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Indigenous Legal Traditions and Australian Legal Education

NICOLE WATSON

Introduction

It is impossible to imagine life without stories. Stories explain our origins, offer comfort in times of grief and reassurance in a world that can be frighteningly unpredictable. Although stories are of universal importance, they take on even greater significance in Indigenous societies, which rely upon oral storytelling as a means of transmitting vast amounts of knowledge from one generation to the next. Perhaps it was because of the importance of oral storytelling in our culture that I had the great fortune of being born into a family of raconteurs.

The adults of my childhood were strong personalities, possessed formidable wit and delivered their stories with meticulous timing. One of the stories that I have long reflected upon concerned my paternal grandmother's certificate of exemption. This piece of paper shielded its holder from the intrusive provisions of Queensland's protectionist legislation. If one was caught by the tentacles of the legislation, the freedom of movement, the ability to marry and to care for one's children, were wrested away by the shadowy figures within Queensland's Indigenous affairs bureaucracy. The path to freedom was a certificate of exemption, granted to those who could demonstrate an ability to assimilate.

In a soft voice, Nanna said that the certificate had allowed her to 'mix in public with white people'. I do not recall my reaction as a child, but now I struggle to imagine the indignity of having to prove one's capacity to become 'white', in order to exercise the most elementary freedoms. Perhaps

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it was because of the various degradations associated with her certificate of exemption that my grandmother encouraged me to go to law school.

My entry into legal education in the final decade of the twentieth century coincided with momentous developments for Indigenous peoples, such as the Royal Commission into Aboriginal Deaths in Custody and the High Court's watershed decision in *Mabo v Queensland (No. 2)*. The Commonwealth's response to the latter included the enactment of the Native Title Act 1993 (Cth) and with it came a process for the recognition of native title. A few years later, the 'Bringing Them Home'[1] report thrust the stories of the Stolen Generations into the national consciousness.

While the world appeared to be changing, my law school, the T. C. Beirne School of Law, University of Queensland, remained frozen in time. In common with most Australian law schools in the 1990s, the T. C. Beirne School of Law was yet to employ its first Indigenous scholar. Laws that had wrought devastation on Indigenous lives, such as the protectionist legislation, were never mentioned in any of my classes. Likewise, Indigenous legal traditions that were practised for thousands of years before the arrival of the British received no acknowledgment.

Three decades later, there have been some positive changes in Australian legal education. Indigenous legal scholars have broken through the glass ceiling and most law schools offer elective subjects on Indigenous peoples' engagements with settler law. However, the efforts of Indigenous legal scholars to prise open spaces for Indigenous peoples' laws have been largely met with silence by those within our discipline. This chapter will advance one possible means to move forward by engagement with methodologies created by Canadian scholars for the recovery of Indigenous legal orders.

This chapter will be divided into four parts. The first part will provide an introduction to the work of some of the Indigenous legal scholars who are building the foundations of an emerging Indigenous jurisprudence. The second part will unpack some of the hindrances to the inclusion of Indigenous legal traditions. The third part will provide an introduction to methodologies that have been developed by Canadian legal scholars for the revitalisation of Indigenous peoples' law. Finally, in the fourth part, I will advance arguments in favour of reform.

1 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Canberra: 1997).

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Indigenous Jurisprudence

For thousands of years prior to the arrival of the British, Australia was a vast tapestry of Indigenous nations that emerged out of the creation period known as the 'Dreaming'. During this time, ancestral beings created the physical features of the land and Dreaming narratives. As distinct from the laws of the colonisers, Indigenous peoples' laws are not buried in judgments and statutes. They are contained in story, song and art. Law inheres in all living things.

The colonial gaze constructed our ancestors as brutish and lawless. Such representations would have profound and lasting impacts for the recognition of Indigenous peoples' laws. One such impact was the sustained erasure of our legal traditions from the discipline of law. Generations of Australian lawyers have begun and concluded their studies without ever having attended a single class devoted to Australia's oldest and most enduring legal systems. But much like the colonial encounter itself, this absence is being met with resistance by warrior scholars.

In this part I will provide an introduction to the work of some of those who are laying the foundations for an Indigenous Australian jurisprudence. As this chapter critiques the absence of Indigenous legal traditions from the discipline of law, I will confine my discussion to the scholarship of Indigenous legal scholars. However, I acknowledge the important contributions made by scholars who work outside of law schools to the creation of spaces for Indigenous peoples' laws in the Academy.[2]

In *The Land is the Source of the Law*, the Kombumerri and Munaljahlai scholar, Dr Christine Black argued that Indigenous peoples should:

> turn to their ancient narratives rather than taking a D'Artagnan-like musketeer approach of intellectually duelling with the Rule of Law, for I would argue that this approach has actually 'grown up' a whole generation of people who have neglected their own Law stories and succumbed to the 'Rule' stories of legal dualism.[3]

According to Dr Black, such an approach had led to a 'dearth of books and articles on Indigenous jurisprudence and a glut of texts on Indigenous peoples and Western jurisprudence'.[4]

In the years since I read Dr Black's important book I have often reflected upon those passages. I share her view that the number of publications about

2 For example, see Christine Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (London: Routledge, 2011).

3 Ibid, 9. 4 Ibid.

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Indigenous Australian jurisprudence is outweighed by those that concern how settler law has impacted upon Indigenous peoples. But I would argue that the problem is not so much indifference by Indigenous legal scholars to our own law stories but, rather, the various obstacles that we encounter in our respective institutions. Before identifying some of those obstacles, it is important to acknowledge the ground-breaking work of those who are creating spaces for an Indigenous Australian jurisprudence. Among them is the Tanganekald and Meintangk scholar, Professor Irene Watson.

Professor Watson writes from a standpoint that is grounded in the *ruwe*, that is, the land of her ancestors who hail from the south-east of South Australia.[5] Professor Watson does not claim to speak for all of those who identify as Tanganekald Peoples and, therefore, her work is not a 'master narrative' of their laws. Rather, it is a 'theoretical intervention, which may or may not extend beyond the self in bringing the mob to gather'.[6] Throughout her large body of publications, Professor Watson has reiterated the very questions posed by generations of Indigenous peoples since the arrival of the British – 'by what lawful authority do you come to our lands? What authorises your efforts to dispossess us?'[7]

In her book, *Aboriginal Peoples, Colonialism and International Law: Raw Law*,[8] Professor Watson casts a critical Aboriginal law lens over the colonial project. Drawing from her own language, Professor Watson names the carnage wrought by colonisation as the *muldarbi*, which means 'demon spirit'.[9] It was the *muldarbi* which brought *terra nullius* and created the status of 'native savages': a status that we have been hostage to ever since. Over the past two centuries Indigenous peoples have been subject to 'civilising missions' that have been ostensibly in our best interests but have caused devastation. In recent times those civilising missions have found resonance in policies such as the Northern Territory Emergency Response.[10]

Because the colonial project is built upon inequality between the colonised and the coloniser, it can never offer solutions for our ongoing oppression. Recognition in the form of native title is illusory because it has preserved the

5 Irene Watson, 'Aboriginal Recognition: Treaties and Colonial Constitutions, "We have been here forever . . ."' *Bond Law Review* 30, no. 1 (2018): 7.
6 Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (New York: Routledge, 2015), 23.
7 Irene Watson, 'The Future is our Past: We Once Were Sovereign and We Still Are' *Indigenous Law Bulletin* 8, no. 3 (2012): 12.
8 Watson, *Aboriginal Peoples*. 9 Ibid, 1.
10 Irene Watson, 'Aboriginal Laws and Colonial Foundation' *Griffith Law Review* 26, no. 4 (2017): 469, 473.

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power of the *muldarbi* to continue to dispossess Indigenous peoples and cause greater destruction to the *ruwe*.[11] Rather than placing our faith in a system of law that was built upon our annihilation, Indigenous peoples should reject *terra nullius* and restore the authority of our own laws.[12]

Our laws may have been suppressed, but they remain alive underneath the layers of the *muldarbi*. Professor Watson calls this law the 'Raw Law'.[13] As distinct from settler law, which is isolated and inert in judgments and statutes, the Raw Law is all encompassing:

> The law transcends all things, guiding us in the tradition of living a good life, that is, a life that is sustainable and one which enables our grand-children yet to be born to also experience a good life on earth. The law is who we are, we are also the law. We carry it in our lives. The law is everywhere, we breathe it, we eat it, we sing it, we live it.[14]

The laws of First Nations peoples recognise the interconnected relationships between all living things.[15] Indigenous peoples' laws are written in the land, and therefore, they can never be extinguished. This Raw Law provides the 'essential basis of social conduct: respect, reciprocity and caring for country . . . '.[16]

Professor Watson weaves law stories into her writing; stories which have much to teach all of us about how we should live in this beautiful and ancient place. However, Professor Watson adheres to the practice of not referencing stories that are yet to be published, in order to 'keep oral traditions and their interpretation in the hands of the storyteller'.[17]

One story referenced by Professor Watson concerns Gurukmun the Frog. The selfish Gurukmun drinks all of the water in the land before sitting on top of a mountain. Gurukmun refuses to share the water with the other animals. It is only when he is made to laugh by Nabunum the Eel that Gurukmun releases the water.[18] Such stories may be ancient but they continue to be relevant. Today, Gurukmun's behaviour finds resonance in the exploits of those who wreak great harm to the environment in the pursuit of corporate profits.

Other Indigenous scholars are also acknowledging the continuing vitality of Indigenous law in their scholarship. For example, in her book, *Overturning Acqua Nullius: Securing Indigenous Water Rights*,[19] the Wiradjuri Nyemba

11 Watson, *Aboriginal Peoples,* 19. 12 Watson, 'Aboriginal Laws and Colonial Foundation'.
13 Watson, *Aboriginal Peoples,* 12.
14 Irene Watson, 'Indigenous Peoples' Law-Ways: Survival against the Colonial State' *Australian Feminist Law Journal* 8, no. 1 (1997): 39.
15 Watson, *Aboriginal Peoples,* 12. 16 Ibid, 22. 17 Ibid, 14.
18 Watson, 'Indigenous Peoples' Law-Ways', 42–4.
19 Virginia Marshall, *Overturning Acqua Nullius: Securing Aboriginal Water Rights* (Canberra: Aboriginal Studies Press, 2017).

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scholar, Dr Virginia Marshall calls for a greater understanding of Aboriginal water rights through engagement with the narratives of Aboriginal peoples. Such narratives 'depict the care and protection for water landscapes within "country" as a legal obligation and a cultural expectation to abide by Aboriginal laws on country'.[20]

The Wiradjuri scholar, Dr Mark McMillan and Anna Dziedzic have also argued for recognition of the age-old constitutions of Indigenous nations. With the constitutional arrangements of the Gunditjmara Peoples and the Ngarrindjeri Nation as their reference points, McMillan and Dziedzic identify common features of Indigenous peoples' constitutions that include a foundation in Indigenous law.[21] Finally, the Palyku scholar, Ambelin Kwaymullina, who hails from the eastern Pilbara region of Western Australia, has written eloquently about the nexus between Aboriginal law and sustainability.[22]

Such work is gradually finding its way in Australia's legal journals. However, the vast majority of those with whom we share a disciplinary background are yet to acknowledge the existence of Indigenous peoples' laws. Below I argue that this sustained erasure is linked to our historical marginalisation in legal education.

The Marginalisation of Indigenous People in Legal Education

Introduction

Many outside Australia, and even those within, are often oblivious to the reality that racism is experienced by Indigenous people as omnipresent. It is manifest in overt forms and subtle gestures and, for some, racism is a wound to the psyche that is endured on a daily basis. The Goenpul scholar, Professor Aileen Moreton-Robinson argues that whiteness is culturally based.[23] The shared beliefs, behaviours and values of white people alone define what is normal and imbue all of our institutions.[24]

20 Ibid, 8.
21 Anna Dziedzic and Mark McMillan, 'Australian Indigenous Constitutions: Recognition and Renewal' *Federal Law Review* 44, no. 3 (2016): 337.
22 Ambelin Kwaymullina, 'Seeing the Light: Aboriginal Law, Learning and Sustainable Living in Country' *Indigenous Law Bulletin* 6, no. 11 (2005): 12.
23 Aileen Moreton-Robinson, 'Witnessing Whiteness in the Wake of Wik' *Social Alternatives* 17, no. 2 (1998): 11.
24 Aileen Moreton-Robinson, 'Unmasking Whiteness: A Goori Jondal's Look at Some Duggai Business' *Queensland Review* 6, no. 1 (1999): 1, 2.

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Law schools are microcosms of society and, as such, they reflect and reproduce Australia's racial hierarchy. However, I argue that law schools are especially injurious to Indigenous peoples. This is due to a combination of factors, such as the late entry of Indigenous people into legal education and systemic racism. The sustained invisibility of Indigenous law from legal research and teaching should be contextualised by this story.

A History of Indigenous People in Legal Education

The first generation of Indigenous people to attend law school gained their qualifications in the 1970s; a time when Indigenous political movements had risen to national prominence. Community leaders were also building organisations that would go on to provide medical care, housing and legal assistance to individuals and families who struggled to survive on the margins of Australian society. The burgeoning Aboriginal Legal Services were critical because of the racist policing practices that were rampant in suburbs and townships in which Indigenous peoples congregated. My late father was one of the many activists who contributed to the building of this sanctuary from the unrelenting violence of the men in blue. He would often describe the beatings that he received from members of the Queensland Police Service, and the arbitrary arrests of those Indigenous people who had the temerity to walk in Brisbane's streets at night.

Unsurprisingly, early Indigenous lawyers were motivated to put an end to such violence. Our first magistrate, the Kunjandji woman, Pat O'Shane graduated from the University of New South Wales in 1976. She would work in Aboriginal Legal Services in Sydney and Alice Springs before being appointed as a magistrate in 1986.[25] In a 2017 interview, O'Shane was asked what motivated her to study law.[26] Her answer began with the assault of two Aboriginal women by police officers in Mareeba, West of Cairns. O'Shane observed the subsequent trial of the officers. Although the officers were ultimately convicted, she was deeply affected by how poorly the women were treated and was determined to make a difference.[27]

The Noonucal/Bunjalung man who would become our first judge, Bob Bellear, was also inspired to study law after observing police harassment in

25 Nikki Henningham, 'O'Shane Pat', in *The Encyclopedia of Women and Leadership in Twentieth-century Australia*, www.womenaustralia.info/leaders/biogs/WLE0771b.htm, accessed 11 January 2022.

26 Paul Gregoire, 'A Career of Firsts: An Interview with NSW Magistrate Pat O'Shane', *Sydney Criminal Lawyers*, 22 January 2017 www.sydneycriminallawyers.com.au/blog/a-career-of-firsts-an-interview-with-former-nsw-magistrate-pat-oshane/ accessed 11 January 2022.

27 Ibid.

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Redfern. At his swearing in ceremony, the former Attorney General of New South Wales, Jeff Shaw, reflected on Bellear's courage during this dangerous time:

> It was easy for police to arrest Aboriginal people. They had a formula. It was the trifecta, 'unseemly words', 'resist arrest' and 'assault police'. Seeing this injustice repeated week after week hit hard, and there was no way that Bob Bellear was going to sit back and watch it happening.[28]

I do not know what studying law would have been like for those giants who blazed a trail for the rest of us to follow. I can try to imagine how it felt to be among the first of our people to breathe the rarefied air of Australia's sandstone universities, surrounded by peers who had little knowledge of Indigenous peoples' perspectives and historical experience. But I doubt that my imagination would be able to truly capture the challenges overcome by those courageous individuals.

My own experience of law school in the 1990s was characterised by confusion and discomfort. On occasions when we studied cases in which there were Indigenous parties, I would brace myself for the inevitable, offensive comments. The humanity of those whose names appeared in the judgments was seldom acknowledged. Articles written by Indigenous scholars, which might have provided valuable context, were never included in our course reading lists.

It would be many years before I discovered the work of Indigenous legal scholars overseas, such as the Canadian Mohawk scholar, Patricia Monture. During her law studies, Monture experienced a constant feeling that there was 'something missing'.[29] It would take some time before Monture realised that she was not the source of the problem:

> In my first year at law school, I felt it was *my* problem, just as Duncan Campbell Scott, and many others in the 1920's and later, were able to characterize the 'Indian problem' as the sole fault of First Nations. Then the solution rested on changing the 'Indian' into a civilized and assimilated being. In first year, I internalized this characteristic of colonialism and oppression, believing that if I could only change, perhaps fit in a little better, my law school experience would also be rewarding. Since then, I have

28 Peter Manning, 'From the Depths to the Heights', *Sydney Morning Herald*, 17 March 2005 www.smh.com.au/national/from-the-depths-to-the-heights-20050317-gdkyon.html, accessed 11 January 2022.

29 Patricia A. Monture, 'Now That the Door is Open: First Nations and the Law School Experience' *Queen's Law Journal* 15 (1990): 179, 185.

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understood that the greatest obstacle was not myself but the very structure of the institution and the program.[30]

As Patricia Monture was powerfully describing the institutional racism embedded in Canadian law schools, a small number of Australian scholars had begun to cast a lens over Indigenous peoples' experiences of legal education. One early paper by Daniel Lavery was based on a survey of Australian law schools between 1990 and 1991.[31] The survey revealed that of the 11,000 students studying law throughout Australia, only fifty were Indigenous.[32] By that time, a mere twenty-one Indigenous law students had completed their studies.[33]

A few years later, Indigenous legal scholars such as Phil Falk described the numerous obstacles commonly encountered by Indigenous law students, which included onerous community obligations and a lack of financial support.[34] Falk also described the racism frequently experienced by Indigenous law students. Classroom discussions about issues such as native title became platforms for the airing of racist views, and lecturers were often dismissive of the laws and continuing sovereignty of Indigenous peoples.[35] Feelings of alienation and despair were reported by many of the Indigenous law students who contributed to research undertaken by Professor Heather Douglas during the same period.[36] Participants reported feeling 'disorientated by the system' and 'under siege'.[37]

Emerging Indigenous legal scholars also faced barriers. Together with others I described my experiences as a junior academic in a special issue of the *Indigenous Law Bulletin*,[38] which was published in 2005. Reading those articles fifteen years later, one is struck by the harms weathered by virtually

30 Ibid.
31 Daniel Lavery, 'The Participation of Indigenous Australians in Legal Education' *Legal Education Review* 4 (1993): 177.
32 Ibid, 180. 33 Ibid.
34 Phil Falk, 'Law School and the Indigenous Student Experience' *Indigenous Law Bulletin* 6, no. 8 (2005): 8.
35 Ibid.
36 Heather Douglas, '"This is not just about me": Indigenous Students' Insights about Law School Study' *Adelaide Law Review* 20 (1998): 315.
37 Heather Douglas, 'The Participation of Indigenous Australians in Legal Education 1991–2000' *UNSW Law Journal* 24, no. 2 (2001): 485, 490.
38 Nicole Watson, 'Indigenous People in Legal Education: Staring into a Mirror without Reflection' *Indigenous Law Bulletin* 6, no. 8 (2005): 4; Irene Watson, 'Some Reflections on Teaching Law: Whose Law, Yours or Mine?' *Indigenous Law Bulletin* 6, no. 8 (2005): 23; Falk, 'Law School and the Indigenous Student Experience', 8; Hannah McGlade, 'The Day of the Minstrel Show' *Indigenous Law Bulletin* 6, no. 8 (2005): 16.

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all of the contributors. Most had experienced ignorance from colleagues and a lack of support. We understood all too well the hurt and disillusionment worn on the faces of Indigenous students, because we too felt isolated in our respective institutions.

Recent analysis by Harry Hobbs and George Williams suggests that while there have been some gains made, there is still a long way to go.[39] Their analysis was based upon the results of a survey completed by thirty-four of Australia's thirty-eight law schools. The authors found that increasing numbers of Indigenous people were enrolling in and completing law courses. However, retention and completion remained problematic.[40] One of a number of hindrances confronted by Indigenous law students was racism:

> A key contributor to the social and academic isolation many Indigenous students experience is racism . . . Racism can be overt and covert. It can take the form of belittling Aboriginal and Torres Strait Islander culture, knowledge and perspectives, or drawing negative stereotypes of Indigenous people, including by identifying defendants as Indigenous where that fact is irrelevant. Racism can also be present in curriculum design, including as to whether Indigenous content is taught in courses, and the manner in which, or assumptions that underlie the way, it is taught.[41]

I would argue that racism within legal education is inextricably tied to the sustained erasure of Indigenous peoples' laws from the discipline of law. Throughout our shared history, Indigenous peoples have been subject to many harmful representations. The first such representation underscored the long application of *terra nullius*. According to that myth, our ancestors were so uncivilised and so lacking in intellect that they did not have legal traditions of their own. This fiction may have been dismissed by the majority of the High Court in the *Mabo* decision. But it continues to lurk within the classrooms of Australia's law schools, where Indigenous peoples' laws are seldom acknowledged.

I appreciate that many non-Indigenous scholars within our discipline are anxious to transform law schools into spaces where Indigenous scholars and students can feel safe. I suspect, however, that we lack agreement on how to move forward. Below, I provide an introduction to methodologies developed by Canadian scholars for the recovery of Indigenous legal orders. This

39 Harry Hobbs and George Williams, 'The Participation of Indigenous Australians in Legal Education, 2001–18' *UNSW Law Journal* 42, no. 4 (2019): 1294.
40 Ibid, 1305. 41 Ibid, 1301.

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important research is providing the foundations for the incorporation of Indigenous peoples' law in legal curricula.

Canadian Approaches

Introduction

In Canada there is a burgeoning movement towards a respectful engagement with Indigenous legal traditions. Universities that offer courses on Indigenous law include the University of Victoria, the University of Ottawa, McGill University, the University of British Columbia, Osgoode Hall and Lakehead University.[42] Impetus for this movement was provided by the Truth and Reconciliation Commission of Canada, which recognised the nexus between national reconciliation and the recovery of Indigenous laws.[43] Support for greater recognition of Indigenous law has also been expressed by the Canadian Bar Association and members of the judiciary.[44]

There are a number of arguments in favour of greater engagement with Indigenous law. The revitalisation of Indigenous legal traditions will provide tools to communities to resolve conflicts and strengthen their governing institutions. Greater awareness of First Nations' laws could also enhance judicial decision-making, because judges will become better equipped to grasp the complexities of First Nations societies. Nonetheless, the task of revitalising Indigenous law is problematic. Indigenous laws may not be readily available,[45] and stereotypes that represent Indigenous law as primitive and inferior will need to be overcome.[46] Such hurdles demand rigorous methodologies.

Among those who have responded to this challenge are Professor John Borrows, Canada Research Chair in Indigenous Law, University of Victoria, and Professor Val Napoleon, Law Foundation Professor of Aboriginal Justice and Governance, University of Victoria. Both scholars have been at the forefront of the world's first joint degree program in Canadian Common Law (JD) and Indigenous Legal Orders (JID), which was rolled out in 2018.

42 Val Napoleon and Hadley Friedland, 'An Inside Job: Engaging with Indigenous Legal Traditions through Stories' *McGill Law Journal* 61 (2016): 725, 731.

43 The Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future, Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Canberra: 2015), 16–17.

44 Napoleon and Friedland, 'An Inside Job', 731.

45 Hadley Friedland, 'Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws' *Indigenous Law Journal* 11 (2012): 1, 8.

46 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 13.

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The JID was a direct response to Call to Action #50 of the Truth and Reconciliation Commission of Canada:

> 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 development, use, and understanding of Indigenous law and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.[47]

This four-year program enables students to study common law doctrine alongside Indigenous legal traditions. Field schools form a crucial part of the JID. For an entire term in their third and final years of study, students are provided with an opportunity to learn from community experts, observe how Indigenous legal traditions operate in practice and contribute to community legal projects.[48] In the future, the program will be housed in an Indigenous Legal Lodge that will become a national and international forum for critical engagement with Indigenous legal traditions.[49]

It is beyond the scope of this chapter to provide a comprehensive description of the complex and voluminous scholarship of either Professor Borrows or Professor Napoleon.

Therefore, this part will provide a brief introduction to one aspect of the work of each scholar, which is the use of Indigenous stories as cases.

The Single Case Analysis Method

Professor Borrows has developed what Dr Hadley Friedland describes as the 'single case analysis method'[50] as a means of drawing out principles of Indigenous law from stories handed over from generation to generation. An example of the application of the single case analysis method is Borrows's analysis of the story of Mayamaking, who transformed into a '*wetiko*' or '*windigo*'.[51] Within the histories of the Cree and Anishinabek are the *wetiko*; cannibalistic giants or spirits who caused terrible harm to both themselves

47 'World's first Indigenous law program launches with historic and emotional ceremony' University of Victoria, 22 October 2018 www.uvic.ca/news/topics/2018+jid-program-launch+news, accessed 11 January 2022.

48 'JD/JID joint degree program in Canadian common law and Indigenous legal orders', University of Victoria www.uvic.ca/law/assets/docs/jid/JIDBrochureWeb2.pdf, accessed 11 January 2022.

49 Ibid. 50 Friedland, 'Reflective Frameworks', 21.

51 Borrows, *Canada's Indigenous Constitution,* 81.

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and others.[52] A person who was turning into a *wetiko* exhibited symptoms that included a lack of self care, refusing food and attempting to hurt others.[53]

An appropriate response to the looming danger posed by someone who was transforming into a *wetiko* was determined according to legal principles and processes embedded in cases such as that of Mayamaking. His story was reported by a Superintendent of Indian Affairs, William Jarvis, in 1838:

> He came among us at the very beginning of last winter, having in most severe weather walked six days, without either kindling a fire, or eating any food.
>
> During the most part of this winter he was quiet enough, but as the sugar season approached got noisy and restless. He went off to a lodge, and there remained ten days, frequently eating a whole deer at two meals. After that he went to another [lodge] WHEN a great change was visible in his person. His form seemed to have dilated and his face was the color of death. At this lodge he first exhibited the most decided professions of madness; and we all considered that he had become a Windigo (giant). He did not sleep but kept on walking round the lodge saying 'I shall have a fine feast.' Soon this (caused) plenty of fears in this lodge, among both the old and growing. He then tore open the veins at his wrist with his teeth, and drank his blood. The next night was the same, he went out from the lodge and without an axe broke off many saplings about 9 inches in circumference. [He] never slept but worked all that night, and in the morning brought in the poles he had broken off, and at two TRIPS filled a large sugar camp. He continued to drink his blood. The Indians then all became alarmed and we all started off to join our friends. The snow was deep and soft and we sank deeply into it with our snow shoes, but he without shoes or stockings barely left the indent of his toes on the surface. He was stark naked, tearing all his clothes given to him off as fast as they were put on. He still continued drinking blood and refused all food eating nothing but ice and snow. We then formed a council to determine how to act as we feared he would eat our children.
>
> It was unanimously agreed that he must die. His most intimate friend undertook to shoot him not wishing any other hand to do it.
>
> After his death we burned the body, and all was consumed but the chest which we examined and found to contain an immense lump of ice which completely filled the cavity.
>
> The LAD, who carried into effect the determination of the council, has given himself to the father of him who is no more: to hunt for him, plant and fill all the duties of a son. We also have all made the old man presents and he is now perfectly satisfied.

52 Hadley Friedland, *The Wetiko Legal Principles: Cree and Anishinabek Responses to Violence and Victimization* (Toronto: University of Toronto Press, 2018), 13.

53 Ibid.

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> This deed was not done under the influence of whiskey. There was none there, it was the deliberate act of this tribe in council.[54]

Borrows has emphasised that the death was the outcome of a legal process that was collective and deliberative.[55] The man's deterioration was observed over some time and, when the danger posed by his condition became too great, the decision was made to permanently incapacitate him. Far from being an example of capital punishment, the death was compassionate, being carried out by a loved one. The case also has an element of restitution, with his father receiving support from both the man who killed Mayamaking and the community.

Borrows has identified the legal principles that underpinned the decision:

(1) Wait, observe and collect information;
(2) Consult with their friends and neighbours when it is apparent something is wrong;
(3) Help the person who is threatening or causing imminent harm;
(4) If the person does not respond to help and becomes an imminent threat to individuals or the community, he or she can be removed so that he or she does not harm others (though, to re-emphasize, the act does not involve what the common law has labelled capital punishment);
(5) Help those who rely on that person by restoring what might be taken from them by the treatment; and
(6) Invite both the community and the individual to participate in the restoration.[56]

Today, there would be means other than death to cause permanent incapacitation, and hopefully, compassionate medical treatment for what was likely a grave mental illness. Nonetheless, the legal principles identified by Borrows could be applied in the present day to determine appropriate responses to those who pose a danger to community safety.

Multiple Cases and an Analytical Framework

The approach by Professor Val Napoleon and her colleagues at the Indigenous Law Research Unit (ILRU), University of Victoria, is underpinned by three 'conceptual strands of thought':

> The first strand explores how we hear, see, and experience Indigenous elders using stories as tools for thinking – in their lives, in their talk, and in

54 Jarvis cited by Borrows *Canada's Indigenous Constitution,* 81–2. 55 Ibid, 82. 56 Ibid, 83.

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> their written work. The second strand reflects the felt need to shift the discussions about Indigenous legal traditions from broad, generalized, descriptive, or philosophical accounts to discussions about specific principles and legal practices. The third and final strand assesses how effective legal scholarship is for accessing, understanding, and actually being able to apply any law in practice, from an internal and embedded perspective.[57]

The result of the fusion of the three strands of thought is the application to stories of tools used by scholars of common law traditions. It is beyond the scope of this chapter to explore Professor Napoleon's complex method in detail. Consequently, this part will provide an introduction to its core components. The first component is framing the research questions to ensure that research outcomes are useful and applicable to the 'real lives' of communities.[58] The second treats stories as cases that hold crucial information about norms, relationships, obligations and legal processes.[59]

In order to extract such information from stories, Professor Napoleon and her colleagues have adapted the 'case briefing' method designed by the former Dean of Harvard Law School, Christopher Langdell, which remains in popular use.[60] In briefing a case the first step is to ascertain the human problem that it deals with. This is followed by identification of the relevant facts, articulation of the decision and reasons for the decision, both expressed and implicit.[61] Finally, elements of the case that require further information, or are not understood, are bracketed.[62]

Principles of Indigenous law have proven to be consistent over time and, as a consequence, the ILRU engages with stories that are both ancient and contemporary.[63] Napoleon and her colleagues apply the case briefing method to multiple stories. Just as common law doctrine cannot be properly understood by reference to a single decision, rigorous analysis of Indigenous law requires consideration of a significant body of cases.[64]

57 Napoleon and Friedland, 'An Inside Job', 734.

58 Hadley Friedland and Val Napoleon, 'Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions' *Lakehead Law Journal* 1, no. 1 (2015): 16, 20.

59 Ibid, 22.

60 Napoleon and Friedland, 'An Inside Job', 744.

61 Lori Groft and Rebecca Johnson, *Journeying North: Reflections on Inuit Stories as Law*, Accessing Justice to Reconciliation, 22 https://indigenousbar.ca/indigenouslaw/wp-content/uploads/2014/05/Groft-and-Johnson-Journeying-North.pdf, accessed 11 January 2022.

62 Ibid.

63 Friedland and Napoleon, 'Gathering the Threads', 38.

64 Ibid, 22.

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Once completed the case briefs are presented to Elders and other knowledgeable persons, in order to allow for clarification and correction.[65] The analyses are then synthesised into an analytical framework. The analytical framework compels the researchers to focus on specific principles of law rather than broad generalisations. The framework also acts as a powerful reminder that Indigenous legal traditions do not exist in isolation, but belong to a 'comprehensive whole'.[66]

One example of the application of the ILRU methodology is the Secwépemc Lands and Resources Law Research Project. In collaboration with the Shuswap Nation Tribal Council, ILRU researchers set about articulating Secwépemc laws concerning lands and resources[67] through engaging with thirty stories and conversations with twenty-three Secwépemc witnesses.[68] Their work culminated in a report that covered general underlying legal principles, legal processes, legal relationships and the ways in which legal principles are enforced.[69] The stories and the case briefs prepared by the ILRU researchers are contained in the back of the report, together with a thematic index.

In addition to conventional research outcomes the ILRU has created resources that are accessible to a broad audience, including a graphic novel[70] and a teaching guide.[71] Finally, the ILRU methodology is not intended to supplant other tools for the teaching of Indigenous law. As emphasised by Professor Napoleon and Dr Friedland, there are many methods to engage with Indigenous laws.[72]

Arguments in Favour of Reform

Introduction

In a seminal passage in *Mabo (No. 2)*, Brennan J argued that it was imperative that the common law 'neither be nor be seen to be frozen in an age of racial

65 Hadley Friedland, *IBA Accessing Justice and Reconciliation Project: Final Report* (2014), 2 https://indigenousbar.ca/indigenouslaw/wp-content/uploads/2013/04/iba_ajr_final_report.pdf, accessed 11 January 2022.

66 Ibid, 7.

67 Jessica Asch, Kirsty Broadhead, Georgia Lloyd-Smith and Simon Owen, *Secwépemc Lands and Resources Law Analysis* (2018), 1 (available on the ILRU website ilru.au, accessed 11 January 2022).

68 Ibid.

69 Ibid.

70 Val Napoleon, *Mikomosis and the Wetiko* (Indigenous Law Research Unit, University of Victoria, 2013).

71 Emily Snyder, Lindsay Borrows, Val Napoleon and Hadley Friedland, *Mikomosis and the Wetiko: A Teaching Guide for Youth, Community and Post-secondary Educators* (Indigenous Law Research Unit, University of Victoria, 2014).

72 Napoleon and Friedland, 'An Inside Job', 753.

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discrimination'.[73] Thirty years after that watershed decision, those within Australia's law schools are yet to acknowledge that like the common law, legal education must also move beyond *terra nullius*. There are a number of compelling arguments in favour of reform.

The first appeals to equality. Indigenous people who are desirous of obtaining a legal education will continue to suffer harm through the perpetuation of stereotypes that underscored the wrongful application of *terra nullius* to Australia, namely the belief that our ancestors were primitive and anarchic. By introducing Indigenous law to the curriculum, our students and scholars will finally see themselves reflected in legal education and, in the long term, law schools will cease to be alienating environments. Furthermore, I believe that all law students stand to benefit from engagement with Indigenous legal traditions. As distinct from the common law, First Nations' laws are rooted in the soil and as such, they must be recognised as a part of Australia's legal heritage.

All Australians can benefit from an awareness of Indigenous legal traditions because they are the only bodies of law that have enabled human beings to live sustainably in this beautiful land. As I completed the first draft of this chapter in the beginning of 2020, Australia was being ravaged by fire. The legacies were catastrophic – millions of animals suffered agonising deaths, families buried loved ones and the nation grieved. Unsurprisingly, there is a growing interest in Indigenous land management practices, such as cultural burning.[74] The success of books such as *Dark Emu*[75] by the Bunurong and Yuin writer, Bruce Pascoe, which celebrate the ingenuity of Indigenous peoples' relationships with their lands, suggests that this interest will continue to grow. Indigenous law is inextricably tied to our land management practices, and as such, it can no longer be ignored.

In moving forward, much can be gained from the work of Professor Borrows and from Professor Napoleon and her colleagues at the ILRU. One of the great strengths shared by both the single case analysis method and the ILRU methodology is the central role of stories. Stories have the potential to create a bridge between Indigenous communities and legal scholars. Writing about the use of stories in American legal scholarship, Scheppele made comments that are equally applicable to Australian legal scholars:

73 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 41–2.
74 Victor Steffensen, *Fire Country* (Melbourne: Hardie Grant Travel, 2020).
75 Bruce Pascoe, *Dark Emu* (Broome: Magabala Books, 2014).

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> Law comes in cases; cases come with facts; facts are arranged into stories. Our understanding of what the 'law' is in a given case is conditioned powerfully by our understanding of how the facts limit the application of the rule in hypothetical future cases themselves envisioned as having, well, facts. Law is mixed up with facts all the way down. And we arrange facts in stories not in lists.[76]

It follows that we 'can no more do law without stories than we can fly without mechanical devices'.[77]

It is not only a mutual reliance upon the medium of storytelling that can provide a meeting point between Indigenous peoples' law and legal scholars. The means by which principles are drawn out of Indigenous people's stories and applied to resolve conflict finds resonance in the legal reasoning used by scholars of the common law:

> Where a past story is very similar to the problem at hand, judges may follow the decision very closely; where a set of facts (a story) is more novel, judges will look to the principles recounted in past cases and apply these to make a new decision. This process, applying the teachings of stories from the past to conflicts and problems in the present, is the type of legal reasoning that Napoleon and Friedland encourage scholars and interested parties to engage in in order to revitalize Indigenous legal traditions.[78]

Not all Indigenous communities will have an interest in collaborating with legal scholars.

Because of the long nexus between research and colonisation, the former remains 'one of the dirtiest words in the Indigenous world's vocabulary'.[79] Understandably, some will also have concerns about how stories will be interpreted and used once taken into the public domain.

Nonetheless, it is useful to identify possible benefits that could flow from the adoption of the Canadian methodologies in Australia. Firstly, research outcomes, such as those produced by the ILRU in the nature of reports and toolkits,[80] could provide practical tools for communities to resolve internal

76 Kim Lane Scheppele, 'Narrative Resistance and the Struggle for Stories' *Legal Studies Forum* 20 (1996): 83, 84.

77 Ibid.

78 Susanna Quail, 'Yah'guudang: The Principle of Respect in the Haida Tradition' *UBC Law Review* 47, no. 2 (2014): 673, 705.

79 Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books, 2010, 2nd edition), 30.

80 See for example, Hadley Friedland, Jessica Asch and Val Napoleon, *A Toolkit for On-reserve Matrimonial Real Property Dispute Resolution* (Indigenous Law Research Unit, University of Victoria, 2015).

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disputes. Such resources could also be used to work through conflicts with government departments, agencies and non-Indigenous land-users. Application of the ILRU methodology could also generate content for courses on Indigenous law, as has occurred at the University of Victoria.

Conclusion

For thousands of years, Indigenous peoples deliberated over, refined and enforced their own laws. While no body of law is infallible, we can assume that those that were practised here before the invasion kept the vast majority of people safe. Those same laws enabled a stewardship of the environment that was so successful that the early colonisers assumed that the land was untouched by human influences. In spite of being shrouded in the mythology of *terra nullius* for two centuries, Indigenous laws endured and have proven to be remarkably resilient.

Today, Indigenous law continues to be lived throughout Australia. Even in areas that suffered the brunt of colonisation, it is likely that remnants of Indigenous legal traditions have survived and therefore, can be recovered. The Canadian experience has taught us that the beginning point for this monumental task of revitalising Indigenous law is legal research. Borrows and Napoleon have demonstrated that the very tools used by scholars of common law traditions can be applied to Indigenous people's stories in order to identify legal principles and processes of legal reasoning.

The arguments in favour of incorporation are persuasive. Law schools will never be level playing fields while Indigenous students and scholars continue to live with the stigma of antiquated stereotypes. Legal education will also be enhanced by the inclusion of legal traditions uniquely designed for the Australian continent, which were thousands of years in the making. Indigenous law is a part of our national story. It is time for this story to be told in its entirety.

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