectful engagement with Indigenous legal traditions. Integrated threat theory comes closest, in my view, to an accurate description of how racial stereotyping and prejudice is associated with settlers' motivation to maintain the inequitable distribution of resources under settler-colonialism. Together, these theories provide a more comprehensive account of the kinds of normative decisions that non-Indigenous courts, lawyers, professors and law students make in Canadian legal education and practice. These theories also disclose the layered quality of the "obsidian quandaries" that Indigenous professors and students face in Canadian legal education and practice.

Helpfully, many current and planned ILE initiatives, such as mandatory Indigenous law courses, Aboriginal law camps, intensives, clinics, institutes and summer programs, may reduce racial prejudice and stereotyping and its effects on Indigenous students and professors, articulate anti-prejudicial norms grounded in Indigenous legal orders, and motivate non-Indigenous students and professors to engage ethically and respectfully with Indigenous legal orders and perspectives. Institutional commitments may further establish the resources and norms necessary for ILE and eventually, the decolonization of Canadian legal education and practice. These activities also support Indigenous students' and professors' determination of their own personal and professional identities. In the next two sections, I inventory current and planned Indigenous programming and institutional commitments, and describe how these programs and commitments may function as prejudice reduction and settler harm reduction interventions in Canadian law schools.

1. Indigenous programming

In the preceding section, I introduced two models for reducing individual and intergroup prejudice. I also challenged the limits of these models for the purpose of implementing the Calls and ILE in law schools. In this section, I inventory current and planned Indigenous programming in Canadian law schools and review it alongside the social psychology on prejudice reduction interventions.

a) Critical Indigenous Legal Education

Critical Indigenous legal education prioritizes Indigenous peoples' perspectives, legal orders, and legal issues, contextualizes and deconstructs Canadian law, and educates students on Indigenous legal orders within Indigenous pedagogical contexts. Such courses challenge the assumptions that deny Indigenous perspectives and uphold colonization,[334] such as "perspectivelessness"[335], the prioritisation of "objective" truth,[336] the invalidity of Indigenous law as law,[337] and the neoliberalization of Indigenous legal orders in the Canadian legal marketplace.[338]

[334] Hewitt, "Decolonizing and Indigenizing", *supra* note 4 at 75, 89.
[335] *Ibid* at 76.
[336] *Ibid*.
[337] *Ibid* at 75.
[338] Monture-Angus, *supra* note 8 at 60.

Constitutional,[339] property,[340] tort,[341] and criminal law[342] are prime subjects for contextualization and deconstruction.

Contextualizing Canadian law is necessary but not sufficient for implementing the Calls. Indigenous legal orders must also be part of the curriculum. As Lindberg writes, "I trust the ability of others to exclude information that is culturally biased, but I question all people's abilities to include information that is excluded."[343] Mills proposes a mandatory course in rooted, Indigenous constitutionalisms for all law students, not just those who want to learn about Indigenous legal orders or practice in Indigenous communities.[344] Otherwise, Mills warns, there is a risk that

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[339] Mills, "The Lifeworlds of Law", *supra* note 12.

[340] Canadian property law is based on the assumption that the Crown has a legal claim, outside of treaty, to land in North America. This assumption is incompatible with Indigenous peoples' legal orders and relationship to land. As a result, Indigenous students experience Canadian property law as alienating.[340] As one student reports, "The legal concepts in property law were difficult to comprehend as well, such as air trespass - in the Indian world, nobody owns the air we breath except the Creator.": quoted in Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 318. Tracey Lindberg describes how Canadian property law obscures Indigenous peoples' relationship to land:

> The layers of colonial laws piled on top of the initial understanding that newcomers are entitled [to land] only serve to substantiate that understanding. English is the asphalt used to pave the roads on top of the layers of protection of that initial understanding of supremacy. The English legal language is used as a trowel to smooth over places where earth and plants break through the pavement. Sitting in one of my law school classes one day, I was able to observe an exchange between my property law professor and a colleague. Their language was a brick heavy to me, landing with a thud – to my ears they lobbed it with the ease of those who were playing tennis – land, chattels, mortgage, home. They spoke of a piece of territory like it was transmutable and exchangeable through a pen stroke. The ease with which the language of exchange and empire flew back and forth to facilitate possessor logic was striking. (Lindberg, "Critical Indigenous Legal Theory Part 1", *supra* note 5 at 238.)

[341] We can, for example, see how the "reasonable person" is culturally contingent. For a discussion of the idea of a reasonable Cree person, albeit in another context, see Hadley Friedland, "Navigating through Narratives of Despair: Making Space for the Cree Reasonable Person in the Canadian Justice System" (2016) 67:1 UNBLJ 269–312 at 272–276.

[342] Criminal law professors may struggle to contextualize cases involving Indigenous victims or defendants. The case-briefing method, which isolates cases from their social context, can alienate Indigenous law students and advance negative stereotypes about Indigenous peoples. See Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 320; Monture-Angus, *supra* note 8 at 15–17. In my view, the backlash to the exam question on Indigenous child welfare at the University of Toronto may have reflected a failure to properly contextualize the assignment and its purpose.

[343] Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 328.

[344] Mills, "The Lifeworlds of Law", *supra* note 12 at 872; see also Askew, "Learning from Bear-Walker", *supra* note 52 at 42.

students will "proceed to read and distort Indigenous law through the liberal constitutional lens they know, even if unbeknownst to them."[345] Furthermore, both Canadian and Indigenous legal education require critical reflection on the role of gender and sexuality in legal education and practice (an important aspect that is sometimes neglected).[346]

Indigenous law courses may also facilitate the reduction of prejudice among non-Indigenous students. For example, students in Mill's Anishinaabe constitutionalism course at Lakehead University responded positively to the shift in pedagogical and epistemological context.[347] The process of contextualizing Canadian law encourages students to reflect on their unstated, implicit beliefs, attitudes and behaviours, a hallmark for the self-regulation of prejudice. It also introduces students to another normative and legal structure through which they may assess their conduct, thus facilitating the integration of anti-prejudicial norms that are consistent with Indigenous legal orders. Although this process may, in some cases, result in increased perceptions of threat (for example, a belief that the recognition of Indigenous title means the appropriation of settler land, or as an attack to a rule of law that excludes Indigneous legal orders), when facilitated appropriately it may support students' self-regulation of their racial beliefs, attitudes, and behaviours. For non-Indigenous students, critical Indigenous legal education contextualizes their own identities, as settlers, and asks whether they can imagine living differently.

These courses also respond to the needs of Indigenous law students, who desire courses that reflect their interests and their personal and professional identities.[348] Indigenous students report feeling

[345] Mills, "The Lifeworlds of Law", *supra* note 12 at 872.
[346] Emily Snyder, Val Napoleon & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593–654 at 596–599; Emily Snyder, "Challenges in Gendering Indigenous Legal Education: Insights from Professors Teaching about Indigenous Laws" (2019) 34:1 CJLS 33–53 at 49–53; Emily Snyder, "Queering Indigenous Legal Studies" (2015) 38:2 Dalhousie LJ 591–618 at 598–600, 610–614.
[347] Mills, "The Lifeworlds of Law", *supra* note 12 at 873–874.
[348] Bailey, "Racism within the Canadian University", *supra* note 155 at 1271.

alienated by course materials that predominantly reflect the experiences of White cis men.[349] In response, Indigenous law students seek out textual and personal resources to support and sustain their engagement in law school, often at the expense of an increased workload.[350] Indigenous students may choose courses that better reflect their experiences of the Canadian legal system, such as courses with a critical legal theory component[351] or that incorporate Indigenous pedagogies, epistemologies, morality, ethics, and legal issues.[352] Mills describes how he turned to unassigned readings to satisfy his learning spirit: "I began to read papers that hadn't been assigned", he writes; these papers reflected what he cared most about, "how Canadian law works for and against Indigenous peoples."[353]

A key debate in critical Indigenous legal pedagogies is whether courses on Indigenous legal issues, or Aboriginal and Indigenous law, should be mandatory or elective, and/or integrated or stand-alone in the curriculum.[354] For example, Drake recommends both integrating Indigenous legal orders throughout the curriculum, so as not to marginalize Indigenous legal orders, as well as

[349] Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 309.
[350] Bailey, "Racism within the Canadian University", *supra* note 155 at 1272. However, some Indigenous law students may also choose to take general law courses, either to advance their careers in mainstream law contexts or to distinguish themselves from stereotypes held about their racial partisanship: Borrows, "Heroes, Tricksters, Monsters, and Caretakers", *supra* note 193 at 806.
[351] Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 307.
[352] *Ibid* at 318–319, 329.
[353] Mills, "The Lifeworlds of Law", *supra* note 12 at 850.
[354] Drake, "Finding a Path to Reconciliation", *supra* note 3; Hewitt, "Decolonizing and Indigenizing", *supra* note 4; Monture-Angus, *supra* note 8 at 161 (arguing for an integrated curriculum); Adam Gaudry, "Paved with Good Intentions: Simply Requiring Indigenous Content is Not Enough", (13 January 2016), online: *Active History* <http://activehistory.ca/2016/01/paved-with-good-intentions-simply-requiring-indigenous-content-is-not-enough/>; Adam Gaudry & Danielle Lorenz, "Decolonization for the Masses? Grappling with Indigenous Content Requirements in the Changing Canadian Post-Secondary Environment" in Linda Tuhiwai Smith, Eve Tuck & K Wayne Yang, eds, *Indigenous and Decolonizing Studies in Education: Mapping the Long View* (New York: Routledge, 2018) 159; Rauna Kuokkanen, "Reconciliation and Mandatory Indigenous Content Courses: What are the University's Responsibilities?", (17 March 2016), online: *Decolonization: Indigeneity, Education & Society* <https://decolonization.wordpress.com/2016/03/17/reconciliation-and-mandatory-indigenous-content-courses-what-are-the-universitys-responsibilities/>; Daniel Heath Justice, "Seeing (and Reading) Red: Indian Outlaws in the Ivory Tower" in Devon Abott Mihesuah & Angela Cavender Wilson, eds, *Indigenizing the Academy: Transforming Scholarship and Empowering Communities* (Lincoln: University of Nebraska Press, 2004) 100.

offering a mandatory stand-alone course, through which students may engage exclusively with Indigenous lifeways.[355] From an integrated threat perspective, mandatory Indigenous programming may increase the likelihood of non-Indigenous student, professor and staff opposition to Indigenous legal orders, and the expression of anti-Indigenous prejudice. On the other hand, elective Indigenous programming may only reach those who are low in prejudice, high in motivation to self-regulate against prejudice, or, who are committed to norms, such as reconciliation, or to a career in Aboriginal or Indigenous law. Integrating Indigenous legal issues, and Aboriginal and Indigenous law, throughout the curriculum may establish a norm and expectation that competency in Aboriginal and Indigenous law is required for the practice of law in any area and that Indigenous legal orders are *law* just as much as Canadian statutory and common law. There are other objectives, aside from the reduction of prejudice, that support making ILE mandatory. These objectives include establishing norms for the respect and acceptance of Indigenous legal orders, perspectives, and peoples, meeting Indigenous students' and professors' academic needs and interests, and ensuring that law students are competent to provide legal services and to fulfill their civic responsibilities as members of the profession.

In between the contextualization of Canadian law and the teaching of Indigenous legal orders in context, the Indigenous Law Research Unit's (ILRU) case briefing methodology offers a shared framework for engaging with Indigenous legal traditions in Canadian and Indigenous legal spaces.[356] John Borrows argues that Indigenous stories share commonalities with common law precedent and that these commonalities open Indigenous legal traditions to interpretation and application by common law trained jurists.[357] Napoleon and Friedland propose that the ILRU

[355] Drake, "Finding a Path to Reconciliation", *supra* note 3 at 26.
[356] Napoleon & Friedland, "An Inside Job", *supra* note 5 at 727.
[357] John Borrows, "With or Without You: First Nations Law (in Canada)" (1995) 41:3 McGill LJ 629–668 at 648–649, 653–654.

method offers a "transparent, transferable and shared framework" and a "pragmatic way forward" for teaching and applying Indigenous legal traditions.[358]

The ILRU methodology incorporates the case study method with Indigenous storytelling and oral history. Learners receive Indigenous stories from knowledge and law holders in the Indigenous community.[359] Once they have received these stories, they consider the facts, issues, related stories or precedents, principles, and decisions disclosed in each story. A learner's context – for example, iwhether they have prior familiarity or training with the traditions, or their gender – also informs their interpretation of a story.[360] For this reason, learners bracket elements of a story that they do not understand and seek further clarification from knowledge or law holders and the land. Introspection is also important; the learner is a participant in his or her interpretation of an Indigenous story. Learners bring their cultural context to the interpretative act. For this reason, learners consider, for example, whether they are applying common law or Indigenous categories, or how gender is relevant, in their interpretation of an Indigenous story.[361] Through a process of analogy, learners draw out legal principles from their interpretation of a set of Indigenous stories, much like how ratios are divined through the case study method. Indigenous communities drive this process.[362]

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[358] Napoleon & Friedland, "An Inside Job", *supra* note 5 at 748, 752. The use of the Langdellian case briefing method, however, brings certain epistemological and pedagogical concerns. Monture-Angus argues that the case briefing method, which requires students to draw out relevant facts to apply the law, causes violence to Indigenous and racialized peoples' lived experiences: Monture-Angus, *supra* note 8 at 15–17. The process of picking apart a fact pattern creates distance between the lived reality of people in those situations and the cold calculus of legal analysis.
[359] For a description of the application of this methodology in context, see Askew, "Learning from Bear-Walker", *supra* note 52 at 34–41.
[360] Snyder, Napoleon & Borrows, "Gender and Violence", *supra* note 346.
[361] See, for example, Borrows, "Heroes, Tricksters, Monsters, and Caretakers", *supra* note 193; Snyder, Napoleon & Borrows, "Gender and Violence", *supra* note 346.
[362] Askew, "Learning from Bear-Walker", *supra* note 52 at 38.

Hanna Askew, a settler lawyer, applied the ILRU method in her work with the Chippewas of Nawash Unceded First Nation at Neyaashiinigmiing (Cape Croker). Reflecting on the ILRU method, she found that "the transition to creating case briefs for Anishinabek traditional stories [was not] an especially difficult leap to make."[363] She explains:

> … although the task of case briefing Indigenous stories is hard work,… the familiarity of the exercise helped to provide an initial bridge between my previous common law training and the first weeks to beginning to learn Anishinaabe law. That said, I do not wish to overemphasize the commonalities between judge-authored decisions and Indigenous stories. Perhaps the most important of these differences is the way that Indigenous stories are intended to engage listeners holistically – that is to say, spiritually and emotionally as well as intellectually.[364]

Askew's experience is informative for how other settler legal professionals may engage with Indigenous law through the ILRU method. First, Askew's experience demonstrates the accessibility of the methodology for persons unfamiliar with Indigenous stories and their related lifeways. Second, she critically contextualizes the use of the methodology as different from its application to the common law. In its original form, Christopher Columbus Langdell conceptualized the case study and briefing method as a means to distill "as a science… certain principles or doctrines" from a wide array of legal decisions.[365] The Langdellian method's aspiration to scientific objectivity persists in its common sense use by many law students. In my

[363] *Ibid* at 36.
[364] *Ibid*.
[365] Todd D Rakoff & Martha Minow, "A Case for Another Case Method" (2007) 60:2 Vand L Rev 597–608 at 598–600.

view, Askew's critical contextualization flows from her acceptance of *debewewin*, "a quality of intellectual humility" that is oppositional to the Langdellian method's claims to objectivity and universality.[366] If the ILRU case-briefing methodology works, it works because it alleviates the burden on settler students to learn Indigenous legal orders within its own distinct epistemological, ontological and cosmological context.[367] However, there remains a risk of misuse or distortion of these stories within a non-Indigenous epistemological and ontological framework. Though Indigenous legal orders may be made of "stronger stuff",[368] we should still proceed with caution when engaging settlers through non-Indigenous epistemological frameworks, as I hope I am doing in this thesis.

b) Indigenous Awareness Camps

Indigenous legal orders are rooted in Indigenous peoples' relationship to land. The land is a "legal archive" of knowledge about how to live well in the world.[369] It governs or models social, political, spiritual, and even economic relationships. To understand Indigenous legal orders, then, requires understanding law in its "outside" context, in Indigenous communities and on-the-land.[370] Indigenous awareness camps (also called Indigenous law camps) contextualize Canadian law, illustrate the practice of Indigenous law *qua* law in its Indigenous context, and assist students in developing a range of self-reflexive, critical, cultural, and practical skills. Students observe and value Indigenous communities and the land as knowledge holders and as agents of self-

[366] Askew, "Learning from Bear-Walker", *supra* note 52 at 38–39.
[367] In 2011, Napoleon and Friedland delivered an ILRU methodology workshop to Indigenous and non-Indigenous community members in Fort St. John, British Columbia. Napoleon and Friedland report that the response was "overwhelmingly positive, especially from community participants. For a description of this workshop and its successes, see Napoleon & Friedland, "An Inside Job", *supra* note 5 at 749–751.
[368] *Ibid* at 754.
[369] Borrows, *supra* note 8 at 22 see also p. 47, 72.
[370] see, for example, Deborah Louise Curran, "Putting Law in Its Place: Field School Explorations of Indigenous and Colonial Legal Geographies" in Deborah Louise Curran et al, eds, *Out There Learning: Critical Reflections on Off-Campus Study Programs* (Toronto: University of Toronto Press, 2018) 135 at 138–139.

determination.[371] In this way, place and land-based learning fulfills a core competency of Indigenous legal training.

Place-based learning may also facilitate the reduction of prejudice towards Indigenous peoples and their laws. Learning law from and in the community offers opportunities for intergroup contact and dialogue under near-optimal conditions. Deborah Curran, for example, finds that face-to-face interaction at field camps "fosters an appreciation of different points of view, and ideally, understanding and an ability to think through multiple pathways for solutions."[372] Placed-based learning may also encourage students to think critically about their personal and professional identities, as lawyers or as participants in reconciliation.[373] Askew, for example, describes the purpose of law camps, which is to "broaden law students understanding of what constitutes law and expose them to Indigenous legal orders, while simultaneously building valuable relationships between law faculties and host communities."[374]

Law camps have profound impacts on both Indigenous and non-Indigenous students. Mills credits UVic's Aboriginal Law summer program[375] as having "opened an entirely new world" for him:[376]

> If the articles I'd read had been signposts for a new door to walk though, that program blew the door wide open. I understood that my life wouldn't have to pass either in the darkness of permanent critique or in fighting within a system at its best unrepresentative of how I understood law and at its worst openly

[371] Drake, "Finding a Path to Reconciliation", *supra* note 3 at 23.
[372] Curran, *supra* note 370 at 146.
[373] *Ibid* at 146–147.
[374] Askew, "Learning from Bear-Walker", *supra* note 52 at 43.
[375] Borrows, "Outsider Education", *supra* note 3 at 16–17; see also UVic Law Aboriginal Awareness Camp, "UVic Law Aboriginal Awareness Camp", (2015), online: *UVic Law Aboriginal Awareness Camp* <https://uvicabcamp.wordpress.com/>; University of Victoria, "Aboriginal Awareness Camp 20th Anniversary", (2015), online: *University of Victoria* <https://www.uvic.ca/law/home/news/archive/AbCamp20thAnniversary.php>.
[376] Mills, "The Lifeworlds of Law", *supra* note 12 at 851.

> hostile to that understanding. I could actually develop my own positive project based in Anishinaabe law and build understanding and professional community from there. I can't overstate the importance of this gift for my life. [377]

Berry Hykin reports that the camp changed her career aspirations and life as a non-Indigenous lawyer:

> AbCamp gives you a rare opportunity at the beginning of your legal education to have a hands-on experience and obtain a different perspective on law and its practical aspect […]Especially for people going into the legal profession, I think it's extremely important that this vital part of our community is made tangible through the participatory experience of something like AbCamp.[378]

Law camps also create space for students to contextualize Canadian law and deconstruct its relationship to Indigenous legal orders. Jasleen Johal describes how her experience with the Osgoode Aboriginal Law Camp and the Chippewas of Nawash Unceded First Nation at Neyaashiinigmiing[379] reoriented her understanding of Indigenous legal orders and Indigenous legal methodologies:

> Following the feast on the last night of our stay, Jasmine, a young community member, asked some of us if we wanted to go out and look for plums…. [I]t is an exercise in patience, of wide eyes and open ears as a cluster of furtive bodies scrambles from tree to tree in a thicket of bush and net fences … it occurred to

[377] *Ibid.*
[378] quoted in University of Victoria, *supra* note 375.
[379] In 2014, I participated as a student organizer for Osgoode Hall Law School's first annual Anishinaabe law camp with the Chippewas of Nawash Unceded First Nation at Neyaashiinigmiing. I returned as an LLM student for the Camp's sixth iteration. For a description of the 2019 camp, see Ashleigh Graden, "Anishinaabe Law Camp 2019", (8 October 2019), online: *Obiter Dicta* <https://obiter-dicta.ca/2019/10/08/anishinaabe-law-camp-2019/>.

> me how the same passion that characterized the discourse of law by daylight now possessed us in this small but earnest pursuit of something sweet but elusive, a satisfaction that hid amidst a woody thicket of ambiguous shapes and voices. We came back empty handed, but the night was hardly fruitless—in fact, the next morning, as we were packing up, a beaming Jasmine produced a handful of dewy plums for our trip back.[380]

For Allison Grandish, the Osgoode Law Camp demonstrated the importance of contextualizing Canadian law's relationship to Indigenous legal orders, instilling, for her, a feeling of cultural humility:

> What I took from the experience was a humbling understanding of what the law can do when it twists and contorts to tell a story that suits one side's understanding.[381]

> Before leaving we sat around the sacred fire as it burned to embers, sharing our reflections. The common theme, beyond how grateful we were to be part of the experience, was a shared desire to learn more about the intersections between Indigenous law and what we hope to practice, to be conscientious about how our approach to practice may serve to unite communities or reinforce systemic oppression, and to remain committed to the values that drove us to law to begin with. [382]

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[380] Serena Dykstra, Zachary D'Onofrio & Jasleen Johal, "Anishinaabe Law Camp: Student Reflections on Osgoode's Inaugural Indigenous Law Camp" (2014) 88:3 Obiter Dicta, online: <http://digitalcommons.osgoode.yorku.ca/obiter_dicta/32> at 3.
[381] Allison Grandish, "Anishinaabe Law Camp 2015: The Stories Behind the Law" (2015) 89:4 Obiter Dicta 5 at 5.
[382] *Ibid.*

Law camps also foster new relationships between Indigenous and non-Indigenous students through opportunities for intergroup contact. Serena Dykstra shares her experience at the Osgoode camp:

> The most profound thing about the law camp was how my relationships with other students deepened. I have been in law school with some of these students for two years, and yet knew very little about their personal lives. At the camp we were able to be vulnerable with each other through sharing circles, singing around the fire, and midnight strolls along the shores of Georgian Bay.[383]

For Zachary D'Onofrio, his experience at the Osgoode camp relocated his place as a settler in Indigenous territories:

> I had passed by Cape Croker multiple times en route from Owen Sound to Tobermory without ever becoming acquainted with the Neyaashiinigmiing; I had never taken the time to learn about the community at more than a cursory level, and therefore could not appreciate the many environmental and legal issues that it faces. Similarly, I lacked an understanding of Anishinaabe legal traditions, and the potential that they have to influence the Canadian legal landscape. Although there is still much to learn, this experience opened my eyes to important issues that had always been right in front me, but that I was unaware of until now.[384]

Thus, Indigenous awareness camps offer opportunities for intergroup contact in near optimal conditions, and for contextualizing and deconstructing Canadian law.

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[383] Dykstra, D'Onofrio & Johal, *supra* note 380 at 3.
[384] *Ibid.*

c) Clinical Legal Education

Community legal clinics also offer unique pedagogical and service opportunities for Canadian legal education. Clinics fulfill a public need for marginalized and Indigenous clients, support law schools' public service commitments, and offer theoretical and practical training for law students.[385] In addition to these objectives, Indigenous legal clinics also offer opportunities for intergroup contact and dialogue, and social recategorization (for the law students), through a mix of cognitive, affective, and behavioral interventions. Indigenous legal clinics support settler harm reduction and may offer a bridge towards decolonial activities in legal practice and education.[386] The success of these clinics also supports the establishment of permanent law school legal clinics that serve local Indigenous communities.[387]

At the University of British Columbia, law students may participate in the Indigenous Community Legal Clinic (ICLC). The ICLC provides legal services to the Indigenous community in Vancouver's downtown eastside. Patricia Barkaskas and Sarah Buhler locate the clinic's activities as a settler harm reduction approach.[388] As a "stopgap" against colonialism, the clinic centers its Indigenous clients' experiences and stories of colonialism in its legal services.[389] Over time, however, Barkaskas and Buhler imagine that successive cohorts may challenge the assumptions and structure of Canadian legal practice and education, opening up further transformative possibilities.[390]

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[385] For a discussion of these benefits, see Sarah Buhler et al, "Clinical Legal Education on the Ground: A Conversation" (2020) 32:1 JL & Soc Pol'y 127–137.
[386] For a discussion on the possibilities and limits of clinical legal education for decolonization and its suitability for settler harm reduction, see Patricia Barkaskas & Sarah Buhler, "Beyond Reconciliation: Decolonizing Clinical Legal Education" (2017) 26:1 JL & Soc Pol'y 1–20.
[387] Hewitt, "Decolonizing and Indigenizing", *supra* note 4 at 82.
[388] Barkaskas & Buhler, "Beyond Reconciliation", *supra* note 386 at 14.
[389] *Ibid*.
[390] *Ibid* at 18.

At the Indigenous Community Legal Clinic (ICLC), law students critically reflect on their ideas of "justice, settler colonialism, the history of Indigenous/settler relations in Canada, the veracity of the Canadian legal system, and the current debates about reconciliation."[391] Students apply three processes in their clinical practice: (1) situational relatedness, or the capacity to be mindful of one's personal and collective history and its impact on interpretation; (2) respectful listening, which requires deep listening without judgment and a respect for personal and intellectual space; and (3) reflective witnessing, which requires "meeting each person where they are at" and witnessing their experience on its own terms.[392]

By fostering trust and dialogue, the ICLC provides a space for settlers to approach unsettling topics, such as White privilege, fragility, and guilt.[393] For some non-Indigenous law students, these sensitive topics impede decolonial work. Madeleine Northcote explains her journey from guilt to responsibility:

> This is all hard work. Settler colonialism and decolonization can feel like issues that are all-encompassing, and so the process of sifting through one's own feelings and positionality can feel overwhelming and daunting. For this reason, the relationships developed through the clinic, both with fellow students as well as instructors, is crucial to create a safety framework through which these feelings can be interrogated in a generative way.[394]
>
> While not the same as discussing decolonization, discussing these surrounding topics establishes a community where we can talk and grow in a safe

[391] Barkaskas et al, "Indigenous Community Legal Clinic Reflections", *supra* note 63 at 140.
[392] *Ibid* at 142.
[393] quoted in *ibid*.
[394] quoted in *ibid* at 148.

> environment, and practice speaking about uncomfortable topics, so that we may be better advocates […][395]

Kate Gotziaman echoes Northcote's observations about the unsettling process of learning about one's personal history and responsibilities as a settler. For Gotziaman, her experience at the ICLC "served as a reminder that the Canadian legal system is a particular legal system that arose from, and is sustained by, particular political circumstances."[396] Ryan Adair shares Gotziaman's reflection, and notes the importance of localizing one's understanding of settler colonialism:

> I believe it is easy for people without personal connection to view the impacts of colonialism as historical and abstracted, and intergenerational effects as amorphous and tangible. It is necessary to hear individual stories and the concrete ways that colonial history has shaped their lives to combat this skepticism.[397]

In this way, the Indigenous legal clinics encourage students to reflect on the structures that sustain the inequitable and unjust redistribution of these resources to the settler state. Working through the discomfort under trained supervision, non-Indigenous law students come out of the process with a fuller understanding of law's situatedness and their sense of themselves as lawyers practicing Canadian law.

The ICLC also offers a safer space for Indigenous law students to articulate their personal and professional identities. Jennifer Mackie describes her experience at the clinic, which helped her "plan [her] future in much greater detail." Through the clinic, Mackie reflected on her White-coded

[395] quoted in *ibid* at 143.
[396] quoted in *ibid* at 147.
[397] quoted in *ibid* at 149.

privilege and the ubiquity of legal control over Indigenous peoples' lives. Mackie's experience resonates with other Indigenous law students, who understand their role as occupying two different positions – that of an Indigenous person and a lawyer:

> …I will often imagine I am speaking to my ut'soo who would let me know in her subtle-not-so-subtle ways when I was sounding too much like a city-girl ivory tower type person. When I could eventually catch her hint, I would renegotiate my words to the space. I recognize this now as part of my shape-shifting ability navigating these myriad worlds.[398]

In these ways, Indigenous legal clinics offer opportunities for intergroup contact in which group differences and structural inequity are meaningfully considered. Most importantly, Indigenous legal clinics motivate students to engage in legal practice as a form of settler harm reduction, while remaining oriented towards processes of decolonization.

d) Indigenous Cultural Competency

Taking a different approach, law schools may offer courses or certificates in Indigenous cultural competency (ICC). For example, the Allard Law School at the University of British Columbia offers a certificate in Indigenous Cultural Competency.[399] The ICC program at UBC offers Indigenous and non-Indigenous students an opportunity to learn about Indigenous legal orders and perspectives within a cross-cultural framework. Over the course of eight months, students participate in seven modules, six of which occur over two days of teachings and talking circles. In

[398] quoted in *ibid* at 145; Mills describes a similar experience in Mills, "Driving the Gift Home", *supra* note 194 at 169.

[399] University of British Columbia, "Indigenous Cultural Competency Certificate", (2019), online: *Peter A Allard School of Law* <http://www.allard.ubc.ca/indigenous-legal-studies-program/indigenous-cultural-competency-certificate>; University of British Columbia, "Reconciliation in Action: Allard School of Law launches Cultural Competency Certificate", (9 August 2017), online: *Peter A Allard School of Law* <http://www.allard.ubc.ca/news-events/ubc-law-news/reconciliation-action-allard-school-law-launches-cultural-competency>.

the first module, students attend an Indigenous awareness retreat. At the end of each module, students submit reflections on what they have learned. In this way, the program facilitates intergroup contact and provides motivation for self-regulation.

The purpose of UBC's ICC program is to assist students in "developing better understandings of colonial assumptions, beliefs, and biases that form the foundation of the Canadian legal system, the history of colonial practices and policies in Canada, Indigenous perspectives on law, and what decolonization means for the practice of law." Participants learn about "implicit bias, anti-racism, histories of Indigenous-Crown relations, including colonial policies and practices enacted through law, Indigenous perspectives on legal issues, and Indigenous law." UBC's ICC program reflects current practices in prejudice reduction interventions, anti-racism pedagogies, and cultural competency. It also achieves much of the content set out in the Calls, particularly the requirement for courses on the history of residential schools and training in Indigenous cultural competency.

The literature on ICC is well-established in the healthcare context, particularly with respect to the concepts of cultural safety and humility,[400] and is becoming increasingly influential in legal education.[401] From these insights, Canadian law schools may implement localized ICC programs

[400] On cultural safety in the healthcare context, see: Elaine Papps & Irihapeti Ramsden, "Cultural Safety in Nursing: the New Zealand Experience" (1996) 8:5 Int J Qual Health Care 491–497; Robyn Williams, "Cultural safety: What Does it Mean for Our Work Practice?" (1999) 23:2 Austl & NZ J Pub Health 213–214; Simon Brascoupé & Catherine Waters, "Cultural Safety: Exploring the Applicability of the Concept of Cultural Safety to Aboriginal Health and Community Wellness" (2009) 5:2 J Aboriginal Health 6–41; Alison J Gerlach, "A critical reflection on the concept of cultural safety" (2012) 79:3 The Canadian Journal of Occupational Therapy 151–8.For a discussion of the concept of cultural humility in healthcare, legal, and Indigenous community contexts, see: Cynthia Foronda et al, "Cultural Humility: A Concept Analysis" (2016) 27:3 J Transcult Nurs 210–217; Evan Hamman, "Culture, Humility and the Law: Towards a More Transformative Teaching Framework" (2017) 42:2 Alt LJ 156–161; Borrows, "Dabaadendiziwin", *supra* note 268. See also the First Nations Health Authority's guide on cultural humility and safety, *Creating a Climate for Change: Cultural Safety and Humility in Services Delivery for First Nations and Aboriginal Peoples in British Columbia*, by First Nations Health Authority (Vancouver: First Nations Health Authority, 2015).

[401] Burns, Hong & Wood, *supra* note 57; Marcelle Burns, "Are We There Yet: Indigenous Cultural Competency in Legal Education" (2018) 28:1 Legal Educ Rev 1–29; Sloan, *supra* note 57; Demers, "Cultural Competence and the Legal Profession", *supra* note 57. Australian legal scholars have focused on cultural competency frameworks for the

for law students, as continuing professional development for practitioners, and as training for professors and administrators.[402] Although ICC is a good start, like prejudice reduction interviews its implementation must remain focused on decolonization.[403]

e) Indigenous Law Degrees and Institutes

Indigenous law degrees and law institutes go the furthest towards the revitalization of Indigenous legal orders and decolonization of Canadian law. Borrows argues that "…properly advanced, the resurgence of Indigenous law [through Indigenous law degrees] could be one of the most important initiatives in legal education for indigenous peoples in a long while."[404] The University of Victoria's Joint Degree Program in Canadian Common Law and Indigenous Legal Orders[405] creates "the chance to build strong relationships with host communities and give students an immersive experience in one or more Indigenous legal traditions."[406] It also "empower[s] community members to claim more space for their own legal orders and engage with state legal

Indigenisation and decolonization of Australian legal education. See, for example, Burns, "Are We There Yet", *supra* note; Burns, Hong & Wood, *supra* note 57; Carwyn Jones, "Indigenous Legal Issues, Indigenous Perspectives and Indigenous Law in the New Zealand LLB Curriculum" (2009) 19:1–2 Legal Educ Rev 257–270; Alexander Reilly, "Finding an Indigenous Perspective in Administrative Law" (2009) 19:1–2 Legal Educ Rev 271–288; Nicole Graham, "Indigenous Property Matters in Real Property Courses at Australian Universities Incorporating Indigenous Perspectives In the Law Curriculum" (2009) 19:1–2 Legal Educ Rev 289–304; Thalia Anthony & Melanie Schwartz, "Invoking Cultural Awareness through Teaching Indigenous Issues in Criminal Law and Procedure" (2013) 23:1 Legal Educ Rev 31–56; A J Wood, "Incorporating Indigenous Cultural Competency through the Broader Law Curriculum" (2013) 23:1 Legal Educ Rev 57–82; Alison Gerard & Annette Gainsford, "Using Legislation to Teach Indigenous Cultural Competence in an Introductory Law Subject" (2018) 28:1 Legal Educ Rev 1–19; Annette R Gainsford, "Connection to Country – Place-based Learning Initiatives Embedded in the Charles Sturt University Bachelor of Law" (2019) 28:2 Legal Educ Rev 1–14; John Rawnsley et al, "Cultural Competency in a Legal Service and Justice Agency for Aboriginal Peoples" (2018) 28:1 Legal Educ Rev 1–13; Asmi Wood & Nicole Watson, "Mirror, Mirror on the Wall, who is the Fairest of them All?" (2019) 28:2 Legal Educ Rev 1–16; Nicole Watson, "Staring into a Mirror without Reflection" (2005) 6:8 Indigenous L Bull 4; Heather Douglas, "Indigenous Legal Education: Towards Indigenisation" (2005) 6:8 Indigenous L Bull 12; Heather Douglas, "Indigenous Australians and Legal Education: Looking to the Future" (1996) 7:2 Legal Educ Rev.

[402] Bailey, "Racism within the Canadian University", *supra* note 155 at 1275 (recommending sensitivity training for professors and staff).

[403] Pooja Parmar, "Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence" (2019) 97:3 Can B Rev 526–557 at 532.

[404] Borrows, *supra* note 8 at 194.

[405] University of Victoria, "Joint Degree Program in Canadian Common Law and Indigenous Legal Orders JD/JID", (2020), online: *University of Victoria* <https://www.uvic.ca/law/about/indigenous/jid/index.php>.

[406] Askew, "Learning from Bear-Walker", *supra* note 52 at 41–42.

systems from a position of greater confidence and knowledge."[407] As Hewitt notes, Indigenous law degrees challenge the role of Canadian law schools in colonization.[408]

Call to Action #50 directs the development of Indigenous law institutes "for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultural of Aboriginal peoples in Canada."[409] Indigenous law institutes point to the need for institutional reform, taking the teaching of Indigenous legal orders out of the Canadian law classroom and into Indigenous communities and contexts.[410] Together Indigenous law degrees and institutes go beyond settler harm reduction to achieve the transformative, decolonizing work necessary for the revitalization of Indigenous legal orders and the empowerment of Indigenous Nations' self-determination and sovereignty.[411]

f) Northern Law Schools

Indigenous programming may also focus on the experiences and resiliency of Indigenous law students. Northern law schools offer opportunities for immersion in Indigenous legal traditions and communities, and for the inclusion of Indigenous law students and professors in a culturally-congruent context.[412] Northern law schools ground Indigenous students and professors in Indigenous legal traditions, support the amelioration of settler harm, and reinforce Indigenous

[407] *Ibid* at 42.
[408] Hewitt, "Decolonizing and Indigenizing", *supra* note 4 at 74, 77.
[409] Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015).
[410] Hewitt, "Decolonizing and Indigenizing", *supra* note 4 at 67–69, 71.
[411] A debate remains as to whether Indigenous legal orders can be revitalized using the "master's tools", to paraphrase Audre Lorde ("the master's tools will never dismantle the master's house"). For a discussion of revitalizing Indigenous legal orders in Canadian legal education see, Henderson, "Postcolonial Indigenous Legal Consciousness", *supra* note 5 at 44.; For a further discussion on the concept of using the "master's tools", see Borrows, *supra* note 8 at 143. See also the discussion at note 8.
[412] I use the term "culturally congruent" to describe environments that are more culturally similar than dissimilar to an individual or group. I do not intend for this term to imply any homogeneity within and between Indigenous peoples, except to the extent that those similarities are meaningful for those participants.

students' resiliency. Such programs also provide an opportunity for students to negotiate their personal and professional identities as an Indigenous person in Canadian legal education and practice.

Established in 2001, the Akitsiraq Law School ("ALS") provides Inuit students a chance to receive a juris doctor degree while residing in Nunavut. The ALS's intent is to increase the number of Inuit lawyers practicing in Nunavut and to support Inuit legal traditions in the territory.[413] Prior to the ALS, southern law schools struggled to retain Inuit law students.[414] Originating in a partnership with the Nunavut government and the University of Victoria, the Nunavut Law Program ("NLP", formerly ALS) now resides at the University of Saskatchewan.

The ALS/NLP has had some success improving the retention and graduation of Inuit law students. At southern law schools, Inuit students experienced dislocation and alienation from their communities and legal traditions.[415] Siobhan Amatsiaq-Murphy, an Inuk law student, explains her experience in a southern law school:

> Inuit typically come from a very close knit community of less than a 1,000 people. When an Inuk youth wants to further their education, they are doing it without their family and support system to guide and protect them. After a lifetime of knowing everyone you meet on the street, knowing about their life,

[413] Kirk Makin, "Nunavut raises the bar", *The Globe and Mail* (11 June 2005) F.1; University of Saskatchewan, "College of Law launches Nunavut Law Program", (2017), online: *University of Saskatchewan College of Law* <https://law.usask.ca/about/articles/2017/college-of-law-launches-nunavut-law-program.php>; For a history of the development of the Akitsiraq Law School, see Serena Ableson, "Bringing Legal Education to the Canadian Arctic: The Development of the Akitsiraq Law School and the Challenges for Providing Library Services to a Nontraditional Law School" (2006) 34:1 Int'l J Legal Info 1–30; See also Kelly Gallagher-Mackay, "Affirmative Action and Aboriginal Government: The Case for Legal Education in Nunavut" (1999) 14:2 CJLS 21–76; On the challenge of funding the Akitsiraq law school, see Lindsay Keegitah Borrows, *Otter's Journey Through Indigenous Language and Law* (Vancouver: UBC Press, 2018) at 37–38, 148 and 191 at note 21–22; John Borrows describes his experience teaching at the Akitsiraq Law School in Borrows, *supra* note 8 at 64.

[414] Ableson, "Bringing Legal Education to the Canadian Arctic", *supra* note 413 at 8–9; Makin, *supra* note 413.

[415] Makin, *supra* note 413.

> you are faced with the daunting difference in the south, where you look over a sea of faces, not knowing a single soul. You see more people than you could've ever imagined at one time, but most importantly, you see none of your people. The south is completely different to the north. Concrete, high rises, masses of people, it is culture shock. Although the effects would seem to wear off, it is amidst this foreign culture that a lone student is attempting to succeed.[416]

The ALS/NLP offers Inuit law students a culturally congruent space in which to express their relationship to law and lawyering. For example, Elisapee Karetak describes how she was supported in her decision to leave the ALS: "Telling them was an emotional, beautiful experience… We had come to trust one another enough to tell our most intimate thoughts; and what was hindering us."[417] Madeleine Redfern, the first Inuk law clerk for the Supreme Court of Canada, described the ALS's capacity to deliver an exceptional legal education in a northern context:

> It was an amazing experience to not have to relocate down south, and yet have teachers whose quality was first-class… A lot of professors did preparatory work to make sure they understood the aboriginal context. Frankly, I think it ended up being much, much better than a southern university program.[418]

If we consider the social psychology on the effects of stereotyping and prejudice, we can see why the ALS/NLP has been successful. Indigenous students receive community and peer support and learn about Canadian and Inuit law within a culturally congruent context. The opportunities for stereotyping and prejudice from qallunaat (settler) peers and professors is minimized, either

[416] quoted in Gallagher-Mackay, "Affirmative Action and Aboriginal Government", *supra* note 413 at 68.
[417] Makin, *supra* note 413, s F8.
[418] *Ibid*.

through the prevalence of Inuit norms or through training. However, one of the key challenges facing the ALS/NLP is resourcing and institutional commitment.[419] After its first iteration, then-premier Paul Okalik expressed concern that the program "took lots of resources from the government… It was successful, but it was also expensive."[420] A mix of insecure funding and institutional commitment leaves the ALS/NLP with a less than clear future. The success of the ALS/NLP program for training Inuit lawyers, however, points to the need for a northern law school, one with stable funding and commitment.

g) Preparatory Programming

The Program of Legal Studies for Native People (PLSNP) at the University of Saskatchewan has received attention from Indigenous students and professors for its pre-law programming. The PLSNP is a rigorous, academically challenging law bootcamp for Indigenous students.[421] Roger Carter, the founder of the PLSNP, stated: "... it can fairly be said that these students are faced with, and have to satisfy, added requirements – rather than the contrary."[422] In some ways, the Program may even function as an additional barrier for some law students.[423]

However, like the ALS, the PLSNP also offers a culturally congruent space for Indigenous law students to learn Canadian and Indigenous property law and to negotiate their personal and professional identities as Indigenous peoples in Canadian legal contexts. It also establishes a support network for Indigenous law students who complete the program. One student reflects:

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[419] Borrows, *supra* note 413 at 148 and 191 at notes 21–22.
[420] Makin, *supra* note 413, s F8.
[421] As a result of the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) pandemic in 2019, the 2020 summer program was cancelled. On June 3, 2020, the Indigenous Law Centre announced that summer program would be "retired" as of May 2021: Indigenous Law Centre, "Indigenous Law Centre announces new legal curriculum", (3 June 2020), online: *Indigenous Law Centre* <https://indigenouslaw.usask.ca/indigenous-law-centre-at-university-of-saskatchewan-announces-new-legal-curriculum.php>.
[422] quoted in Monture-Angus, *supra* note 8 at 104.
[423] See Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 326.

> I am fortunate because I know I can rely on the other Indian people I met through the summer program. It is not academic support. The presence of other Indian people in the college makes me feel visible. I thought I would vanish in law school ... somehow become White. With other Aboriginal people here I am constantly reminded that I am here for many important and good reasons.[424]

These features establish the program as more than an "affirmative action" program. The PLSNP is a harm reduction program that enhances Indigenous law students' resiliency and agency during their time in Canadian legal education and practice through a combination of culturally safe and congruent education, spaces, and laws. It provides an opportunity for students who struggle on the Law School Admissions Test (LSAT) to enter law school after completing the program. It may even possibly mitigate the risks of stereotype threat on Indigenous students, not only by reducing their workload in their first year of law school (most law schools, except the University of Toronto, provide credit for first year property) but also by clarifying what will be academically required of them in law school (thus, potentially reducing the risk of stereotype threat). In my view, as long as Indigenous students are underrepresented in law schools and face systemic barriers and prejudice, preparatory programs will be valuable.

h) Summary

Indigenous law camps, legal clinics, intensives, Indigenous cultural competency training, and critical Indigenous legal education satisfy many of the conditions that facilitate positive intergroup contact: equal status between groups, common goals, intergroup cooperation, authority sanction, and the potential for cross-group friendship. Although community members hold knowledge about

[424] *Ibid* at 303–304.

their legal traditions and stories, both community members and learners enter their relationship under conditions of relatively equal status in accordance with Indigenous laws and related protocols, such as humility. These approaches actively seek a shared framework for resolving conflict, rooted in Indigenous legal orders. All participants share the common goal of, and cooperate in, drawing out legal principles from Indigenous peoples' stories, traditions, and histories. The interaction between learner and knowledge or law holder is sanctioned by the Indigenous community and, in some cases, authorized under Indigenous law; to the extent that a settler participant requires settler authorization, such authorization can be found in judicial precedent or institutional support. Because interactions are personal and familiar, occurring around shared activities such as forest walks[425] or a client or community-centered relationship,[426] these encounters offer the potential for cross-group friendship. The more of these conditions that are satisfied, the more likely the encounter may reduce prejudice, enhance empathy, decrease anxiety, and correct faulty generalizations about Indigenous peoples and their legal traditions.

ILE programs also facilitate intergroup dialogue. Intergroup dialogue is a "process that allows for collective exploration of social identities in the context of social inequality and promoting social change."[427] Trained facilitators stimulate dialogue between participants in a climate of "communication symmetry."[428] Self-disclosure[429] and storytelling[430] provide opportunities for

[425] Askew, "Learning from Bear-Walker", *supra* note 52 at 39–42.
[426] Imai, "A Counter-Pedagogy for Social Justice", *supra* note 111.
[427] Biren R Nagda, "Breaking Barriers, Crossing Borders, Building Bridges: Communication Processes in Intergroup Dialogues" in Biren R Nagda, Linda R Tropp & Elizabeth Paluck, eds, *Reducing Prejudice and Promoting Social Inclusion: Integrating Research, Theory, and Practice on Intergroup Relations* (Malden, Massachusetts: Blackwell Synergy, 2006) 553 at 558.
[428] *Ibid*.
[429] Davies et al, "Cross-Group Friendships", *supra* note 296 at 340–345. Vorauer *et al*., propose that Indigenous peoples' self-disclosure may counter negative stereotypes held by non-Indigenous peoples: Jacquie D Vorauer, Kelley J Main & Gordon B O Connell, "How Do Individuals Expect to be Viewed by Members of Lower Status Groups? Content and Implications of Meta-Stereotypes" (1998) 75:4 J Pers Soc Psychol 917–937 at 935.
[430] Maoz, *supra* note 51 at 278–281.

disadvantaged group members to share their experiences, which may in turn enhance intergroup comfort and understanding.[431] Listeners develop and apply a critical empathy, which requires them to establish affective connections with others, reflexively consider their own values and beliefs, and link dialogue with action.[432] Intergroup dialogue interventions attend to the ways that discourse may unintentionally reinforce dominant group norms, intentionally control others, or obfuscate inequality.[433] Thus, these programs may facilitate "a mutual and reciprocal learning process that involves sharing and learning about racial/ethnic identities, introspective learning about one's own group and bridge building across differences."[434] Over an extended application, non-Indigenous learners develop critical skills, including awareness of one's own culture[435] and cultural humility.[436]

These programs' broader objectives – the development of a *sui generis* Indigenous and non-Indigenous legal order and the revitalization of Indigenous legal orders – address one of the fundamental drawbacks of the intergroup contact approach. Although positive intergroup contact is associated with reduced prejudice between groups and better intergroup relations, it may come at the cost of undermining collective action towards social change. This phenomena - the darker side of "we" - is also found in social recategorization approaches that emphasize a common ingroup identity (for example, "we are all Canadians" or "we are all here to stay") or social harmony (which is how some Canadians understand "reconciliation").[437] These programs

[431] Nagda, *supra* note 427 at 559.
[432] *Ibid* at 569–571.
[433] *Ibid* at 559.
[434] *Ibid* at 554.
[435] Mills, "The Lifeworlds of Law", *supra* note 12 at 870.
[436] Borrows, "Dabaadendiziwin", *supra* note 268 at 154–155.
[437] Recall that in their study of non-Indigenous participants in the Truth and Reconciliation process, Denis and Bailey found that many allies hold a vision of reconciliation that does not include decolonization and Indigenous peoples' land struggles and are generally less comprehensive than the TRC's vision for reconciliation. In addition, although many allies understood that reconciliation required collective action toward social change, such as through increased

explicitly motivate non-Indigenous and Indigenous peoples to engage in the reconciliation of Canadian law with Indigenous legal traditions; they remind everyone that "we are all here to stay, *but not in the same way*." Moreover, by centering the source of Indigenous law and stories in communities and emphasizing Indigenous self-determination and agency, these programs motivate learners to respect Indigenous difference. These differences are rendered salient to learners through culture, stories, ceremonial protocol (such as drum groups, round dances, and tribal authority closing), and Indigenous-land relationships. Indigenous community members and their laws are not required to assimilate or accommodate a common ingroup identity. When Indigenous difference is centered, settler difference becomes explicit. When properly articulated to learners, these programs ensure that Indigenous lifeways are respected. These programs – Aboriginal law camps, legal clinics, intensives, and Indigenous cultural competency training and critical Indigenous legal education – also offer opportunities for each student to articulate their personal and professional identity. For Indigenous students, preparatory programs and northern law schools may also provide a culturally congruent and safer learning environment in which they may define their own personal and professional identities as Indigenous persons engaging in Canadian legal education and practice.

2. Institutional Commitment

As law schools respond to the Calls, it is important to maintain institutional resolve. Monture-Angus argues that "[r]eal change requires a full and systemic institutional response. Such a response will never be found unless the institutional commitment to eradicate all barriers is sincere."[438] If Canadian law schools do not change, Indigenous students, professors and

education, and changes to symbolic and material status, some placed conditions on the extent of their reconciliation activities. Although some allies supported a reformist vision for Canada that would better respect Indigenous peoples, some supported an integrationist, or arguably assimilationist, agenda. Denis & Bailey, *supra* note 285 at 144–155.

[438] Monture-Angus, *supra* note 8 at 67.

communities may abandon their efforts in Canadian legal education and practice and turn to other options.[439]

a) Representation and Facilities

First, law schools can further this work by recognizing and supporting Indigenous spaces within the surrounding area. Underneath the law school's physical infrastructure lie Indigenous legal orders, the "hidden but underlying bedrock upon which the Crown and its assignees have built their claims."[440] For example, Philosopher's Walk, a footpath on the St. George Campus at the University of Toronto, runs along a buried stream, *ziibiing*, that remains significant to the Anishinaabe.[441] No Canadian law school is immune from the settler colonial displacement and erasure of Indigenous peoples from their territories. However, like birds nesting in urban canopies, Indigenous laws survive.[442]

Law schools may further recognize Indigenous peoples' governance and the arrival of settlers through territorial acknowledgments. Rima Wilkes identifies five types of acknowledgement: of land and title, of specific treaties and political relationships, of multiculturalism and heterogeneity, of no recognition at all, and "of people, territory and openness to doing more."[443] Although some

[439] Although Indigenous students and professors might respect the agency of non-Indigenous law school administrators *not* to make such commitments, at some point, Indigenous lawyers may turn away from solutions found in Indigenous law to those found in Canadian law: Borrows, *supra* note 8 at 118–119.. Lindberg writes:

> All along, we learn the Caucasian code, some become code talkers, and we translate the invasion of our lands, territories, homes and minds. We wonder what our next generation – angry and anti-colonial students of your tactics – will visit upon your communities, your families, your homes. (Lindberg, "Critical Indigenous Legal Theory Part 1", *supra* note 5 at 229.

[440] Borrows, *supra* note 5 at xi.
[441] *Ibid* at x; It is not just physical burial that occurs, but also legal stratification and ossification: Pasternak, Collis & Dafnos, "Criminalization at Tyendinaga", *supra* note 127 at 65, 81. For a history of the erasure of Indigenous presence in Toronto, see Freeman, "'Toronto Has No History!'", *supra* note 156.
[442] Borrows, *supra* note 5 at 161.
[443] Rima Wilkes et al, "Canadian University Acknowledgment of Indigenous Lands, Treaties, and Peoples" (2017) 54:1 Can Rev Soc 89–120 at 91, 115–117.

Indigenous scholars critique a politics of recognition and question its intent,[444] such acknowledgments may establish institutional norms that support, or may lead to support for, intergroup contact and dialogue, Indigenisation and decolonial practices. These possibilities depend on the strength of the acknowledgment and whether it is accompanied by action.[445]

Law schools may follow through on their territorial commitments by funding and resourcing Indigenous peoples' revitalization of Indigenous spaces and facilities on campus. Indigenous presence may be represented through framed declarations or treaties,[446] and aesthetically, politically and spiritually significant objects, such as posts,[447] wampum replicas,[448] and contemporary installations.[449] Settler objects may also contribute to the recognition of Indigenous presence, such as Kevin Berk's Two-Row Table at Windsor Law.[450]

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[444] Coulthard, *supra* note 8 at 39–41.

[445] Chelsea Vowel argues that we must go "beyond territorial acknowledgments" to recognize Indigenous presence and laws. Vowel provides a review of territorial acknowledgments and offers suggestions for how to apply territorial acknowledgements in practice: Chelsea Vowel, "Beyond territorial acknowledgments", (23 September 2016), online: *âpihtawikosisân* <https://apihtawikosisan.com/2016/09/beyond-territorial-acknowledgments/>. See also Jeffery Hewitt, "Land Acknowledgment, Scripting and Julius Caesar" (2019) 88:1 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference, online: <https://digitalcommons.osgoode.yorku.ca/sclr/vol88/iss1/2>.

[446] See, for example, the Musqueam Declaration at the University of British Columbia, described in Borrows, "Outsider Education", *supra* note 3 at 10.

[447] See, for example, the Capilano House Post at the University of British Columbia: Kevin Ward, "House Post of qiyəplenəx^{w} (Capilano)", (6 February 2020), online: *First Nations House of Learning* <https://students.ubc.ca/ubclife/house-post-capilano>.

[448] According to Borrows, a replica of the Guswentha hangs outside the Bora Laskin Law Library at the University of Toronto, Borrows, *supra* note 5 at 160.

[449] See, for example, the Treaty Canoe installation at Osgoode Hall Law School by Alex McKay, described in Ruth Buchanan & Jeffery G Hewitt, "Treaty Canoe" in Jessie Hohmann, ed, *International Law's Objects* (Oxford: Oxford University Press, 2018) 491. See also Ya'Ya Heit's carvings, which hang in the atrium of Osgoode Hall Law School, or the "Faceless Dolls" piece to raise awareness about Missing and Murdered Indigenous Women and Girls: Osgoode Hall Law School, "Aboriginal Art Project", (2016), online: *About Osgoode - Art in the School* <https://www.osgoode.yorku.ca/about/art-in-the-school/aboriginal-art-project/>.

[450] Berk's Two-Row Table replicates the design of the Two-Row Wampum or Guswentha Belt. The centre of the table is a cross-section of unfinished timber. A second cross-section is halved and arranged on each side of the centre cross-section. Between the centre cross section and the two-halves is a purple-coloured fill, echoing the colours of the wampum. A description of the table is posted at Windsor Law. The table is used for waiting at the entrance of the law library.

Many Indigenous legal orders require adherence to protocols before teachings. For example, smudging may be used to ensure that the teacher and learner engage with each other in a good way. For this reason, law schools must also provide facilities for these protocols to be followed.[451] Related to this concern, Indigenous law students and professors require culturally safe spaces to foster peer support networks, enter dialogue about the negotiation of their personal and professional identities, receive teachings specific to Indigenous legal orders, and engage in Indigenous legal ceremonies. Such spaces may be opened for non-Indigenous students in certain circumstances, depending on the needs of the community for whom the facility is designated. Already, many Canadian universities have supported the construction of Indigenous facilities for these purposes.[452] These activities respect and normalize Indigenous peoples' presence in law schools and reduce the harmful effects of racial stereotyping and prejudice on Indigenous students and professors.

b) Peer Support Groups

Institutions may also further support Indigenous students and professors by funding activities and spaces for Indigenous peer support groups.[453] Some Indigenous law students turn to each other to

[451] Mills, "The Lifeworlds of Law", *supra* note 12 at 873.

[452] Examples include the First Peoples House at the University of Victoria, Skennen'kó:wa Gamig (formerly Hart House) at York University, the Native Law Centre at the University of Saskatchewan, and the University of British Columbia's House of Learning and the *Sty-wet-tan* or Great Hall, which has an adjoining library and sweat lodge. See University of Victoria, "First Peoples House", (2019), online: *University of Victoria* <https://www.uvic.ca/services/indigenous/house/>; Sandra McLean, "Skennen'kó:wa Gamig: York U's Hart House renamed to create safe space for Indigenous peoples", (21 June 2017), online: *York Media Relations* <https://news.yorku.ca/2017/06/21/skennenkowa-gamig-york-us-hart-house-renamed-to-create-safe-space-for-indigenous-peoples/>; York University, *supra* note 66; University of Saskatchewan College of Law, "Indigenous Law Centre", online: <https://indigenouslaw.usask.ca/index.php>; University of British Columbia, "First Nations House of Learning", online: *Indigenous Portal* <https://indigenous.ubc.ca/longhouse/fnhl/>; For a description of the impact of the First Nations House of Learning and Great Hall, see Borrows' description in Borrows, *supra* note 8 at 150–152.

[453] Clark *et al.,* recommend funding peer support and Indigenous students services to mitigate some of the effects of racial stereotyping and prejudice on Indigenous students: Clark et al, *supra* note 186 at 122–123.

"[take] comfort into the room" with them.[454] Lindberg describes the Indigenous peer support network as:

> a base network that is like a basket woven from similar experiences and backgrounds. This basket is coloured with the fibres of our differences. In the basket, we place our law school experiences. While the bulk of our time is spent filling the basket, we recognize daily that it is the basket that supports the load.[455]

On a practical level, peer support fulfills an inclusionary role. Indigenous law students, particularly those who are women or mature students, carry with them unique family and community responsibilities.[456] Peer support groups function as an in-school community and support system: "There is a general sense that we [all law students] share a common experience, but I receive support specifically from both Aboriginal men and women both academically and personally and I cherish it."[457] However, peer support groups are not the only way in which Indigenous students may be supported. While some desire the support of culturally safe or Indigenous support groups, others may want to be treated as an individual.[458] Others may look to existing support networks, such as LGBTQ2S+ organizations.[459] In this way, peer support groups also function as *life support systems*.[460]

On another level, peer support groups offer a safer space in which Indigenous students, professors and staff may navigate their personal and professional identities in Canadian legal context. Thus,

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[454] Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 308.
[455] *Ibid*.
[456] *Ibid* at 323.
[457] quoted in *ibid* at 309.
[458] quoted in *ibid* at 315.
[459] quoted in *ibid* at 308.
[460] Johnson, *supra* note 180 at 25 (emphasis in original). Bailey, "Racism within the Canadian University", *supra* note 155 at 1271.

the resourcing of Indigenous peer support groups by law schools may reduce settler harm to its Indigenous members, support Indigenous members' engagement in intergroup contact and dialogue, and support Indigenous members' negotiation of their personal and professional identities in Canadian legal education and practice.

c) Inclusion of Elders and Community Relationships

Establishing institutional norms is a critical part of the implementation of the Calls in law schools. So too, however, is fostering relationships between Indigenous legal orders and Canadian legal education. For this reason, institutions should establish Advisory Circles of Elders that are permanent on Faculty and Governance Councils and whose members are remunerated as faculty, in recognition of their expertise in Indigenous legal orders.[461] An Elder's Residence Program may complement Indigenous peer support groups as well as provide advice to the institution.[462] To support the development of relationships between law schools and their host communities, community liaison positions and community relationships should also be funded and supported in agreements.[463] These initiatives may establish institutional norms in support of intergroup contact and dialogue, assist in the reduction of prejudice and settler harm to Indigenous students, support related programming, and lead to processes of Indigenisation and decolonization of Canadian legal education and practice.

d) Financial Resources and Funding

Institutions should also permanently and meaningfully fund Indigenous programming, grants, and student scholarships. Institutions may prefer to displace the cost of the implementation of the Calls onto Indigenous students and professors or onto public and third-party sources. In this way,

[461] Hewitt, "Decolonizing and Indigenizing", *supra* note 4 at 81.
[462] Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 330.
[463] *Ibid.*

Indigenous students and professors are forced to engage with a small number of ethical funding sources or, in some cases, compromise with less ethical sources (such as law firms that serve extractive industries). Implementing the Calls requires permanent, ongoing, meaningful, and reliable financial resources and funding.[464] Law schools – and society – benefit from the inclusion of Indigenous legal orders and peoples in Canadian legal contexts. Monture-Angus rejects the argument that law schools are strapped for cash: "I am not very persuaded by fiscal restraint arguments. They are racist. Just when Aboriginal people have some access to previously denied spaces, the country goes bankrupt. This is still my land being shared, and an obligation is still owed. Fiscal constraint is not my problem!"[465] Therefore, law schools should adequately compensate, fund and resource the programs that make all that possible. These public funding commitments also establish institutional norms that support intergroup contact and dialogue and enable Indigenous-led collective action toward social change.

e) Hiring and Advancement

Hiring policies must address who is qualified to teach Indigenous law and recognize the unique workload of Indigenous professors. First, there is nothing limiting non-Indigenous professors from teaching Aboriginal or Indigenous law; in some cases, particularly for Aboriginal law courses, non-Indigenous professor instruction may be beneficial for non-Indigenous student learning. It appears that individuals respond more positively to prejudice reduction interventions when led by members of their own ingroup.[466] In addition, non-Indigenous professors' participation is necessary to reduce the disproportionate and inequitable workload assigned to Indigenous professors. As with any course, non-Indigenous professors must be competent to teach Aboriginal

[464] Monture-Angus, *supra* note 8 at 61–63.
[465] *Ibid* at 72 at note 19.
[466] Whitley & Kite, *supra* note 24 at 408.

and/or Indigenous legal orders. Since interpretive meaning is found in Indigenous languages, professors should demonstrate some competence, or at least committed to learn, an Indigenous language(s).[467]

Institutions must also develop clear and transparent hiring and advancement policies that reflect the unique contributions of Indigenous professors. The reality is that Indigenous professors experience a higher teaching, research and service workload than their non-Indigenous peers, even those who teach Aboriginal or Indigenous law or are involved in Indigenous-related committees and activities; Monture-Angus observes that "[e]quality stops somewhere before my office door."[468] Indigenous professors are expected to participate in additional committees or projects related to the institution's efforts at reconciliation,[469] provide additional learning resources to meet the academic interests of Indigenous students, counsel and mentor Indigenous students,[470] complete additional research ethics approval processes for their research involving Indigenous communities and laws, maintain expertise in both Indigenous and non-Indigenous legal orders (including Aboriginal law, which requires competence in several areas of law including criminal, constitutional, child and family, tax, and property law) and pedagogies,[471] ameliorate the failure of the Canadian elementary, secondary and post-secondary education to prepare non-Indigenous students for ILE, explain the value and importance of ILE to tenure committees and peers,[472] facilitate intergroup contact and dialogue between Indigenous and non-Indigenous students and communities, navigate the harm caused to their person by the prejudice, stereotyping and discrimination of their non-Indigenous students, peers, and the institution, and carry many of the

[467] Drake, "Finding a Path to Reconciliation", *supra* note 3 at 30–31.
[468] Monture-Angus, *supra* note 8 at 64.
[469] *Ibid* (discussing admissions committees).
[470] Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 314–315.
[471] Monture-Angus, *supra* note 8 at 60.
[472] See also Borrows, "Heroes, Tricksters, Monsters, and Caretakers", *supra* note 193 at 806.

same familial and community responsibilities as Indigenous students. Indigenous faculty are essential to the implementation of the Calls to law schools, and to the reduction of settler harm to Indigenous students and peers. For this reason, law schools must recognize and weigh appropriately the unique teaching, research, and service activities of Indigneous law professors in their career advancement and compensation.

f) Admission and Advancement

The legal profession has historically excluded Indigenous peoples from the practice of law.[473] Until 1951, individuals with status under the *Indian Act* could not attend law school without being emancipated from their reserves and treaty rights. After these legal restrictions were repealed, Indigenous peoples were excluded from the profession through prohibitive academic requirements, professional norms, oaths of allegiance to the Queen,[474] and persisting systemic barriers to education. Today, non-Indigenous students, and some professors, oppose inclusionary policies as an unfair special advantage or as lowering the standard of education.[475] In the 1980s and 1990s, Canadian law schools prioritized affirmative action, or inclusionary, policies to ameliorate Indigenous peoples' lack of representation in the profession.[476] These practices, however, appeared to be based more on Indigenous peoples' demographic inclusion – and

[473] Backhouse, "Gender and Race in the Construction of 'Legal Professionalism'", *supra* note 3.
[474] In 1988, Monture-Angus filed a lawsuit in the Ontario Supreme Court arguing that she should not be required to swear an oath of allegiance to the Queen of England. She was successful: Monture-Angus, *supra* note 8 at 52 (at note 10). The oath of allegiance to the Queen is now optional, however, I recall it being spoke aloud at my call to the bar in 2017 and feeling compelled to repeat it.
[475] Klippenstein & Pardy, *supra* note 82.Monture-Angus' response is powerful: "The debate about lower standards is really a thinly disguised smokescreen for an unimaginative suggestion that perhaps the status quo should remain entrenched within law schools" in Monture-Angus, *supra* note 8 at 107.
[476] Canadian Bar Association Committee on Aboriginal Rights in Canada, *Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Canadian Bar Association, 1988); Monture-Angus, *supra* note 8 at 102–121.

potentially enclosure – than their contribution to our understanding of law, particularly Indigenous legal orders.[477]

Admissions policies should recognize Indigenous students' unique contributions to law schools and commit to supporting them as they navigate their personal and professional identities. This means identifying the connection between admissions policies and broader institutional policies related to Indigenous programming, representation, facilities, funding and resources, and the support of Indigenous peer support, community relationships, and elder involvement. It means also recognizing and appropriately supporting Indigenous students' unique familial and community responsibilities. Indigenous students are critical to the implementation of the Calls and are a necessary participant in intergroup contact and dialogue activities undertaken in law schools. Inclusive policies are only meaningful insofar as they respectfully and support the unique contributions of Indigenous law students to the implementation of the Calls.

g) Anti-Racism and Harassment

Recall Monture-Angus' accounts of reverse racism complaints made by non-Indigenous students in response to unsettling content about settler colonialism.[478] Anti-racism, discrimination and harassment policies and training must be responsive to Indigenous peoples' experiences of prejudice and the rhetorical resources that non-Indigenous peoples employ to avoid responsibility,

[477] Tuck & K. Wayne, "Decolonization is not a Metaphor", *supra* note 4 at 23. In 1988, the Canadian Bar Association released a report that considered the lack of Indigenous lawyers in Canada: Canadian Bar Association. Committee on Aboriginal Rights in Canada, *supra* note 476 at 87–88. In the 1990s, when Monture-Angus wrote *Thunder in my Soul*, the numbers of Indigenous law students and professors remained small, though increasing: Monture-Angus, *supra* note 8 at 108–114. Although more law schools are looking to Indigenising the curriculum than ever, I argue in this thesis that barriers remain to the ethical and respectful inclusion of Indigenous legal orders and Indigenous students and professors in Canadian law schools.

[478] Borrows, *supra* note 8 at 154–156; Monture-Angus, *supra* note 8 at 66.

such as "reverse racism".[479] Such training should also include factual training intended to counter beliefs associated with "modern" prejudice towards Indigenous peoples.[480] These policies provide the institutional support necessary for intergroup contact and dialogue, and are necessary for the reduction of settler harm to Indigenous law students and professors. More work is required to develop anti-racism, anti-domination, and harassment policies that are responsive to anti-Indigenous stereotyping and prejudice in Canadian law schools.

h) Decolonization Plans

The reduction of prejudice, which is the focus of this thesis, is only a most preliminary step towards the implementation of the philosophy underlying the Calls. Hewitt cautions against projects, such as Indigenisation, that function "to side-step other responsibility-filled, harsher-sounding words like 'decolonizing'."[481] In many ways, Hewitt's concern echoes my concern with the limits of a prejudice reduction approach, which can become myopically focused on intergroup harmony and non-Indigenous peoples' comfort rather than on collective action toward social change. Our projects must remain oriented towards decolonization.[482]

Hewitt proposes the creation, institutional entrenchment, and valuing of decolonization plans based on local Indigenous legal orders.[483] Such plans reflect the reality that decolonization applies to both non-Indigenous peoples and Indigenous peoples trained within the Canadian legal system,[484] and that decolonization is specific to the Indigenous territory and legal orders in which

[479] Several social psychologists have recommended training, such as sensitivity or Indigenous cultural competency training, for law school professors and administrators: Clark et al, *supra* note 186 at 122–123; Bailey, "Racism within the Canadian University", *supra* note 155 at 1275.
[480] Recall the discussion in Chapter 2, section 2(a), and see Morrison, Morrison & Borsa, "A Legacy of Derogation", *supra* note 146 at 1006–1008.
[481] Hewitt, "Decolonizing and Indigenizing", *supra* note 4 at 71.
[482] See, generally, Tamara Pearl, *Māmawī Wīcihitowin: Colonization is not about sharing space. The Treaties are.* (LLM, University of Saskatchewan, 2020) [unpublished] [unpublished, copy with author].
[483] Hewitt, "Decolonizing and Indigenizing", *supra* note 4 at 78–82.
[484] *Ibid* at 80.

a law school and its members is located.[485] Some Canadian law schools are clearly at the point in their implementation of the Calls that they can sincerely consider implementing decolonization plans. These law schools, such as the University of Victoria, have established robust Indigenous programming and have recruited Indigenous students and professors in large enough numbers, and with enough institutional support, to begin to decolonize legal education and practice.

IV. Evaluating the Implementation of Prejudice Reduction Interventions

Having inventoried several individual and intergroup interventions and compared them to current ILE programming, the next logical step would be to ask how these activities might be measured. It is possible that implicit and explicit measures of prejudice may be used to evaluate the success or impact of prejudice reduction interventions.[486] Implicit measures, such as the Implicit Bias Association Test, may be used to evaluate implicit racial stereotyping towards Indigenous peoples. These measures evaluate the physiological and behavioural responses of participants to external stimuli, such as the presence of a racialized person.[487] Explicit measures, such as the Old-Fashioned and Modern Prejudicial Attitudes Toward Aboriginal Scales (O-TAPAS and M-TAPAS, respectively), may be used to evaluate an individual's self-reported beliefs and attitudes.[488] However, as I will argue, such measures are insufficient for evaluating the implementation of the Calls and the decolonization of Indigenous legal education and practice.

[485] *Ibid* at 80–81.
[486] Olson & Zabel, *supra* note 49.
[487] Whitley & Kite, *supra* note 24 at 54–59.
[488] The O-TAPAS and M-TAPAS scales have since been confirmed as psychometrically valid measures of old-fashioned and modern prejudice held by undergraduate students and community members against Indigenous peoples in Canada: Morrison et al, *supra* note 146; Nesdole et al, *supra* note 146; Morrison, Morrison & Borsa, "A Legacy of Derogation", *supra* note 146. Further research is required to determine the validity of the O-TAPAS and M-TAPAS for members of the legal profession (including law students, law professors, clerks, lawyers, and judges).

Outside of a research context, these measures can be carefully used to inform and assess the impact of programming or activities in Canadian law schools. The application of measures in this context should be approached cautiously, with a mind to the inherent limitations of the scientific method. For example, the O-TAPAS and M-TAPAS may be used before, during and after (including at further intervals) an Indigenous awareness camp to assess changes in common indicators of "old-fashioned" and "modern" racial beliefs and attitudes towards Indigenous peoples. Where appropriate and with the consent of the individual, this evaluative data may be shared with the individual so that they may reflect on any inconsistencies between their results and any non-prejudicial beliefs or attitudes that they hold.[489] In turn, this information may assist individuals in self-regulating against prejudice. Pre, mid and post-intervention data may also be used to assess the impact of a program or activity. This data may also be used to support the qualitative experiences of facilitators, professors, and students.

In my view, the use of measures from social psychology cannot be used independently of qualitative assessments that consider a broader range of social and political objectives (apart from prejudice reduction) and that are based on the experiences of Indigenous students and professors. First, individuals may underreport or not report beliefs or attitudes that they know could be perceived as prejudicial. This "social desirability effect" may make some explicit measures of prejudice unreliable.[490] Second, measures of prejudice may lose their currency, since the content of stereotypes and prejudices change over time and place.[491] Third, some are of the view that the results of a "modern" prejudice measure may reflect a political position rather than prejudice.[492]

[489] Devine, *supra* note 280 at 334–336.
[490] Olson & Zabel, *supra* note 49 at 176–177.
[491] *Ibid* at 177–182.
[492] Measures of contemporary prejudice, for example, often correlate conservativism with prejudicial attitudes: *Ibid* at 181.

Since I propose that racial prejudice is an endorsement of behaviours or policies that maintain racial subordination, I do not place much weight in this critique; prejudice is political. Fourth, in a law school context, implicit bias testing will likely be impractical. Moreover, recent research suggests that the most common implicit measure, the implicit association test, may be unreliable in some cases.[493] I am also skeptical as to whether implicit bias is the kind of prejudice that we should be concerned about. Finally, measures require interpretation and decision-making. What is the appropriate course of action when a program does not reduce prejudice (and of what kind?) in its participants? As law schools contemplate or implement mandatory ILE, we must consider the possibility that, despite our best efforts, students' pre-existing racial stereotypes and prejudices might not change. If this occurs, is the appropriate response to make ILE elective? To have it taught only by non-Indigenous faculty, since such instructors may be perceived as more authoritative to non-Indigenous students? To separate Indigenous and non-Indigenous students in separate sections so as to reduce the impact of stereotyping and prejudice? What should happen if it raises and/or lowers prejudices in some students but not others? Should we think about elective courses, where students self-select ILE that may reflect their anti-prejudicial and decolonial values, differently from mandatory courses? Do we consider the individual-level differences of students, such as their personalities, prior contact experiences, or commitment to Indigenisation or decolonization? Ultimately, how ILE is implemented is a complex decision, one which reflects many different objectives and normative considerations and that will require many different tools.

For these reasons, I propose that the success of ILE, even as a prejudice reduction intervention, cannot be evaluated only with measures from social psychology. In my view, social psychology supports, but does not encompass or supplant, Indigenous peoples' experiences of racial

[493] *Ibid* at 192–195.

stereotyping, prejudice, and discrimination in Canadian legal education and practice. As Jonathan Kahn warns, social psychology cannot be prioritized over the complicated reality of racial stereotyping and prejudice.[494] Not only is the scientific discipline methodologically limited, it cannot acquire its vaunted universal and objective truth. When we prioritize science over human experience – and law – we obscure the messy, never-quite-perfect, social, political, and ethical decisions that we must make as agents. Indigenous and post-colonial scholars further remind us of the role that science has played in dominating and displacing Indigenous peoples. For these reasons, there are empirically and socially significant reasons why psychological measures, alone, are insufficient for telling us about the impact of Indigneous programing on the reduction of prejudice and the implementation of the Calls.

Conclusion

I doubted myself many times when writing the first chapter of this thesis. I have taken care to locate and prioritize the experiences of Indigenous students and professors throughout. I felt like this was not only methodologically appropriate and necessary, but the only way I could communicate how I understand the relevance of the social psychology on stereotyping, prejudice, and discrimination. For several years, I have journaled my own experiences in Canadian legal education and practice, but never really considered them worth sharing. Somehow, through the process of writing this thesis, I have come to see that my experiences are my contribution – doctrinal, practical, and relational.

If you return to the first chapter with what you have read in this thesis, you will notice the hallmarks of all the concepts introduced in subsequent chapters. I have shared how processes of social

[494] Kahn, *supra* note 24.

categorisation complicated the British Columbian bencher's perception of my identity as a Métis person. In my account of the 2015 CIAJ conference, I observed: the aversiveness of the former Chief Justice, who spoke about Indigenous peoples' access to legal services rather than the integration of Indigenous legal orders or the impact of systemic racism on Indigenous peoples; the benevolence of the justice who interrupted our informal peer support debrief after the conference to tell us that it was our task to change things; and the perception of threat by some non-Indigenous conferences participants who excluded Indigenous legal orders from their understanding of the rule of law. In describing my experiences as co-chair of the Osgoode Indigenous Students Association, I illustrate how chronic stereotyping and prejudice and stereotype threat impacted me and my peers.

You will also see that I struggled with my own sense of whether individual self-regulation was sufficient to reduce the harms to Indigenous students and professors and to Indigneous legal orders. My interest in the buddy-system, as I called it, reflected my interpretation of Métis-Nêhiyawak relational ethics but also found support in self-categorisation and intergroup contact theory. In my account of the 2015 CIAJ conference, I reflect on the theme of the conference, "We are all here to stay". In this thesis, I articulate how this phrase – and the "reconciliation" norm – may be insufficient, even counterproductive, at least as commonly interpreted by settlers. My sense at the conference, affirmed by Monture-Angus and Lindberg's own scholarship, was that settlers must unsettle themselves, transform their anxiety and guilt, and accept responsibility.

I have also benefited immensely from some of the best in ILE. I was fortunate to attend the Program of Legal Studies for Native People at the University of Saskatchewan, where I received some of my most meaningful personal and professional relationships, and to participate in Osgoode Hall Law School's first and sixth Anishinaabe Law Camp with the Chippewas of Nawash

Unceded First Nation at Neyaashiinigmiing, in the Kawaskimhon Aboriginal law moot in New Brunswick, and to be placed with the Métis Settlements Appeal Tribunal in Edmonton, Alberta through Osgoode's Intensive Program in Indigenous Lands, Resources and Governments. These programs reduce the effects of racial stereotyping, prejudice and discrimination on Indigenous students, professors and legal orders in Canadian legal education, and offer non-Indigenous professors and students opportunities for ethically and respectfully engaging with Indigenous peoples and their legal orders and perspectives. I hypothesized that the social psychology literature would support these programs for these purposes. My research confirms this intuition.

The social psychology literature on racial stereotypes and prejudices (re)affirms the experiences of Indigenous students and professors in Canadian law schools. Though none of these theories are determinative, nor without their own faults, each offer explanations for understanding the manifestation and effects of racial stereotyping and prejudice against Indigenous peoples and their legal orders in Canadian law schools. Implicit social cognition theory and self-regulation interventions offer a helpful starting point for individuals who are resistant to taking accountability for their intentional or conscious beliefs, attitudes and behaviours. However, implicit approaches fail when they "naturalize" racial stereotyping and prejudice and obfuscate our agency in social contexts. Contemporary theories of prejudice, such as "modern", "symbolic", "aversive" and "benevolent" prejudice, round out our understanding of racial stereotyping and prejudice. Although these theories (re)affirm Indigenous peoples' experiences of racial stereotyping and prejudice in Canadian law schools, it is important to recognize that these theories are socially contingent, owing their origins and objectives to the development of social psychology in the American context of Black and White intergroup relations. Integrated threat theory offers a description of how racial stereotyping and prejudice is associated with settlers' motivation to

maintain the inequitable distribution of resources under settler-colonialism. When brought together, these theories may provide settlers a familiar framework or heuristic for naming and addressing racial stereotyping and prejudice against Indigenous peoples and their legal orders in Canadian legal education. We can see, too, how these theories help us understand the "obsidian quandaries" that Indigenous students and professors face in Canadian legal education and practice. Applied critically, with an eye towards collective action toward social change, these theories may offer a more comprehensive account of the kinds of normative decisions that non-Indigenous courts, lawyers, professors and law students make in Canadian legal education and practice. Intergroup contact theory and the experiences of Indigenous and non-Indigenous professors and students also supports the proposition that many ILE programs, such as Indigenous awareness camps, may function as prejudice reduction interventions. These theories also describe how institutional commitment, including resourcing and funding, is necessary to not only establish anti-prejudicial norms but also support the implementation of the Calls. Finally, I have made it clear that all of this – settler harm reduction, prejudice reduction interventions, and cultural competency training – must be oriented towards the decolonization of Canadian legal education and practice. In the meantime, before decolonization is more widely applied, these theories and interventions, none of which are a panacea, may reduce the harm caused by settler colonialism and racial stereotyping and prejudice towards Indigenous peoples and their legal orders in Canadian legal education and practice.

Justice LaForme's words, "We are all here to stay, but not in the same way", strike me as a call to action that is consistent with my reading of the prejudice reduction literature. "We are all here to stay…" is an echo of a shared sensibility, a possibility of "gathering together" that has otherwise become co-opted in a way that sustains settler colonialism. The "but" poses conflict. Is it a threat?

Or is it a contradiction for us to resolve together? To say that we will stay "not in the same way" is unsettling. What does it mean to be "not in the same way"? To me, that unsettling proposition is a call for collective action toward social change, that is, for all of us to respectfully and ethically enter a space of ethical engagement. If we do so together, we must not reinforce a common identity that sustains settler colonialism and that denies Indigenous peoples' *Indigeneity* in this land. We must imagine new identities, new possibilities, that respect Indigenous peoples' determination of their own identities. Ultimately, "not in the same way" also requires the decolonization of Canadian law, which I define as the dismantling of racial and settler-colonial hierarchies embedded in the rule of law. It is my hope that this thesis functions as an introduction for some settlers, a review and orientation for others, and an affirmation for Indigenous students and professors that the implementation of the Calls and the decolonization of Canadian legal education and practice is possible and necessary.

> [W]e have accepted the responsibility of educating ourselves. We have risen to the challenge of remaining Aboriginal in the search for knowledge in a system that challenges our make-up. We respect the wisdom that we have gained. We honour the teachers who have tried to change a vision of their world in order to include other worlds. We have found ourselves immersed in a value system that is strange and foreign to many of us. We have struggled academically, personally, and in innumerable other ways to include, or at least to respect, your vision of the world. It is your turn.[495]

[495] Lindberg, "What Do You Call an Indian Woman with a Law Degree?", *supra* note 104 at 331.

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