

TOWARDS AN/OTHER LEGAL EDUCATION: SOME CRITICAL AND TENTATIVE PROPOSALS TO CONFRONT THE RACISM OF MODERN LEGAL EDUCATION

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...the Queen wishes her red children to learn the cunning of the white man...

The Honourable Alexander Morris, Lieutenant Governor of Manitoba, The Northwest Territories and Kee-Wah-Tin¹

I. Prefatory Comments

It seems to me that by drawing on the myth of Prometheus, Harry Arthurs has struck an important chord that we may find will resonate throughout the papers that are to be presented today. Particularly, by emphasizing the idea of being "unbound," President Arthurs has opened up a conversation that is premised upon the connection between law and freedom. I propose to take up and expand that conversation and, hopefully, to give it a significantly different orientation. Specifically, I want to identify and attempt to come to terms with an issue which, I fear, does not engender sufficient concern within the legal community: the manner in which contemporary university legal education perpetuates and reinforces "the culture of silence,"² and, more generally, the way in which Canadian society seems unwilling to acknowledge the pervasiveness of racism. To substantiate these propositions it will be necessary for me to oscillate between theoretical reflection on the one hand, and practical suggestions on the other. My presentation will be structured as follows: Part II is a reflection on the nature and ramifications of the historical context in which we currently find ourselves, what I broadly identify as "modernity." The third part of my paper develops, briefly, a critique of contemporary university legal education. Part IV connects this critique with what can be described as the existential malaise of modernity and tentatively develops an alternative, reconstructive vision. Part V concretizes this vision through some tentative proposals that are designed to confront the structural racism of contemporary legal education in Canada. In Part VI, I will return to the theme of sameness and difference, while Part VII demonstrates that reconstruction is not unprecedented, even for law.

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¹Alexander Morris, *The Treaties of Canada with The Indians of Manitoba and the North-West Territories* (Toronto: Belfords, 1975) at 96. Cited in *Native Lawyers: Why So Few?* Report of the Special Students Committee, Faculty of Law, University of Manitoba, 1984 at 16.

²See generally, Paulo Freire, *The Politics of Education* (South Hadley, Mass.: Bergin and Garvey, 1985).

One final introductory comment. I believe that we should always be careful about the language we adopt, that accusations should not be wantonly bandied about, and that there is a thin line between use and abuse. Undoubtedly, some may be uncomfortable with my suggestion that contemporary Canadian legal education incorporates racist norms or practices. Frequently such discomfort manifests itself in the demand, "what do you mean by 'racism'?" I want to resist providing a definition of racism because I believe that definitions are as constraining as they are helpful, and that more often than not they take on a life and dynamic of their own that becomes a distraction from the concern that they are designed to identify. With that proviso in mind, it may be useful to provide an interpretive angle that can lay the parameters for the remainder of this article. I understand racism through the prisms of power and inequality. As a phenomenon, racism can be conceived of as a conscious or unconscious, personal or institutional, belief, ideology or practice that, in response to a person or group's racial origins, has as its purpose or effect, the cultural or economic subordination/exclusion of that person or group.³ One thesis of this article is that one reason why there are so few indigenous lawyers is because of the racist underpinnings of modern legal education. A second thesis is that this situation can

³I base this interpretation on what Indigenous and Black people have told me about their experiences with, and feelings towards, Canadian society. As Dr. Carrie Best informed the Marshall Inquiry on November 25, 1988, "... racism is as common as Hockey Night in Canada." The following provide alternative interpretations, although each, like my own, has its own perspective:

(a) "racial prejudice + institutional power = racism."

Esmeralda Thornhill, Presentation To the Marshall Inquiry, 25 November, 1988.

(b) "racism is the doctrine that a man's [sic] behaviour is determined by stable inherited characteristics deriving from separate racial stocks, having distinctive attributes and usually considered to stand to one another in relations of superiority and inferiority."

Michael Banton, "The Concept Of Racism" in S. Zubaida (ed) *Race and Racism* (London: Tavistock Publications, 1970) at 18.

(c) "A working definition of white racism: racism is a lie. The lie asserts that white people (people of European ancestry) are innately superior morally, intellectually, and culturally to other racial/cultural groups."

Terry Wolverton, "Unlearning Complicity, Remembering Resistance: White Women's Anti-Racism Education" in Charlotte Bunch, Sandra Pollack *Learning Our Way* (Trumansburg, N.Y.: Crossing Press, 1983). Wolverton continues:

Everyone born into a racist society learns this misinformation. We do not ask to learn it; we often resist learning it. Once we learn this lie, we perpetuate it through creating or participating in institutions which legislate privilege to white people. These institutions bestow economic, legal, political, educational and social power to white people, while robbing people of color of their labor, natural resources, cultures, and right to self determination. Eliminating racism involves exposing and unlearning the lie, and dismantling the institutions which keep the lie in tact. *Ibid.*

For extended analyses and critiques of Canada's racist norms and practices see Subhas Ramcharan, *Racism: Nonwhites in Canada* (Toronto: Butterworths, 1982); B. Singh Bolaria and Peter S. Li, *Racial Oppression in Canada* (Toronto: Geramond Press, 1985). See also Charles R. Lawrence III, "The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39 *Stanford Law Rev.* 317; Joe Feagin and Clairece Feagin, *Discrimination American Style: Institutional Racism and Sexism* (Englewood Cliffs, N.J.: Prentice-Hall, 1978).

only be remedied if we develop an alternative, post-liberal ethos, one that necessitates and justifies the adoption of a "preferential option for the poor and the oppressed."

II. Some Thoughts On Modernity

Our culture treats differences as something to be afraid of, something to distrust. Look at the myths about Black people, the myths about homosexuals, the myths about women. All involve terror and distrust of someone who is different from the dominant norm--the other.

Education involves breaking down those fears. It's not just providing information about the inequality of women or the inequality of Blacks. It's not just letting people know that some people get a bad deal. It's also speaking to that fear of difference, that absolutely irrational and yet deeply imbedded terror of the other in our society. Fear, insecurity, and hierarchy are so entrenched that if someone is different from you, immediately there is a need to rank them as better or worse; to worry that they're going to get you; or that there's something very terrifying about their lifestyle. If we could learn from differences to see that they make life interesting, then those differences would open us all up for greater possibilities.

Charlotte Bunch⁴

We live in a modern world and modernity is the pervasive intellectual world view. Generally, modernity with its emphasis on mutability and prospectivity--can be understood in contradistinction to antiquity--with its emphasis on classicism and foundationalism, and medievalism with its emphasis on status and hierarchy. To focus, but without attempting to define its essence, I want to suggest that modernity can be understood from two, interconnected perspectives. The first is technical-economic, while the second is politico-philosophical and aesthetic.⁵ As

⁴Charlotte Bunch, in "Bunch and Powell Talk About Feminism, Blacks and Education as Politics" in C. Bunch and Sandra Pollack, (eds.) *Learning our Way* (Trumansburg, N.Y.: Crossing Press, 1983), 302 at 310-311. See also Audre Lorde, *Sister Outsider* (1984).

⁵To attempt to provide a determinative definition of modernism would be impossible, indeed, anti-thetical to its significance. However, one commentator suggests that some of its key themes include, but are not limited by "an intense concern with the mediation of 'content' by form; use of synchronous montage as an alternative to merely linear additive time; techniques of 'de-familiarizing' the object-world; cultivation of paradox and ambiguity as opposed to monolithic notions of a single objective reality; and exploration of the fragmented and alienated experience of individuals in modern urban and industrial societies." Eugene Lunn, *Marxism and Modernism 2* (Berkeley: University of California Press, 1982). For some useful discussions of modernity see Richard Bernstein (ed) *Habermas and Modernity* (Cambridge, Mass.: MIT Press, 1985); J. Habermas, *The Philosophical Discourse of Modernity* (Cambridge, Mass.: MIT Press, 1987); Daniel Bell, *The Cultural Contradictions of Capitalism* (New York: Basic Books, 1976); Frederick R. Karl, *Modernism and Moderism* (New York: Atheneum Press, 1985); Malcolm Bradbury and James McFarlane (eds), *Modernism* (Harmondsworth: Penguin, 1976); Marshall Berman, *All That Solid Melts Into Air* (New York: Simon and Schuster, 1982); S. Spender, *The Struggle of the Modern* (London: H. Hamilton, 1963); Jo Anna Isaac, *The Ruin of Representation and Modern Art and Texts* (Ann Arbor, Mich.:

Max Weber reminds us, modernity has a peculiar and particular connection with the emergence of western society.⁶ Specifically, it is connected with the West's phenomenal and unique economic growth in the nineteenth century, supplemented since then by "continuous technological innovation. . . expanded industrialization and urbanization."⁷ This is reflected in Weber's concept of "rationalization," or what elsewhere has been described as "the rational-scientific"⁸ or "instrumental rationality."⁹ In its politico-philosophic and aesthetic moment, which can be traced to an epoch prior to the industrial revolution,¹⁰ modernity is characterized by what Seyla Benhabib describes as "self-reflexivity," an awareness of the partiality, incompleteness and contingency of any worldview, including modernity's own.¹¹ By embracing transience, fluidity and openness modernity comprehends reality as "becoming rather than being,"¹² as a dynamic "not yet" rather than a static "that's it." Understood in this light, modernity is neither essentially good nor bad, neither necessarily desirable nor undesirable. Historically, however, it has engendered two contradictory responses, one negative, the other affirmative.

The negative response to modernity has been underpinned by an anxious fear of nihilism, the concern that the abandonment of certainty leaves us in a meaningless vacuum, thereby rendering all our efforts--personal, political or pedagogical--futile. The result, then, has been disillusionment and disenchantment. This has also gone in two directions. In its liberal manifestations, this loss of stability has resulted in the "triumph" of the individual subject, and the ascendancy of moral relativism. In turn, these premises have contributed to a belief that the only process that makes existential sense is to prioritize one's own needs or desires. By the late twentieth century this has resulted in the cult of the self where apathy, narcissism and consumerism become the determinants of human existence. The other negative approach that has been adopted has been, at bottom, reactionary. This has been the effort to identify modernity as the cause of

U.M.I. Research Press, 1986).

For discussions and examples of its impact on contemporary jurisprudence, see e.g. David Luban, "Legal Modernism," (1986) 84 Michigan L.R.; Roberto Mangabeira Unger, *Knowledge and Politics* (New York: Free Press, 1975); *Passion: An Essay on Human Personality* (New York: Free Press, 1984); *Politics* (Cambridge, Mass.: Cambridge University Press, 1987); D. Cornell, "Towards a Modern/Postmodern Reconstruction of Ethics," 133 U.Pa.L.R. 295 (1985). For a further critical discussion of modernism, see my review essay of Unger's *Politics*, "On the Road to Radical Reform" 27 Osgoode Hall L.J. (forthcoming).

⁶Max Weber, *Economy and Society* eds G. Roth and C. Wittich (New York: Bedminster Press, 1968). *The Protestant Ethic and the Spirit of Capitalism* trans. Talcott Parsons (London: G. Allen & Unwin, 1930).

⁷Seyla Benhabib, "Autonomy, Modernity and Community: An Exchange Between Communitarianism and Critical Social Theory" [unpublished].

⁸Franklin Baumer, *Modern European Thought* (New York: MacMillan, 1977) at 268,369.

⁹Max Horkheimer and Theodor Adorno, *The Dialectic of the Enlightenment*. (New York: Seaburg Press, 1972)

¹⁰See generally, Franklin Baumer, *Modern European Thought* (New York: MacMillan, 1977) and Frederick R.Karl *Modern and Modernism* (New York: Atheneum, 1985).

¹¹Benhabib, *Critique, Norm and Utopia* (New York: Columbia University Press, 1986) at 257-258.

¹²Baumer *supra*, note 8 *passim*.

our ills, and to hark back to a premodern era in a quest for stability. This is an attempt to backtrack on the democratizing elements and potential of modernity, an attempt to reinstitutionalize elitism.¹³

The affirmative response is to recognize the emancipatory potential of modernity, to embrace its resistance to closure, and to direct its context-dislocating impulse¹⁴ in humanizing directions. Specifically, modernity recognizes a role for human agency, be it benign or malign, although it would reject naive voluntarism. In this sense, modernity is empowering in that it reaffirms the constructive, reconstructive, and destructive potential of humanity and locates responsibility for the direction of contemporary society on human agency. Consequently, it provides us with a vital opportunity to challenge those who claim that social conditions as currently constructed are "necessary," "inevitable," the "natural order of things," on the basis that this order is constructed and that some are benefactors and others are disadvantaged. In relation to racism, then, modernity allows us to challenge the still pervasive and deeply embedded essentialist assumption that our qualities, abilities and potentials as persons are dependent upon our racial origins. Moreover, because of its anti-essentialist bent, modernity directs our attention to alternative non-biologically determined explanations for racial inequality; for example, that the differences between races are utilized by some as a legitimation of their oppression and inferiorization of others.¹⁵ Thus, modernity emphasizes the centrality of power relations, it highlights factors of reinforcement, and indicates centres of resistance. Most importantly, it identifies the constructed nature of power itself, its mutability, its transience. In this affirmative light, modernity suggests that things do not necessarily fall apart, rather they might fall together, thereby encouraging us to pursue a politics of hope.

III. Critique

Whether [it] is done ingenuously or astutely, separating education from politics is not only artificial but dangerous.

Paulo Freire

Critical legal studies, as a movement of thought and action in law, *both* denounces and announces. Those who inhabit the mainstream of the legal

¹³Recent educational debates mirror this negative dual dynamic. For example, a deconstructive reading of Derek Bok's liberal and widely celebrated *Higher Learning* (1986) suggests that his primary concern is not the improvement of third level education in its own right, but rather because he identifies education as an essential bulwark to resist the decline of the American empire, brought about by the emergence of competitors. See for example, p.5. The reactionary element has manifested itself in the diatribes of Allan Bloom, "The Failure of the University" (1974) *Daedalus* 60; *The Closing of the American Mind* (1987); E.D. Hirsch, *Cultural Literacy* (1987) and Linda Frum, *Linda Frum's Guide to Canadian Universities* (1987). See also Michael Levin, "Women's Studies, Ersatz Scholarship" (1985) 17 *New Perspectives* 7.

¹⁴Roberto Mangabeira Unger, *False Necessity* (Cambridge: Cambridge University Press, 1987).

¹⁵One wonders why Bloom is so critical of, for example, Black Studies, *supra*, note 13.

community--be they practitioners or academics--if they have heard of critical legal studies at all, have probably focused their attention on the denunciatory aspects of our activities . . . and with good reason: for it is they whom we hold responsible in large part for the impoverished nature of our legal system.¹⁶ However, critique is only one side of the progressive coin, for we also advocate reconstruction. And it is to the project of reconstruction of the legal academy that I want to address the vast majority of this paper. Nevertheless, for the sake of comprehensiveness it may be useful to briefly highlight some of the aspects of the critique of mainstream legal education.

The critique of mainstream legal education operates on at least three levels: whom we teach, what we teach, and how we teach. Even the most cursory review of the constituencies, "texts," and methodologies of university legal education in Canada betrays the political agenda, be it explicit or hidden, conscious or unconscious, intentional or systemic.

The question of whom we teach is important in that, by identifying the primary recipients of this "community service," it directly unravels the much vaunted neutrality and objectivity of the legal community. Only an ostrich would think that, for example, social, economic, racial or gendered factors have no relevance for the viewpoint of the legal community.¹⁷ The simple fact is that the consumers of legal education are still primarily upper or middle class. Even *Law and Learning*, hardly a CCLS manifesto, recognizes the class bias of recruitment to law school:

. . . the law student population in the 1980's probably resembles that of the 1950's in a socio-economic sense: it remains heavily skewed toward children of middle class and professional families . . . law study and law practice are effectively beyond the reach of many able but disadvantaged individuals.¹⁸

This has been particularly obvious to me as a non-Canadian, legally educated elsewhere. Although I would be reluctant to wax eloquent about legal education in Northern Ireland (for it cannot be done), on an impressionistic basis I would suggest that between one-third and one-half of my classmates would have been

¹⁶This is not to be taken as an indirect claim that critical legal scholars, themselves a privileged constituency, are beyond criticism. See in particular "The Minority Critiques of The Critical Legal Studies Movement," (1987) 22 *Harvard C.R.-C.L.L. Rev.* 297-447. Much of this present paper is inspired by that critique.

¹⁷This juridical pretension to neutrality and impartiality is symptomatic of a deeper malaise than either self delusion or ideological obfuscation, although it is those also. It is connected to at least one strand of liberalism, what philosophers call "Deontological liberalism." John Rawls, whose *Theory of Justice* (Cambridge: Belknap Press of Harvard University Press, 1970) I consider to be the most developed, honest and comprehensive of all contemporary liberal thinkers, in his pursuit of "the right" deliberately takes as his primary task the philosophical elimination of difference, the factoring out of just those characteristics that make us who we are. At bottom, he understands difference to be a cognate of bias, whereas, as will become clear, I understand it to be fundamental to our humanity.

¹⁸*Law and Learning: A Report to the S.S.H.R.C.* (Ottawa: The Council, 1983) [Chair.: Harry Arthurs; hereinafter the *Arthurs Report.*] See also Harry Glasbeek and Reuben Hasson "Some Reflections on Canadian Legal Education" (1987) 50 *Modern Law Review* 777.

from a working-class background, and many of these would have been from the "ghettoes." This had an impact on the students far beyond the obvious political ramifications of Ireland. The point here, however, is that the pervasiveness of sameness in Canadian law schools is quantitatively different than it is, for example, in Northern Ireland.

Class is only one factor in the critique of the predominantly unidimensional character of those who currently have access to university legal education.¹⁹ Despite developments over the last two decades, women still comprise less than half of the contemporary law school population.²⁰ Although law schools are beginning to respond to the demands for access by various ethnic groups--Ukrainian, Jewish and Italian for example--other ethnic communities are still almost completely excluded, most disturbingly, Indigenous Peoples and Blacks. The paucity of minority participation indicates to me that--implicitly if not explicitly--racist norms still inform Canadian legal education. I will return to this point below.

What we teach is also important. As will become apparent, an organizing theme for this paper is relationship between sameness and difference. As Harry Arthurs has pointed out elsewhere, both legal education and legal practice fulfill

¹⁹This statement should not be misunderstood. Sameness and difference are relative, not absolute concepts. Of course, each member of the legal educational community is different from the others and it is these differences that make even the contemporary educational process enjoyable. Nevertheless, it is still fair and accurate to suggest that the majority of the participants are more like each other than they are like those who are excluded.

²⁰Current statistics indicate that women compose something in the region of 45 percent of the law student population. The following is a profile of the first year class broken down by gender:

	<u>1986-87</u>		<u>1987-88</u>		<u>1988-89</u>	
	<u>F</u>	<u>M</u>	<u>F</u>	<u>M</u>	<u>F</u>	<u>M</u>
University of Victoria	41	62	44	55	43	53
University of British Columbia	102	126	109	125	122	113
University of Calgary	27	33	36	30	38	28
University of Alberta	80	95	65	106	76	107
University of Saskatchewan	38	75	48	66	37	73
University of Manitoba	39	53	40	52	40	54
University of Windsor	69	75	61	76	58	75
University of Western Ontario	51	104	67	88	64	93
Osgoode Hall Law School	N/R	N/R	158	167	159	166
University of Toronto	55	105	79	95	74	105
Queen's University	61	90	65	84	62	94
University of Ottawa (Common Law)	72	86	76	89	81	89
McGill University	25	25	16	31	27	27
University of New Brunswick	30	51	32	50	34	48
Dalhousie University	<u>67</u>	<u>90</u>	<u>62</u>	<u>95</u>	<u>71</u>	<u>85</u>
TOTAL	757	1070	958	1209	986	1210
Approx %	41%	59%	44%	56%	45%	55%

There are some indications that the civil law schools appear to do better.

powerful ideological and socializing roles.²¹ Last night he described this as the "professional nexus." It seems to me that there is something insidious about a practice that superficially appears to accept difference but, in the course of its processes, eradicates the significance of difference. Restated, although law schools, in pursuit of the open door, may accept some students from culturally different backgrounds, by their subject matter and norms, law schools demand that, in order to succeed, these students become different from what they are, in other words, that they become the same as the others. What we teach plays an important role in forging this transformation, this eradication and elimination of difference. Consider, for example, the facial neutrality of the vast majority of the courses we teach and the materials we assign. They are premised almost exclusively upon a colour blind, generic "he," thereby rendering invisible the specificity of difference. The message that goes across loud and clear from a law school curriculum is that the real law, the important law, is that which dovetails with the operational requirements of westernized, capitalist post-industrial, patriarchal society. Other topics or approaches, those which are seen as different, are understood to be "soft," as deviant, as "perspectives" from without, as "law and . . ." courses, not the real thing, not fundamental to the real world of law.

Closely interconnected with the question of what is the question of how we teach and the messages that are encoded therein. Critical scholars are painfully aware that knowledge and power are fundamentally interconnected, and that knowledge itself is a key factor in the continuation or transcendence of the relations of domination and subordination that characterize contemporary society. More particularly, we are concerned about the power-laden nature of the professor-student relationship, the patron-client dynamic that not infrequently results in deference, dependency and disempowerment, and the abuse of illegiti(n)mate hierarchy. We are concerned about the psychically repressive aspects of domination, the way in which education can internalize and sediment the patterns of domination and subordination in the subconscious of the personality by making hierarchy and estrangement appear to be the natural and inevitable order. The basic proposition is that, as a central component in the training, controlling and disciplining of students, legal education plays a vital role in molding some of the key technicians of what Michel Foucault calls the "disciplinary society."²² Legal education, in this view, is about power (sameness) and powerlessness (difference), a microcosm not only of domination and subordination but also of one of the means of their reproduction.²³

²¹See e.g. Arthurs et al. "The Canadian Legal Profession" (1986) A.B.F. Res.J. 447 at 496-500; Arthurs, "The Law School in a University Setting" in R. Matas and D. McCawley, eds., *Legal Education in Canada* (Montreal: Federation of Law Societies of Canada, 1987) 157.

²²Michel Foucault, *Discipline and Punish*. (New York: Pantheon Books, 1977)

²³There is a rapidly burgeoning critical and feminist literature on the politics of legal education. See e.g. Sheila McIntyre and Mary O'Brien, "Patriarchal Hegemony and Legal Education" (1987) 2 C.J.W.L. 69; Mary Joe Frug, "Re-reading Contracts: A Feminist Analysis of a Contracts Casebook" (1985) 34 Am. U.L.R. 1065; James R. Elkins (ed.), "Worlds of Silence: Women the Law School" (1984) 8 ALSA F. 1; K.C. Worden, "Overshooting the Target: A Feminist Deconstruction of Legal Education" (1985) 34 Am. U.L.R. 1141; Jennifer Jaff, "Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning" (1986) 35 J. Legal Education 249 at 258-261; Nancy S. Erickson, "Legal Education: The Last Academic Bastion of Sex Bias?" (1986) 10 Nova L.J. 457; Faith Seidenberg, "A Neglected Minority--Women Law School" (1986) 10 Nova L.J. 843. Elizabeth

IV. Preferential Option

... critical social theory frames its research program and its conceptual framework with an eye to the aims and activities of those oppositional social movements with which it has a partisan though not uncritical identification.

Nancy Fraser²⁴

The foregoing critique of mainstream legal education, though necessary and beneficial, is insufficient in that it lacks an articulated reconstructive vision. Moreover, because it is a critique, it still concedes too much, allowing the dominant tradition to continue to set the agenda, both substantively and methodologically. Finally, as a matter of *realpolitik* and inspirational motivation, it cannot be expected that people will abandon the present system, even if they acknowledge its failings, unless they have a developed sense of how things could be "otherwise." What is required is a situated discourse that both responds to the needs of the times and makes concrete reconstructive proposals. This section lays a foundation for "another" legal educational system, while the following section will tentatively outline how it might begin to operate in practice.

As I indicated earlier, one of the key aspects of modernity is contingency, the awareness that essentialism is a fraud, the conviction that reality is constructed to its core.²⁵ A consciousness of contingency may manifest itself in one of two

M. Schneider, "Task Force Reports on Women in the Courts: The Challenge for Legal Education" (1988) 38 J. Legal Education 87; Nancy S. Erikson, "Sex Bias in Law School Courses: Some Common Issues" (1988) 101 J. of Legal Education; Ann Shalleck, "Report of the Women and the Law Project: Gender Bias and the Law School Curriculum" (1988) 38 J. Legal Education 87; Mary Irene Coomes, "Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook" (1988) 38 J. Legal Education 117 (1988); Taunya Lovell Banks, "Gender Bias in the Classroom" (1988) 38 J. Legal Education 137. Karl Klare, "The Law School Curriculum in the 1980's: What's Left?" (1982) 32 J. Legal Education 336; Morton Horowitz, "Are Law Schools Fifty Years Out of Date?" (1985/1986) 54 U.M.K.C.L.R. 385; Elizabeth Mensch, "History of Mainstream Legal Thought" in D. Kairys, *The Politics of Law* (New York: Pantheon Books, 1982) at 18; Peter Gabel and Jay Feinman, "Contract Law as Ideology" in Kairys *ibid.* at 172; Richard Abel, "Torts," *Ibid.* at 185; Robert Kerry Wilkins, "The Person You are Supposed to Become: The Politics of the Law School Experience" (1987) 45 U. of T. Fac.L.Rev. 98. Stephen Halpern, "The Politics and Pathology of Legal Education" (1982) 32 Journal of Legal Education 383. G.A.H. Benjamin et al., "The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers" (1986) A.B.F. Res. J. 225; Toni Pickard, "Experience as Teacher: Discovering The Politics of Law Teaching" (1983) 33 U. of T. L.J. 279; "Is Real Life Finally Happening?" (1986) 2 C.J.W.L. 150; Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (Cambridge, Mass.: Afar, 1983); "Liberal Values in Legal Education" (1986) 10 Nova L.J. 603; J.C. Foster, "The 'Cooling Out' of Law Students" (1981) 3 Law and Policy Q. 243; Carrie Menkel Meadow, "Feminist Legal Theory, Critical Legal Studies, and Legal Education or The Fem-Crits Go to Law School" (1988) 38 Journal Legal Education 61. Critical legal scholars do not pretend to be original in their analysis of education. Rather theirs is an application of what is more generally identified as, "The New Sociology of Education." See also, Jerry Farber, *The Student as Nigger* (New York: Pocket Books, 1969).

²⁴Nancy Fraser, "What's Critical about Critical Theory" in Seyla Benhabib and Drucilla Cornell (eds.) *Feminism as Critique* (Cambridge: Polity Press, 1987) at 31.

²⁵R.M. Unger, *Politics: A Work in Constructive Social Theory* (3 Vols.) (1987).

responses: trepidation and the politics of fear; or, therapy and the politics of hope. I subscribe to the latter.

Liberalism, itself a catalyst for modernity, has taken us a long way. Its emphasis on equality and its rejection of status and entrenched hierarchy provide an important precedent for the potential of democracy, participation and empowerment. But we are not yet "there." The liberal commitment to substantive equality and real freedom has stalled midstream, failing to interrogate what I consider to be the fundamental dilemma of postindustrial, patriarchal society: that the freedom of some is dependent upon the oppression of others.²⁶ To be context-specific, the comfort and wealth of mainstream, upper and middle-class Canada is premised upon a history and contemporary practice of exploitation and subordination. Witness, for example, our racism, past and present, towards Indigenous Peoples, Acadians, Blacks, various ethnic groups or the second class status assigned to many women.

In part, liberalism's failure to deal with the paradox of freedom founded on domination may be due to the extremism of its reaction against the feudalistic system of status. Undoubtedly, the regime of status produced a social structure that was hierarchical, exploitative and dehumanizing but it did have a sense interdependence and community, impoverished though they might have been. In its quest for equality, liberalism prioritized the dignity of the self in order to challenge the inequality of a feudalistic community, but in so doing set in motion a dynamic that has resulted in a decidedly anticommunitarian ideology that bifurcates the self and the other. The result has been individualism taken to an extreme so that we fail to recognize the importance of others to our very existence and identities, what some philosophers describe as our "intersubjectivity."²⁷ The excessiveness of our individualism has enabled us to be blind to the extent to which our successes, our achievements, our comforts, our privileges have come at a cost: others' defeats, others' abuse, others' impoverishment, others' subordination.²⁸ Indeed, so pervasive and systemic has been the myopia and the deafness, that we can neither see nor hear the existential needs of others unless they cease being different and become the same as us.

In recent years, however, among the mainstream there has been a gradually increasing consciousness of liberalism's inability to transcend the paradox of freedom embedded in oppression. {Those who had been marginalized always recognized the failure . . . they lived it.} A number of thinkers have begun to recognize the equality, integrity, value and moral worth of others and have argued that

²⁶"Towards a Politics of Hope" (1989) 3 C.J.W.L. (forthcoming).

²⁷See for example, Jurgen Habermas, *The Theory of Communicative Action, Vol. II, Lifeworld and System* (Boston: Beacon Press, 1988)

²⁸This is true not only on the personal level but also on the macro-political level. As one commentator puts it, "the West has become a tower of success for a few victors on a human platform of many victims." Rebecca Chopp, *The Praxis of Suffering*. (Maryknoll, N.Y.: Orbis Books, 1986) at 28. As Walter Benjamin reminds us, we must learn to reread history from the underside and against the grain. *Illuminations* (New York: Harcourt and Brace, 1969) at 257.

those of us who are privileged have a responsibility that goes beyond the self. In philosophy, Michael Ignatieff has urged us to respond to the *Needs of Strangers* (1984) while Larry Blum has encouraged us to expand our practice of *Friendship, Altruism and Morality* (1980). Social theorist Roberto Mangabeira Unger, in an essay on human personality entitled *Passion* (1984), argues at length against the false dichotomy of self and other, highlighting instead the radical interrelatedness of human existence, our mutual interdependence. More importantly, in an earlier work he tentatively adumbrates an alternative conception of social interaction that allows us to recreate community without regressing to status. Central to this reconstruction is "solidarity," a political agenda which he characterizes as, "love struggling to move beyond the circle of intimacy."²⁹ He continues,

The kernel of solidarity is our feeling of responsibility for those whose lives touch in some way upon our own and our greater or lesser willingness to share in their fate. Solidarity is the social face of love: it is concern with another as a person rather than just respect for him [*sic*] as a bearer of formally equal rights and duties or admiration for his [*sic*] gifts and achievements.³⁰

This discourse of solidarity and responsibility for others remains, unfortunately, at a disconcertingly high level of abstraction. Let me attempt to be a little more specific. Paralleling these efforts of male academics to redirect and reforge political power and morality, several feminist scholars have also been articulating a theory and practice that can be understood as critical, deviationist and reconstructive. They concentrate their efforts on what they call "an ethic of care." I want to make reference to the work of two such advocates, Carol Gilligan, and Joan Tronto. My thesis is that solidarity and care are mutual cognates.

Carol Gilligan, a developmental psychologist, is also seriously concerned about the bifurcation of self and other.³¹ Specifically, she takes issue with Lawrence Kohlberg's theory of moral development and particularly his proposition that the highest stage of moral development is individual autonomy. She is discomfited by the fact that when women are measured against the Kohlbergian structure they tend to achieve the highest level, autonomy, less frequently.³² Gilligan refuses to believe that women are less morally developed than men and

²⁹Roberto Mangabeira Unger, *Law in Modern Society* (New York: Free Press, 1976) at 207.

³⁰*Ibid.*, 206. Similarly, Freire attempts to disconnect love from "pathological possessiveness" so that it can encourage the "liberation of subjects." *The Politics of Education, supra*, note 2 at 82. For a homologous feminist jurisprudential effort to reclaim love for feminist transformation see Colker, "Consciousness and Love: Towards a Feminist-Theological Dialogue" [unpublished].

³¹Carol Gilligan, *In A Different Voice* (Cambridge: Harvard University Press, 1982). [Hereinafter *Voice*.]

³²Nor are women the only "less developed" group. Blacks, Hispanics and members of the working class also tend to score lower on the hierarchy, as even Kohlberg is forced to admit. [See A. Cortese, "Moral Development in Chicano and Anglo Children" (1982) 4 *Hispanic Journal of Behavioural Science* 353; J. Broughton, "The Genesis of Moral Domination" in S. Modgil and C. Modgil, (eds.), *Lawrence Kohlberg: Consensus and Controversy* (London: Falmer Press, 1986), 363; and Kohlberg, *The Psychology of Moral Development* (San Francisco: Harper and Row, 1984), 77.] We can only be amazed by the hegemony of a theory, the explanatory capacity of which is based upon its ability to exclude "deviant data." Similar concerns will come to light below when I briefly discuss the L.S.A.T.

calls into question the comprehensiveness or appropriateness of the theory. She suggests that the theory incorporates an androcentric bias in that the data base upon which the theory was constructed was primarily composed of men. Her further suggestion is that extreme bifurcation and an unmodified autonomy may be more characteristic of, but not essential to, men than it is of women. Emphatically, that does not mean that women are less morally developed than men, it merely suggests that women's morality may be different from that which is prioritized by Kohlbergian theory.

The significance of Gilligan's argument goes beyond the critique of androcentric bias--although that is important--for she also tentatively identifies what the substantive difference of women's different voice might be, what she calls an "ethic of care." As she says, "Yet in the different voice of women lies the truth of an ethic of care, the tie between relationship and responsibility and the origins of aggression in the failure of connection."³³

Gilligan's discussion of the ethic of care is not developed in any cohesive or comprehensive sense. Rather it surfaces in her work as a corrective or complement to "the logic of justice," "the premise of equality," as a resisting countermorality to the morality of exclusive rights. However, I think it is possible to distill from her reflections some of its interlocking components. The central insight of an ethic of care is an awareness of the constitutive interconnection and interdependence of the self and other. This consciousness of mutuality militates against isolation, exclusion and separatism, with their correlative potential for selfishness, subordination, aggression and violence. Rather, this awareness encourages a recognition of, and enthusiasm for, the needs of others and a willingness to respond compassionately and responsibly to those needs,³⁴ to participate in the lived experiences and reality of others.³⁵ An ethic of care identifies "a world of mutuality" that "creates and sustains the human community."³⁶ It reconceptualizes and reconstructs moral dilemmas to be issues of competing responsibilities of the self because of its connection with and responsibility for others, rather than a conflict between self and other in which the only options are assertion of the self's trumping rights, or martyred self-sacrifice on the pyre of altruism.³⁷ Finally, and importantly, not only does the ethic encourage a discourse and praxis that rejects domination, it strives to resolve moral dilemmas without recourse to violence as that would counteract "the injunction not to hurt others."³⁸ Thus, the ethic of care aspires to "a more generative view of human

³³*Voice, supra*, note 31 at 173.

³⁴*Voice, supra*, note 31 at 62 and 74-98.

³⁵*Voice, supra*, note 31 at 79. A similar theme can also be located in Martha Minow, "Justice Engendered" (1988), 101 *Harvard Law Review* at 14, "... the perspective to seek out and appreciate a perspective other than ones own . . ." and in Unger's idea of "negative capability," *Politics* Vol. II, *supra*, note 25.

³⁶*Voice* at 156.

³⁷*Voice* at 114.

³⁸*Voice* at 73, 102, 134, 149, 174.

life,"³⁹ and even more ambitiously, an affirmative transformation of the polity.⁴⁰

Feminists' reflections upon the "ethic of care" have also been expanded and concretized by political and moral philosopher, Joan Tronto.⁴¹ Tronto forcefully argues against the dangerous anti-modern and essentialist tendency among some feminists of reducing an ethic of care to women's difference. Rather, she cautiously attempts to develop the ethic of care so that it can rest on its own political, philosophical and moral base, independent of our biological facts, with the result that it becomes potentially accessible to us all, as an *alternative* to the rampant individualism of conventional wisdom.

She suggests that the core of care is an awareness of relationalism, that it involves both "ongoing responsibility and commitment" to others. Drawing a useful distinction between "caring about" and "caring for" she posits that the latter "involves responding to the particular concrete, physical, spiritual, intellectual, psychic and emotional *needs of others*."⁴² However, Tronto is careful to distinguish between a "feminist" and a "feminine" approach to care, arguing that the former maintains the integrity and autonomy of the "self," whereas the latter runs the risk of falling into a "romanticized notion of selflessness"⁴³ which is simply the reproduction of women's male constructed role. The "ethic of care" does not resolve the issue of the relationship between self and other, but it does

³⁹*Voice* at 174.

⁴⁰It is important to point out, though, that the ethic of care is distinct from the traditional masculinist stereotype of "female self-abnegation and moral self-sacrifice," [*Voice* at 90] what Virginia Woolf has described as "The Angel in the House" [*Women and Writing* 59 (New York: Harcourt Brace and Jovanovich, 1979)]. It should not be confused with passivity or delicacy, submissiveness or obedience, dependence or domesticity; it is not what Irigaray has posited to be a "phallic feminine," [Cited in C. Duchon, *Feminism in France* (London: Routledge & Kegan Paul, 1984) at 87] nor "a romantic prescription for chaining women to the classical definition of femininity" [K. Karst, "Women's Constitution," *Duke L.J.* 447, 480 (1984)]. Emphatically, although there is some verbal intersection, the ethic of care is not what Catharine MacKinnon has described as "contemporary industrial society's version of woman . . . docile, soft, passive, nurturant, vulnerable, weak, narcissistic, childlike, incompetent, masochistic and domestic, made for child care, home care and husband care." "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982) 7 *Signs* 515 at 530. Moreover, lest there be any confusion, I want to stress that nothing in my suggestions is premised upon the idea that the ethic of care grows out of the rosy private family life of women. For many women the family is anything but a haven in a heartless world; it is, in many instances, the locus of extreme domination, subordination, inequality and violence. Indeed, Gilligan's own example refutes such self-negation, for at least some of the women to whom she listened decided to have abortions, thereby demonstrating that care does not necessarily prioritize the other over the self. Rather, care attempts to consider the interests of the other in a responsive and responsible manner. The ethic of care includes care for oneself [*Voice* at 139]. It denies the absolutist, formalistic recourse to individual autonomy by favouring an "injunction against hurting" so that we have to seriously and contextually make moral decisions and, at the same time, bear responsibility for that choice, and its consequences for others as well as ourselves. The ethic of care necessitates a keen consciousness of the "social consequences of action" [*Voice* at 167] and, I would add inaction.

⁴¹"Beyond Gender Difference to a Theory of Care" (1987) 12 *Signs* 644; "Women and Caring: What Can Feminists Learn About Morality From Caring" in A. Jaggar and S. Bordo, (eds.) *Body Gender and Knowledge* (forthcoming); "Rationalizing Racism, Sexism and Other Forms of Prejudice: Otherness in Moral and Feminist Theory" [unpublished].

⁴²"Women and Caring" *ibid.* at 4, see also 8-11 (emphasis added).

⁴³*Ibid.* at 12. Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (Berkeley: University of California Press, 1984) in the most explicit "feminine" elaboration of care.

identify and reconceptualize the problem to emphasize the needs of others and to highlight the importance of contextualized responses. Moreover, the ramifications of such an ethos are large for we may be required to "restructure broader social and political institutions if caring for others is to be made a more central part of the lives of everyone in society."⁴⁴ Legal education, I want to suggest, is one such institution.

For some these references to love, solidarity, intersubjectivity, responsibility and care may appear nebulous, indeterminate or unspecific. Even mushy. They do, however, tentatively suggest the ethical, political and philosophical foundations for a praxis that confronts what I earlier identified as the twin evils of the modernist malaise: the paradox of freedom embedded in domination, and the self-indulgent cynicism of oppressive consumerism. Moreover, it is, I think, possible to be even more emphatic in specifying the requirements of an/other legal educational process: law schools should operate a preferential option for the poor and the oppressed. This proposition is not a slogan, it is not simply a pithy encapsulation of a preferred political agenda, although it is that too and therefore strategically and ideologically significant. Rather, it is a proposal that is designed to

- (a) make explicit the integral connection between knowledge and power,
- (b) highlight who at this present moment are the benefactors and losers in this power network,
- (c) demand that emphasis be relocated so as to challenge the citadels of traditional power, be they public or private, and
- (d) in recognition of the centrality of law in contemporary power relations, to locate responsibility for the continued pervasiveness of inequality, in part, on the shoulders of legal educators.⁴⁵

This preferential option is simultaneously an opportunity and a responsibility.

At this point, now that I have tentatively traced what I consider to be the ethico-political foundations of the reconstructive agenda, I want to briefly touch upon Harry Arthur's paper and to provide an indication of the critical distance between our alternative positions. Although, at one point, he does refer to the relationship between law and empowerment, his proposal for freeing people from bondage seems to revolve around the maturation of legal education through the double dynamic of (i) unshackling the legal academy from the profession and (ii) enhancing interdisciplinary scholarship. Undoubtedly, these are important proposals and they do in fact dovetail with much of my own work which incorporates such a transdisciplinary impulse.

⁴⁴"Women and Caring," *ibid.* at 23.

⁴⁵For a helpful discussion of the relationship between knowledge, power and responsibility in relation to literature see Frank Lentricchia, *Criticism and Social Change* (Chicago: University of Chicago Press, 1983).

However, I fear that the Arthurian proposal does not go far enough, and worse, it runs the very serious danger of misallocating the weight of our limited critical capacity. For example, in his discussion of equality he suggested that, as lawyers, we could gain a lot from philosophers. True, but I think we could be a lot more relevant, more in tune with the structures, practices and impact of inequality, if we had greater contact with those who are the victims of inequality, constituents who do not tend to be professional philosophers or lawyers.⁴⁶ The preferential option goes far beyond the pluralistic preference for opening up the conversation to other insiders; it actually changes the problem by creating space for the outsiders so that they can redefine the issues and the remedies.

V. An Example: Confronting The Racism of Contemporary Legal Education

The whole pyramid of discrimination rests on solid extra-economic foundation--education.

Juliet Mitchell⁴⁷

While it is vital to think globally, it is even more important to act locally. The foregoing reflections provide us with a critical and reconstructive context, they allow us to understand that the politics and pathologies of contemporary Canadian legal education are interconnected with, and the product of, much broader social, economic, political intellectual and cultural forces, what I have described as modernity. But in the same way that it is not possible to argue everything at once, we cannot expect to change everything at once. We must begin to remake the matrices of social interaction interstitially, in the various realms of activity in which we find ourselves as social beings. I am, among other things, a legal educator, and it is in this realm that I want to concretize some of these thoughts.

Despite the efforts of the Canadian legal system over the last couple of decades at the constitutional, legislative, regulatory or, on occasion, judicial levels, discrimination, dispossession, marginalization, abuse, and inequality are still pervasive and systemic components of the social structure. Even if the self perception of Canada as a mosaic is descriptively accurate--although that this may be more rhetoric than reality--I wonder whether that image incorporates a sufficiently egalitarian impulse. As an artifact, there is an element of authorial intentionality which chooses to prioritize, emphasize and combine certain pieces, thereby devaluing and marginalizing the other, noncentralized components. By recognizing the artifactual nature of the mosaic and identifying the role of an author we must ask: who is the author, does s/he have a racial, socio-economic, or gendered context; how did s/he get the time, space, or energy to develop his or her talents; why are

⁴⁶Although I don't think Harry Arthurs was doing so, there is a real danger in overemphasizing the constraints which the profession imposes on university legal education. Too often such references to structural constraints are used as a cop-out from present responsibilities. Professional constraints are real, but they are not total.

⁴⁷Juliet Mitchell, cited in E. Young Brehl, "The Education of Women as Philosophers" (1987) 12 Signs 207 at 209.

certain pieces prioritized and others decentralized and, even more importantly, by what criteria? By identifying context and choice, we confront the necessary component of subjectivity and are plunged into the politics of the aesthetic. The politics of the polity or legal education are not qualitatively different.

There are many groups in Canadian society who are impoverished and oppressed on the basis of class, sex, race, ethnic origins,⁴⁸ sexual orientation,⁴⁹ age, etc. And yet university based legal education, as I have indicated above, does not deal adequately with such pervasive and structured inequality. Undoubtedly, many schools have courses that touch upon or deal with such issues but these are still understood by many faculty and students alike to be "soft," deviant and inferior, not "the real law." The proposal to exercise a preferential option for the poor and oppressed is an attempt to confront this inequality in a direct and uncompromising way, to rethink and reconsider what in fact "reality" is,⁵⁰ and, indirectly, to raise the question of who has the power to define "reality."

If we are to take this preferential option seriously, at least three issues must be confronted: who we teach, how we teach, and what we teach. At this point, I want to concentrate on the first of these issues, although I will also make brief references to the other questions. In particular, I want to make some tentative proposals⁵¹ in relation to legal education for Indigenous Peoples.⁵² This is so for several reasons. First, I think that racism is deeply embedded in Canadian society, and at all levels.⁵³ Second, by focusing on the process of legal education for Indigenous Peoples we can begin to think about similar processes for other subordinated groups, although we should not anticipate simple transplantation for although domination is pervasive, it is also particular.⁵⁴ Third, for better or worse,

⁴⁸Subhas Ramcharan, *supra*, note 3.

⁴⁹Gary Kinsman, *The Regulation of Desire: Sexuality in Canada* (Montreal: Black Rose Books, 1987)

⁵⁰See further Toni Pickard, "Is Real Life Finally Happening?" (1986) 2 C.J.W.L. 150.

⁵¹This point cannot be sufficiently emphasized. What follows should not be understood as a blueprint for indigenous legal education that strives to provide the right answers. Rather it is a suggested agenda that is designed to respond to the very low numbers of legally trained indigenous persons, to create a space in order that they can develop their own agenda, to enable them to effectively mobilize in pursuit of equality, to use the law school as a zone that is at least partially open to difference. There must be a great deal more input from indigenous communities into any project for reconstruction of legal education. My project is an effort to facilitate that input.

Moreover, nothing in these suggestions should be understood as a fetishization of law or legal education. Neither can provide a solution to the problem of racism or the pervasiveness of deprivation. However, law and legal education are important arenas of social interaction; they should not be ignored in any proposal that pursues substantive equality.

⁵²I use this term in a generic sense, to refer to "status indians," "non-status indians," "metis" and "inuits" but without any desire to downplay the important differences that distinguish them from each other or the differences of each individual person. Some of the suggestions of this paper will need to be tailored to the particular needs of each of these communities.

⁵³See *supra*, note 3.

⁵⁴Two further points are worth noting. Although classism, racism, sexism and heterosexism are not reducible one to the other they are, I think, interconnected. Therefore, if we can get a critical angle on one we can use that as a starting point in relation to the others. Thus it seems to me to be both unnecessary and harmful to pursue the question of "which is more important: race, class or sex?" Secondly, the claim of this paper is not that racism, sexism etc. is "caused" by the separation of the self and other. Rather, it is that a critical consciousness of the

Canada is becoming an increasingly legalized society. Power and the discourse of power are increasingly being filtered through legal-constitutional processes, and Indigenous Peoples cannot afford to be structurally and epistemologically excluded from this relocation of the fora of power. An interrelated point is that this relocation necessitates an even greater dependence on lawyers, and it is clearly better if such lawyers come from their own community rather than being well meaning outsiders.⁵⁵ Confidence and the "ability to know" are important and, given our long history of oppression, neglect and abuse, we should hardly wonder if the Indigenous Peoples would prefer to be their own analysts and spokespersons. Trust is better than dependency.⁵⁶ Fifth, I would suggest that we have an ethico-constitutional responsibility to provide substantive education to Indigenous Peoples, based on our treaty obligations⁵⁷ and our historical refusal to seriously honour them. Finally, I sense that, increasingly, the Indigenous Peoples will no longer acquiesce in their enforced inequality, that they will "irrupt"⁵⁸ and challenge the hegemony of those of us who occupy the power elite and that the legal system will prove to be as much a barrier as an instrument of relief in their quest for self determination.⁵⁹ Indigenous Peoples must know the law to know what they are up against.⁶⁰

pathologies of fear-driven otherness enables us to acknowledge our fears and then, perhaps, to immobilize them as engines of domination.

⁵⁵Even without the legalization of politics it would still be beneficial for Indigenous Peoples to have access to legal education in that, historically, lawyers have played an extremely important role in Canadian politics, exercising an "influence . . . out of all proportion to their numbers." Harry Arthurs et al. "The Canadian Legal Profession" [1986] A.B.F. Res. J.447 at 465.

⁵⁶I suppose that I have in mind Antonio Gramsci's idea of "organic intellectuals." See *Prison Notebooks* (New York: International Publishers, 1971).

⁵⁷See H.B. Hawthorne, *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies* (Ottawa: Queen's Printer, 1967) Vol II; Alexander Morris, *supra*, note 1.

⁵⁸For an important discussion of the "irruption of the poor" see Gustavo Gutierrez, *The Power of the Poor in History* (Maryknoll, N.Y.: Orbis Books, 1983).

⁵⁹For an excellent discussion see Leroy Little Bear, Menno Boldt, J. Anthony Long, eds., *Pathways to Self Determination* (Toronto: University of Toronto Press, 1984).

⁶⁰I am also acutely conscious of a countervailing concern. There is a real danger that the endeavour to create spaces for indigenous people is itself a form of neocolonialism in that, given legal education's socializing role, my proposals will have the effect of further expanding the hegemony of the dominant culture, eliminating difference rather than encouraging it. From this perspective, "separatism" is a preferable mode of resistance.

My own position is that I do not believe that we should conceive of participation and separatism as mutually exclusive polarities, as a dichotomous either/or choice. Rather, it may be more empowering to conceptualize them as two mutually reinforcing strategies on a progressive continuum. The choice when to use one, the other, or both, must depend on the context and an acute critical awareness of the dangers of each: incorporationism or entrenched marginalization. Moreover, I believe that choice must be made by the Indigenous Peoples themselves, not by non-indigenous persons for that would be an exercise in paternalism and disempowerment. My proposals are a modest attempt to make the ability to choose a possibility.

Even more optimistically, as my espousal of difference may indicate, I would hope for an expansion of indigenous legal cultures to the extent that they might even contribute to a reconstruction of the dominant culture. As Paulo Freire noted, "As the oppressed, fighting to be human, take away the oppressor's power to dominate and suppress, they restore to the oppressors the humanity they had lost in the exercise of their oppression." *Pedagogy of the Oppressed* (New York: Herder and Herder, 1970)

I should also add that nothing in the text should be construed as suggesting that law may be a panacea for

Any proposal in relation to education must pay keen attention to the relevant context. This cannot be emphasized enough in any discussion of legal education in relation to Indigenous Peoples. Put simply, Indigenous Peoples live in a situation of social deprivation and economic dispossession⁶¹ and that awareness should be our contextual starting point. As statistics from the last census indicate, Indigenous Peoples are significantly poorer than other Canadians, they experience significantly higher unemployment rates and lower health, housing and educational conditions.⁶² Mortality rates for infants, children and adults are frighteningly higher than the national averages. Indigenous children are significantly over-represented in the child welfare system, while juveniles and adults are particularly conspicuous as the recipients of the attention of the repressive apparatuses of the state, what we euphemistically call our "justice and correctional systems."⁶³

the problems of the Indigenous Peoples or any other disadvantaged group. At best, it might help resist the oppression. For an excellent American account of how law both helps to pursue, yet fails to achieve, racial justice see Derrick Bell, *And We Are Not Saved: The Elusive Quest For Racial Justice* (New York: Basic Books, 1987).

⁶¹ *Report of the Special Committee on Indian Self-Government: Indian Self-Government in Canada*. (Ottawa, Queen's Printer, 1983) (The Penner Report). 1983.

⁶² *Canada's Native People* (Ottawa: Statistics Canada, 1984)

⁶³ Donald Purich reminds us that "native people represent 9 per cent of the national prison population but, at most, form 5 per cent of the population. In some provinces . . . they represent over 40 per cent of the prison population." "Affirmative Action in Canadian Law Schools: The Native Student in Law School" (1986-87) 51 Sask. L. Rev. 79 at fn. 1. The following lengthy quotation is even more specific in its indictment:

In the case of the statistics regarding the impact of the criminal justice system on native people the figures are so stark and appalling that the magnitude of the problem can be neither misunderstood nor interpreted away. Government figures--which reflect different definitions of "native" and which probably underestimate the number of prisoners who consider themselves native--show that almost 10% of the federal penitentiary population is native (including about 13% of the federal women's prisoner population) compared to about 2% of the population nationally. In the west and northern parts of Canada where there are relatively high concentrations of native communities, the over-representation is more dramatic. In the Prairie region, natives make up about 5% of the total population but 32% of the penitentiary population and in the Pacific region native prisoners constitute about 12% of the penitentiary population while less than 5% of the region's general population is of native ancestry. Even more disturbing, the disproportionality is growing. Thus, in 1965 some 22% of the prisoners in Stony Mountain Penitentiary were native; in 1984 this proportion was 33%. It is realistic to expect that absent radical change, the problem will intensify due to the higher birth rate of native communities. . .

Bad as this situation is within the federal system, in a number of the western provincial correctional systems, it is even worse. In B.C. and Alberta, native people, representing 3-5% of the province's population constitute 16% and 17% of the admissions to prison. In Manitoba and Saskatchewan, native people, representing 6-7% of the population constitute 46% and 60% of prison admissions.

A study reviewing admissions to Saskatchewan's correctional system in 1976-77 . . . contains findings that should shock the conscience of everyone in Canada. In comparison to male non-natives, male treaty Indians were 25 times more likely to be admitted to a provincial correctional centre while non-status Indians or Metis were 8 times more likely to be admitted. If only the population over 15 years of age is considered . . . then male treaty Indians were 37 times more likely to be admitted, while male non-status Indians were 12 times more likely to be admitted. For women the figures are even more extreme. A treaty Indian woman was 131 times more likely to be admitted and a non-status or Metis woman 28 times more likely.

In the light of these factors--and we should remember that these are socio-political factors, not natural or essential⁶⁴--it should not be surprising to find that the Indigenous Peoples are dramatically under-represented in the legal community. Before the early seventies the number of Indigenous lawyers in all of Canada could be counted on one hand.⁶⁵ Although this number has steadily increased over the last two decades, there is hardly cause for celebration or acquiescence for there are still probably less than one hundred.⁶⁶ As of the time of writing, there are a few graduate students who are of indigenous background, a couple of lower level judges but no full time law teachers.⁶⁷ A report from Manitoba recommends that for the Indigenous Peoples to be proportionately represented in the legal community there would need to be 1500 indigenous lawyers!⁶⁸

The legal academy recognizes that people from an indigenous background rarely achieve their LLB status. However, more often than not this is understood as the failure of the students to come to terms with the requirements--intellectual and psychological--of the law school, although sometimes modified with the recognition that law schools need to do more. I want to suggest that this awareness of responsibility is misallocated, that although the burden lies on both the students and the institution, the law schools need to accept greater responsibility, to recognize that we fail them more than they fail law school. Our addiction to sameness only allows us to tolerate difference, not to foster it. The preferential option brings into vivid relief the distinction between believing ourselves to non-racist and being actively anti-racist.⁶⁹

In the light of these propositions I want to suggest that we fail Canada's indigenous Peoples at every stage of the university legal educational process: in

The Saskatchewan study brings home the implications of its findings by indicating that a treaty Indian boy turning 16 in 1976 had a 70% chance of at least one stay in prison by the age of 25. . . . The corresponding figure for non-status or Metis was 34%. For a non-native Saskatchewan boy the figure was 8%. Put another way, this means that in Saskatchewan, prison has become for young native men, the promise of a just society which high school and college represents for the rest of us.

Locking up Natives in Canada--A Report of the Committee of the Canadian Bar Association on Imprisonment and Release (1988), at 2-3. (footnotes omitted)

⁶⁴I would go further and suggest that they provide irrefutable evidence of racism . . . if not intentional, then structural and institutional.

⁶⁵*Why So Few?*, *supra*, note 1 at 31.

⁶⁶Purich, *supra*, note 63 at 100.

⁶⁷Purich, *ibid.*, note 63 at 81. There are some part time law teachers of indigenous background and Dalhousie Law School has just appointed the first full time teacher for the academic year beginning 1989. There have, however, been justices of the peace in several provinces and territories, as well as R.C.M.P. officers who have an indigenous heritage. *Locking Up Natives*, *supra*, note 63 at 40-41.

⁶⁸*Why So Few?*, *supra*, note 1 at 32.

⁶⁹See Wolverton, *supra*, note 3 at 191.

recruitment, in admissions, in participation and involvement, and in completion.⁷⁰ The deracialization of legal education must confront the following concerns.

(a) Recruitment

Although as law schools there is not a great deal that we can do to improve the quality of the pre-law school education of indigenous candidates, we still have a role to play.⁷¹ It is inappropriate for us to expect indigenous people to apply to law school in the same way that the mainstream of students do, on the premise of a free market economy of application. For many indigenous people law school will not come within their ken of possible careers. This is because of the educational deprivation which they have suffered, the consciousness that law is still the preserve of the elite, and a feeling of the alien nature of whiteman's law, that it has been, and continues to be, a tool of the dominant culture's imperialist and racist agenda.⁷² To counteract these legitimate and not inaccurate concerns, but without ignoring Indigenous People's experiential understanding, law schools must develop an active recruitment program designed to attract indigenous people to university. And we must start early, by contacting those who are involved with the secondary level education of indigenous people so that they might encourage students to contemplate law school as a feasible career path. We should go into indigenous schools and discuss such possibilities with the students. Similar efforts should be made with community counsellors. This should be repeated with those indigenous students who attend university, and those who interact with them.

Current pre-law school programs should be expanded, honed and developed to respond to the particular needs of indigenous students.⁷³ Particular emphasis should be placed upon the development of communicative--written and oral--and study skills.⁷⁴

⁷⁰See, *Why So Few?*, *supra*, note 1.

⁷¹For a convincing critique of the failure of Canada's past and present attempts to provide education for the Indigenous Peoples see James S. Frideres, *Native People in Canada, Contemporary Conflicts*. (Scarborough, Ont.: Prentice-Hall Canada, 1983) at 156-174. See, for example, presentations made to the Marshall Inquiry, 24th November, 1988.

⁷²See also Purich, *supra*, note 63 at 84-85.

⁷³For a discussion of the ACCESS programme at the University of Manitoba, see *Why So Few?*, *supra*, note 1 at 37-39. The programme of Legal Studies for Native Students which is located in Saskatoon, is the only pre-law experience for indigenous people in Canada. Although it has had an impressive track record, it could certainly benefit from greater support, financial and intellectual. This, however, is not a focus of this paper. For discussions, see *Why So Few?*, *supra*, note 1 at 40-54; Purich, *supra*, note 63 at 92-97.

⁷⁴Mary Ellen Turpel has suggested that, at this point, I face a tricky contradiction. First, there is the paternalistic problem of who is to determine what the "needs" of indigenous people are? This is brought into relief by my proposal that we develop "communicative and study" skills. The implicit assumption in my proposal is that indigenous students have to comply with our communicative and study skills, implying that their skills, developed in their community, are inadequate. In other words, our standards remain the benchmark, and indigenous people "need" support to achieve our standards. Viewed in this light, "needs" are relativized, and more importantly, predefined by a framework of ethnocentric assumptions.

I think that there is much force in this criticism, although, as I have indicated in footnote 60, given our current context, it is important to forge a middle path (which is, I think, different from compromise) that allows for

In recent years law schools in general, and law deans in particular, have had to develop the talent of fund raising in order to make up the short fall created by the governmental retreat from third level education. This new found ability to generate funds should be utilized for the benefit of indigenous students. We should fulfill an active lobbying function to ensure that potential indigenous candidates can be confident that they will attain total and adequate financial support in the nature of a non-returnable grant, so as to modify any worries about the financial toll of third level education.⁷⁵

(b) Admissions

Law schools should develop feasible and realistic entrance requirements. In recognition of the fact that so few indigenous people actually make it to third level education, it may be desirable to conditionally waive the normal two-year undergraduate requirement for those candidates who demonstrate aptitude in other ways, what we sometimes refer to as "maturity, experience and motivation."

Particular attention must be paid to the applicability of the LSAT test to indigenous students. First, we must remember that the real significance of the test for law schools is that it serves as a mechanism of attrition; given the very high application rates, law schools use the test to render the numbers manageable. This consideration should not apply to indigenous people for our goal must be to facilitate their entry into law school, not to inhibit them. Secondly, there are indications that the test incorporates cultural biases that may disadvantage members of minority groups.⁷⁶ If this is even a possibility we should not rely on the test as it further prejudices the possibility of indigenous candidates gaining access. Third, it seems clear that the test is a poor predictor of how minority students will actually perform if they get to law school.⁷⁷ If this is true, then again it is only of very limited utility for our current project, that of creating space for indigenous

the Indigenous Peoples to have power in both traditions.

⁷⁵In the last year this concern has come centre stage. While the federal government, on the one hand, appears to be supporting the Indigenous Peoples in their quest for self government, on the other it is effectively making such an achievement unrealizable because of its slashing of financial support for indigenous students. On June 17, 1988 the Department of Indian Affairs and Northern Development unveiled its Draft Policy on Post-Secondary Student Assistance Program, to become effective April 1, 1989. In effect this program will cut both the amount of money actually paid to indigenous students on a monthly basis, and the length of time they will be eligible for governmental assistance. With particular reference to indigenous students in law school, this means that their funding may run out in the course of their second year. This suggests that the federal administration either does not, or does not want to, understand the difference between formal and substantive equality, and that it fails to recognize its own contribution to what Derek Bok calls "the culture of deprivation with its . . . array of disincentives and deprivations." [*Higher Learning, supra*, note 13 at 139.] Legal educators must also educate the government if they want to educate indigenous people.

⁷⁶See, for example, David M. White, *Towards a Diversified Legal Profession* (San Francisco: Julian Richardson Associates For the National Conference of Black Lawyers, 1981) at 149-181; Portia Y.T. Hamler, "Minority Tokenism in American Law Schools" (1983) *Howard Law Journal* 443, at 493-506; Robert Linn, "Test Bias and the Prediction of Grades in Law School" (1975) 27 *Journal of Legal Education*.

⁷⁷See eg Purich, *supra*, note 63 at 87-88.

people. Consequently, I would suggest that we abandon the LSAT test altogether for indigenous applicants, or at least only use it to determine the lowest possible entrance point.⁷⁸ However, given the stress, cost, and disadvantage caused to those who are preparing for the test, even this last justification may not carry too much weight.

What these proposals suggest is that we need to actively reflect upon the assumptions that underpin our understandings of university legal education, to question their appropriateness for those who are marginalized by the mainstream, and, indeed, to identify the structural biases that these assumptions incorporate. Restated, university legal education is essentially front-end loaded, it is more difficult to get in than it is to get out. But the evidence for indigenous students is different; if it is difficult to get in, it is just as difficult to get out. The non-completion rate is disturbingly high. The proposed remedy is to refocus our concern, to make it easier to get in, and then, to help them to the best of our abilities so that they can also get out.

(c) Counselling and Tutoring

Given the structural disadvantages that indigenous people experience, it is essential that we go beyond the open door and equal opportunity in order to make the legal opportunity effectively realizable. To abandon indigenous students on admittance is to set them up for failure, our failure, not theirs . . . although it will be they, not the institution, who will suffer the psychological consequences of such a failure. We must ensure that the open door is not, in effect, a revolving door.

If the students request,⁷⁹ tutorials should be provided in order to continue to develop communicative, study and examination skills which they had picked up in the pre-law program.⁸⁰ Moreover, these tutorials should be dovetailed with the substantive courses that the students are taking in order to simultaneously develop legal analytic skills.

In terms of staffing such a need, there should be assigned a full time faculty member whose sole opportunity is to assist the development of minority legal education.⁸¹ Furthermore, funding should also be provided to hire upper year stu-

⁷⁸*Ibid.* at 89.

⁷⁹In recognition of indigenous student's autonomy and to avoid forced paternalism, tutorials should be offered on an "as needed" basis, with the choice being left with the students. However, it is hoped that the support structure will be sufficiently encouraging that communication gaps can be modified, enabling students to take advantage of the assistance when they recognize they need it.

⁸⁰For a useful, non-legal model of the structure of such seminars see for example, *The Monash Orientation Scheme for Aborigines Handbook* (Clayton, Australia: Monash University, 1987) at 13-14.

⁸¹Various other functions could also fall on this person, primarily in their role as "contact" person. Discrimination is still a pervasive factor for many minorities when seeking living accommodation. Law schools, through this faculty advisor, must attempt to avoid such problems by consulting with such students and through the contacts they might have in the community. Or, again, this faculty member, in liaison with the indigenous students, should attempt to help identify and procure both summer and post degree employment that is both relevant and desirable.

dents on a part time basis to act as tutors on a one to one basis with each indigenous student.⁸² If possible, this faculty member or the tutors should be indigenous persons also. At the very least they should have extensive interaction with an education specialist who has particular knowledge of minority needs.

This proposal may appear to be very expensive, but if we are to take our responsibility seriously we must make such financial and institutional investments, even, or especially, if it is at the expense of other programmes, whether they be traditional bastions or fancy new interdisciplinary efforts.⁸³ This is, after all, a

⁸²See further Purich, *supra*, note 63 at 98. I may disagree with Purich in his suggestion that the tutorials should not single out indigenous students. I think that the problems that indigenous students face are peculiar and particular and we should not risk overburdening the tutors. However, there is a real possibility that some, or perhaps even all, indigenous students will not want such concentrated attention. My position is that we should be willing and able to provide such support if it is wanted by the students; we should be in a position of institutional preparedness. As I have suggested elsewhere, the opinion of either Purich or myself should be secondary and responsive, rather than determinative.

⁸³There is a vitally important context here that we simply cannot afford to ignore . . . nor should we permit it to become an escape mechanism by which we can avoid developing remedies against institutionalized racism.

The current economic and political environment for universities is far from satisfactory. Put bluntly, although Canadian universities enjoyed a hot house period in the sixties and seventies, many are now struggling to survive in the extremely adverse ecological conditions of the 'eighties. The central problem is, of course, funding. The political decision-makers in these the twilight years of the twentieth century no longer appear to be committed the ideal of third level education. They see it as an expensive luxury that we can hardly afford, as an investment that is both quantitatively and qualitatively deficient in terms of returns. The message, implicit rather than explicit, is that the educational trough must be filled from alternative sources.

This retreat from third level education has at least two deleterious ramifications. Firstly, it means that there is a shift in the balance of the universities' dependency from the "public" to the "private" sphere, primarily but not exclusively, corporations. This dependency is at once economic, political and ideological. [See, Janice Newson and Howard Buchbinder, *The University Means Business* (Toronto: Garamond Press, 1988).] Secondly, the changing foundations of funding has an impact upon the meaning and purpose of "knowledge." Corporations are wise with their money, they understand knowledge to be in the service of economic imperatives, and they provide funding for relatively specific purposes. Consequentially, the horizons of knowledge are structurally narrowed and even the questions to be asked are frequently predefined. This increased corporate dependency results in the intensification of what has been called "instrumental rationality," at the expense of alternative forms of knowledge.

Where do law schools fit within this broader educational dynamic?

It is a common observation among legal academics that law schools have a peculiar and particular position within the academy. The most important distinguishing feature of law schools is their hybrid status . . . they are part academic, part professional. [See e.g. Harry Arthurs, "The Law School in a University Setting" in R. Matas and D. McCawley, *Legal Education in Canada*, *supra*, note 21 at 157. For a located and poignant account of this tension see C. Ian Kyer and Jerome Bickenbach, *The Fiercest-Debate* (Toronto: Osgoode Society, 1987).] Although this has been a notorious source of tension, it is also a possible strength in that the legal academy has been able to adapt itself to this almost schizoid existence, an adaption that may provide a foundation on which to deal with the changes demanded by corporate dependency. I want to suggest that our mongrel nature may be a source of resilient creativity, it may provide us with an opportunity for flexibility, innovation, openness and maybe even a little transgression.

A second significant feature about law schools is their position of status within the university. Although it would go too far to say that a law school is the jewel in the crown of a university, a law school is an important part of the desired image of many universities. Witness, for example, the efforts made by York University to attract Osgoode Hall to North York. Thus even though our involvement with the academy has been, in the main, relatively recent we do add prestige, respect and comprehensiveness to any university. This perception of importance may give us a structural advantage over some other departments in our efforts to resist the corporatization of the acad-

preferential option, an attempt to prioritize the needs of the Indigenous Peoples, and thus in a world of finite resources it will be at the expense of the mainstream agenda. If we choose not to make such an investment, then we choose not to respond to the needs of the Indigenous Peoples and in that way we continue and reinforce the inequality, oppression and racism imbricated within the Canadian polity. Racism is not simply the product of intentionalism, it also comes about through omission and negligence.

Access to counselling should also be available but great care should be taken that the counsellors are familiar with the distinctive educational characteristics of indigenous students. Furthermore, in pursuit of cohesion, there should be close contact between the counsellors, the faculty advisors and the tutors so that they can learn from each other.⁸⁴

emy. Our possible advantages and privileges also impose upon us special responsibilities. This paper is an attempt to address those responsibilities.

⁸⁴See also *Why So Few*, *supra*, note 1 at 70. These suggestions with regard to tutoring, in turn, generate larger questions about *how* we teach. A full discussion of this issue would necessitate a further article but I do think a few comments are appropriate.

The vast majority of us who are legal educators have had little, if any, exposure to the vast array of information that identifies the qualities of a good teacher. In the recruitment process little attention is paid to the criterion of ability to teach effectively, and the professorial career structure prioritizes research over teaching. The result is that we tend to muddle through, learning on the job. Consequently, if some of us are good teachers it's probably only a fluke, while the rest of us probably don't realize just how appalling we are, and how much better we could be. Although there is a Canadian law teachers' clinic, its voluntary and occasional nature means that it can have only limited impact upon our pedagogical proficiency. The tendency then is to use our own teachers as role models thereby rendering our pedagogical vision retrospective and, perhaps more dangerously, reproducing sameness even at the level of how we teach. In the last decade or so, critical and feminist educators have demonstrated the poverty of mainstream pedagogy, and have begun to develop alternative and better approaches. Again the discourse of sameness and difference can help structure our understanding of these developments. Mainstream education works on an assumption of sameness in that, procedurally, it tends to give all students the same amount of attention and effort and then penalizes those who cannot keep up with the race. Substantively, it tends to identify core areas which it then universalizes as "knowledge" and then expects all students respond to it similarly. If they do not, they are penalized once again. Critical and feminist pedagogy tend to valorize difference. Both encourage flexibility so as adjustments can be made to provide adequate attention and effort so that those who need assistance can also achieve the standards required. Education understood in this light is "learner centered" rather than "teacher centered." Furthermore, both critics and feminists recognize that the reason why some students do not deal well with knowledge is because that knowledge is not universal, it is not theirs, it is an alien social construct. In response, critical or feminist teachers attempt to develop courses, materials and techniques that dovetail more closely with the reality and knowledge of these students. Teaching, then, is not understood as a top-down, unidirectional process but is transformed into an interactive conversation that exchanges and validates different knowledges.

To bring these points into sharper relief, it may be helpful if we temporarily escape the confines of Euro-yanqui legal education and attempt to achieve some critical distance through a reflection on the work of one of the most influential practitioners and theorists of these alternative methods of teaching, Latin American educational theorist, Paulo Freire. Freire adumbrates two competing visions of the educational process which he variously labels as "banking" and "critical," "domesticating" and "liberating." Their differences can be roughly schematized as follows:

Banking

student as object
student as depository
student passive

Critical

student as subject
student as contributor
student active

(d) Substantive Studies

Given the important cultural differences that distinguish mainstream and indigenous understandings and approaches to the world, we must attempt to render the law school more sensitive to those alternative perspectives and practices. For example, in recognition of the centrality of the oral tradition⁸⁵ we should, perhaps, attempt to make our classes less text bound and lecture based and more conversational. Or, with regard to evaluation, we should contemplate the possibility of oral rather than written examinations, if that was the preferred choice of the students. Or, at the minimum, we should devise mechanisms that would allow for ongoing evaluation throughout the term, rather than the 100% final exam. Alternatively, we could evaluate indigenous students on criteria other than those which are premised upon examinations, for example, their work in some volunteer agency.⁸⁶

On the substantive level, we should strive to develop courses that directly encompass issues that will be of particular interest to Indigenous students. At UBC for example, there are four courses in "Native Law": The Foundations of Aboriginal Rights and Treaties, Self Government, Land Claims and Comparative International Law. At the same time, however, we must be cautious not to ghettoize indigenous issues and should strive to develop "generative themes"⁸⁷ in all

teacher as dispenser
 knowledge as object
 education as hierarchal
 education as lecture
 education as domesticating
 education as oppression

teacher as facilitator
 knowledge as process
 education as cooperative
 education as dialogue
 education as consciousness
 education as liberation.

See *Pedagogy of the Oppressed*, *supra* note 60; *Education for Critical Consciousness* (New York: Seabury, 1973); *The Politics of Education*, *supra*, note 2. It is also worth noting that Freire's suggestions for an alternative pedagogy overlap with and manifest themselves in the practice of Latin American Christian "base communities," one aspect of the praxis of liberation theology. See Philip Berryman, *Liberation Theology* (Philadelphia: Temple University Press, 1987), at 63-79.

Particularly useful discussions of feminist pedagogy can be found in Adrienne Rich, "Toward a Woman-centered University," in *On Lies, Secrets and Silence* (New York: Norton, 1979); Elizabeth Langland and Walter Gove (eds) *A Feminist Perspective in the Academy* (Chicago: University of Chicago Press, 1983); Charlotte Bunch and Sandra Pollack, *Learning Our Way* (Trumansberg, N. Y.: Crossing Press, 1983); Margo Cullley and Catherine Portugues, *Gendered Subjects* (Boston, Routledge and Kegan Paul, 1985); Kathleen Weiler, *Women Teaching for Change* (South Hadley, Mass.: Bergin and Garvey, 1988); Symposium "Restructuring the Academy" (1987) 12 *Signs* 203-372.

Further, several helpful papers which focus on ways to improve the processes of legal education can be found in J. Himmelstein and H. Lesnick, *Humanistic Education in Law* Monograph III (St. Paul: West, 1981).

⁸⁵Patricia Monture, "Ka-Nin-Goh-Heh-Gah-E-Sa-Nonh-Yah-Gah" (1986) 2 C.J.W.L. 159. Sam Deloria, "Legal Education and Native People" [1973-74], *Saskatchewan Law Review* 22 at 29.

⁸⁶Recommendation 9a, Native Law Seminar, Dalhousie University, June 17 1988.

⁸⁷Freire, *supra*, note 2.

our other classes. We should attempt to expand the horizons of traditional courses to include issues that relate to indigenous concerns or perhaps to draw on indigenous legal materials or documents. For example, in contracts we could discuss the contractual aspects of the refusal of the Nova Scotia government to honour the hunting rights of the Micmac nation as they are enshrined in treaties, treaties that have been upheld by the Supreme Court of Canada. Again, we could inquire into the way in which both contracts and property law have, historically, tolerated and legitimized the practice of racial discrimination. Esmerelda Thornhill has suggested that the *Criminal Code* be amended to create a crime of racism and that if any other crime involves a racist element then that should increase the relevant sanction, paralleling the distinction between assault and aggravated assault.⁸⁸ The pedagogical advantages engendered by such a discussion would have significance beyond the particular concerns of indigenous people.

Furthermore, there is some indication that because of profound cultural and value differences, some courses prove to be particularly difficult for some indigenous students to come to terms with.⁸⁹ Some students may find property law, as it is currently taught, conceptually alien.⁹⁰ Perhaps the course could be adapted to respond to their needs, or failing that, they should have the option either to avoid the course altogether as a component of their LLB, or to take it in an upper year when they have a more solid legal foundation. Even more generally, by analogy with part time programmes, indigenous students should have the option of completing their degree in four or more years, rather than the compulsory three. What all this suggests is that legal education should be tailored to suit their needs rather than that they be forced to adapt to our routines, because the preferential option prioritizes ortho-praxis (right acting) rather than ortho-doxy (right doctrine).⁹¹

VI. Sameness And Difference

The direct struggle by . . . poor and oppressed people must be matched . . . by a struggle and resistance against ourselves, against the ingrained ideals of always having more, of always having to increase our influence.

Johann Baptist Metz⁹²

⁸⁸ See *supra*, note 3.

⁸⁹ *Why So Few?*, *supra*, note 1 at 57. This is an important point in that not all indigenous people experience the same problems. There are important differences between the Indigenous Peoples that we should strive very hard to be sensitive to. We should attempt to avoid the insidious dynamic of stereotyping which reduces difference to sameness.

⁹⁰ Leroy Little Bear, "Concept of Native Title" (1982) Canadian Legal Aid Bulletin, 99. Furthermore, in relation to the point of profound cultural and value differences, Leon Trakman has suggested to me that the competitive and rampantly individualistic nature of current legal education, may be at odds with indigenous conceptions of education, thereby further reinforcing the alienation of the law school experience.

⁹¹ Philip Berryman, *supra*, note 84 at 85.

⁹² Johann Baptist Metz, *The Emergent Church* (New York: Crossroad, 1981) at 12.

We must be careful, however, not to let this proposed agenda for a reconstruction of legal education take on its own dynamic. As I mentioned earlier, and it bears reiterating, the touchstone should be the needs and desires of those who are disadvantaged, not our arrogant professorial predilections. We must be extremely careful to avoid the dangers of our liberal predecessors: assimilation, integration, protectionism, paternalism, beneficent neo-imperialism and western intellectual prejudice. Our concern should be to create spaces to allow for the emergence of authentically different voices within the academy, not ventriloquism.⁹³

Legal educators in the university encounter a disturbingly narrow cross section of Canadian society, for the catchment area is structurally and racially exclusive, thereby benefitting some and excluding others. The result, in the main, is the reproduction of "solipsistic tunnel vision,"⁹⁴ an entrenchment of sameness, a marginalization of difference and an exclusion of otherness. Lest there be any doubt about what I am suggesting, let me be clear. An addiction to sameness is an addiction to oppression. The remedy of a preferential option is qualitatively different from affirmative action (although we can develop this as a deviationist base) for that runs too great a danger of either letting a few others in, but just enough to pacify our liberal consciences, or tokenism. Affirmative action leaves too much of the substantive and methodological foundations of liberalism intact,⁹⁵ calling only for tolerance, pluralism (add the minority and stir) and generosity when what is required is openness, renewal, transformation and conversion. My proposal is that we actively seek out and support to the best of our abilities large numbers of indigenous students, at least five per year per law school,⁹⁶ for as the

⁹³There is a real danger of which I have attempted to be extremely conscious. This article certainly runs the risk of being paternalistic, arrogant or protectionist, a reinterpretation and encoding of a profound social problem from the perspective of one who does not know; an appropriative, intellectual, neo-imperialism dressed in a critical empathetic guise. Theft. It is this concern that underpins the caution of the title and the nondoctrinaire presentation of the reconstructive proposals. Substantively, as I have attempted to indicate, my aim is modest: to help generate a discussion and practice in the legal academy that, as yet, has really not received sufficient attention; and to help create spaces in the academy so that those who will be affected most directly will have the opportunity to define what the problems are and what the appropriate remedies may entail. It may be a thin line between being part of the problem and part of the solution. See also note 51.

⁹⁴Adrienne Rich, "Taking Women Students Seriously" in *Gendered Subjects*, *supra*, note 84, 21 at 25.

⁹⁵For a particularly useful discussion of the structures and patterns of resistance to affirmative action programs in the United States see Carl A. Auerbach, "The Silent Opposition of Professors and Graduate Students to Affirmative Action Programs: 1969-1975" (1988) 72 *Minnesota Law Review* 1233. See also Anthony J. Scanlon, "The History and Culture of Affirmative Action" (1988) *Brigham Young L. Rev.* 343. The suggestion of this paper is that the only effective way to deal with such repressive resistance is to identify its premise of formal meritocracy, to unmask the hidden agenda of privilege in the ideology of merit, and to provide alternative political and moral foundations for entitlement to community goods.

⁹⁶This may not appear very dramatic or challenging to the status quo. However three points should be noted. If there are twenty one law schools in Canada, that would mean that in each academic year there would be over one hundred indigenous students, and in any given academic year fifteen students per law school. I do think that is an important opening up of legal education. Moreover, each law school must also make arrangements to ensure that these students complete their degrees and, as I have indicated, that will require a fairly extensive use of limited resources. Secondly, the suggested number of five is provisional and a minimum, targeted at the immediate context. Consequently, it is open to revision as more indigenous candidates apply to law school. Third, as I indicate elsewhere, indigenous people are not to be the only benefactors of the preferential option, and policies might be

UBC experience tells us, difference can only have a home when there is peer support.⁹⁷ Moreover, the Indigenous Peoples are not the only oppressed group within the Canadian polity. A similar option, although closely tailored to each group's specific needs, should also be developed for other communities who have been marginalized by the traditional legal culture. In this way, we can begin to decentre the politically sclerotic and elitist influences of one of the citadels of private power, law schools, in order to democratize them and perhaps, to help create a liberated zone in which those who have been excluded and exploited can pursue cultural action for freedom.⁹⁸

VII. A Prospective Precedential Conclusion

Futurology is an impossible enterprise. What is certain about the future is that it will bring surprises.

Phillip Berryman⁹⁹

By way of conclusion, I want to make a few comments on the past, present and future. As I suggested earlier, modernity is primarily future-oriented in that transience and a belief in the "not yet" are its underlying themes. Given this, one would have thought that contemporary education would welcome modernity as an ally in forging the future. However, this does not appear to be the case in that much of what we do, at least in the legal academy, is either retrospective or reinforcing of the status quo.¹⁰⁰ Restated, legal academics are, in the main, antimodern clericists¹⁰¹ who lack a transgressive vision of the future. My suggestion is that Canada's future lies with our diversities, with the Indigenous Peoples, minorities, women, the poor, people of colour, people with alternative sexual

designed that would attract even greater numbers of non-mainstream students. In sum, even these relatively modest proposals might engender quite a different legal educational environment. Transformation is more realistic than revolution.

Moreover, the radicalism of this proposal can be highlighted through a comparison with one proposed governmental strategy. Bromley Armstrong, of the Ontario Labour Relations Board, recently informed the Marshall Inquiry that the RCMP has only 1% minority participation but that it does have a goals and timetables target: that over the next fifteen years it hopes to have minority representation to the extent of 3%!

⁹⁷See eg Purich, *supra*, note 63 at 85-86 and 98. Monash has gone even further in establishing and supporting aboriginal "enclaves" within the university in order to resist the impersonal and culturally alien educational institutions, in order help provide a "sense of mutual identity, solidarity, support and obligation . . . and community" *MOSA supra*, note 80 at 15. Another Australian, Bob Connell, has also discussed the idea of liberated zones. See his *Gender and Power* (Polity in Association with Blackwell, 1987).

⁹⁸Freire, *Politics of Education, supra*, note 2 at 43.

⁹⁹*Liberation Theology, supra*, note 84 at 201.

¹⁰⁰For a useful schematization and overview of the various political roles fulfilled by academics, see Stephen Brooks and Alain Gagnon, *Social Scientists and Politics in Canada* (Kingston: McGill-Queen's University Press, 1988), "Introduction."

¹⁰¹T.S. Eliot coined this term in a critique of the intellectual defenders of the status quo. See "On the Place and Function of the Clerisy" in *The Idea of a Christian Society and Other Writings*. (London: Faber and Faber Ltd., 1982) 159.

orientations etc. As legal educators we must make space for these people, we must critique, destabilize and eliminate the socially constructed barriers that foreclose an egalitarian future for these people, barriers that are founded on caucasian ethnocentrism, male hegemony and compulsory heterosexuality.¹⁰² Legal education, in this view, is in dire need of reconstruction in the pursuit of difference so as to exist for others, and not for the reproduction of sameness.

Some may object to my tentative reconstructive proposal, that it is naive, idealistic or utopian, the desultory ruminations of a nameless and powerless academic in an ivory tower. The past and the present, however, suggest that they are mistaken, for precedent, too, can be remade to support my reconstructive agenda. Nothing is sacred! As legally trained persons, many of us have an almost infantile need for the sanctifying grace of precedent . . . if it has not been done, it cannot or should not be done. I want to suggest to you that dramatic and fundamental changes can, and should, be effected in an institution as retrospective, ponderous, conservative and hierarchically remote as the legal community. Our omission to do so should only be interpreted as a refusal to do so, as a complicitous moment in Canada's long history of self-imposed myopia, a will not to know. The failure of the legal academy to pursue the preferential option must then stand as monument to our choice to defend an alternative preferential option, one that is itself partisan to its core, for it favours the rich, the racially dominant and the privileged.

Anyone with a sense of international affairs can hardly fail to be amazed with developments in the Soviet Union over the last four years or so. Under the leadership of Mikhail Gorbachev, the Soviets have begun to attempt a major social reconstruction, captured in the neologisms of *glasnost*, *perestroika*, and *khozraschot*. This reference is not intended to suggest that a reconstructed Soviet Union is exercising a preferential option for the poor or the oppressed, or that current developments are inspired by solidarity or care. Rather it is to suggest a more structural--or should I say reconstructive--point that reconstruction can be from the top down *as well as* from the bottom up, and that it can take place in even the most unlikely locations.¹⁰³

Another, perhaps surprising, example might also help. Historically, if there is any institution that can rival the Soviet Union for conservatism and resistance to change, or has a history of support for or encouragement of power elites, or has been complicitous in the preservation of unjust social structures, it is the Roman Catholic Church.¹⁰⁴ Of particular significance is the role played by the Society of

¹⁰² Adrienne Rich, "Compulsory Heterosexuality and Lesbian Existence" (1980) 5 *Signs* 631.

¹⁰³ For some useful and cautiously critical discussions of Soviet reconstruction, see for example, Mikhail Gorbachev, *Perestroika* (New York: Harper and Row, 1987); Jerry Hough, *Russia and the West* (New York: Simon and Schuster, 1988); Ralph Miliband et al. eds. "Problems and Promise of Socialist Renewal" *Socialist Register* 1988; Donald Kelley, *Soviet Politics from Brezhnev to Gorbachev* (New York: Praeger, 1987). Lawyers may find the following to be of particular interest: "Perestroika: A Joint Interview with Soviet Lawyers" (1988) 1 *International Review of Contemporary Law*, and Alexander Sukharev, "The USSR: Some Legal Aspects of Restructuring" *International Review of Contemporary Law* (forthcoming).

¹⁰⁴ For a specific discussion of conquest, colonization and christianization in the context of Latin America see Enrique Dussel, *History of the Church in Latin America* (Grand Rapids: Eerdmans, 1981).

Jesus, the Jesuits, who have served as the intelligentsia of the church, fulfilled the role of the central defenders of the hierarchy and elitism of the pope, even to the extent of the inquisition. Much of the Church's conservative political agenda is related to the pre--and anti-modern premise that the very identity of catholicism is anchored in universalism and unchangeability. And yet both the Church and the Jesuits have, in the course of the last quarter century, been undergoing the throes of a major modernist transformation. Specifically, in response to the imperialism of capitalist and communist practices alike, the Catholic church has begun to respond to the existential, and not just the spiritual, needs of the Third World, with particular reference to Latin America.¹⁰⁵ On an intellectual level, this has manifested itself in liberation theology; on a practical level, it has resulted in the development of educational and health programs and an extremely active political agenda that is at once critical of the exploitative activities of the power elites--both local and imperialist--and passionately committed to social justice. The Jesuits have played a pivotal role in this transformation.¹⁰⁶ Indeed, my adoption of the preferential option for the poor and the oppressed, as you may have already realized, is culled from these developments in Latin America, outside the mainstream of Euro-yanqui society.¹⁰⁷

But we do not need to look so far for inspirational examples of how things could be otherwise. There are examples internal to our legal system which, if

¹⁰⁵Some readers may be somewhat disturbed by this religious turn in my thinking, particularly given my left-oriented dynamic and the Marxist aphorism that religion is "the opiate of the people." My response is twofold. First, like most of our cultural practices and institutions, I do not believe that religion is total in its repressive powers. Rather there are gaps, spaces, nuances, countertrends and loci of resistance. Progressive praxis needs to develop these, to operate from within as well as from without, prioritizing neither one nor the other. Secondly, it may be possible to identify and develop emancipatory elements of religion in an eclectic sense without adopting theological idealism, with its potential for placatory deradicalization.

¹⁰⁶Malachi Martin, *The Jesuits* (New York: Linden Press, Simon and Schuster, 1987).

¹⁰⁷The concept of a preferential option was first adopted by the Second General Conference of Latin American Bishops (CELAM II) at Medellin, Colombia in 1968, and survived a conservative reaction at CELAM III in Puebla, Mexico, 1979. For a discussion see, Gustavo Gutierrez *A Theology of Liberation*, trans; Renato Poblete, (Maryknoll, N.Y.: Orbis Books, 1973), "From Medellin to Puebla" in Daniel Levine ed., *Churches and Politics in Latin America*. (Beverly Hill: Sage Publications, 1980) at 41; Phillip Berryman, *Liberation Theology*, *supra*, note 84 at 42-44; Edward Cleary, *Crisis and Change: The Church in Latin America Today* (Maryknoll, N.Y.: Orbis Books, 1985).

Liberation Theology has also had an impact on the Catholic Church in Canada. See for example, G. Baum and D. Cameron, *Ethics and Economics: Canada's Catholic Bishops on the Economic Crisis* (Toronto: Lorimor, 1984) and W.E. Lewis and D.L. Lewis, "Liberation Theology in First and Third World Countries" (1988) 30 *Journal of Church and State* 33.

Liberation theology has also been embraced and modified by, for example Blacks and feminists. See more generally, James Cone, *A Black Theology of Liberation* (Philadelphia: Lippincott, 1970), *For My People: Black Theology and the Black Church* (Maryknoll, N.Y.: Orbis Books, 1984) and Rosemary Radford Reuther, *Sexism and God-Talk: Toward a Feminist Theology* (Boston: Beacon Press, 1983); Carter Heyward et al. *God's Fierce Whimsey: Christian Feminism and Theological Education* (New York: Pilgrim Press, 1985); Elisabeth Moltmann-Wendel, *A Land Flowing with Milk and Honey* (New York: Crossroad, 1986)

Moreover, we should not be too cynical about the possibility of dramatic change within religious communities, for even liberation theology has a dramatic and powerful precedent: the Protestant Reformation.

suitably and critically developed and expanded, can also provide us with some direction as to how we might proceed. For example, within legal education there has been an increasing awareness that merely providing students with the skills of a lawyer, "the cobwebs of technique,"¹⁰⁸ is at best only an achievement of instrumental rationality. At worse, it has contributed to the impoverished, uncritical, unprofessional and not infrequently, morally culpable practices of lawyers. Consequently, in its best manifestations, there has been an effort to enable students to think critically about their future roles as lawyers and the *responsibilities to others* that their professional status and skills entail.¹⁰⁹ Indeed, three schools in Canada now have mandatory courses in professional responsibility.¹¹⁰ My point is that we already have accepted in principle the idea that lawyers and legal education must confront issues of social responsibility,¹¹¹ our next task is to expand the scope of that opportunity, to make societal responsibility and not elite reinforcement the organizing paradigm of Canadian legal education.¹¹²

Furthermore, the underlying idea of exercising a preferential option for the poor and oppressed has already been accepted by the Canadian polity, although perhaps inchoately, begrudgingly and equivocally. Section 15(2) of the *Charter* constitutionally entrenches the possibility of remedial affirmative action. My suggestion is that affirmative action is a cognate of the preferential option, although its potential is circumscribed by its embeddedness in liberal presuppositions and discourse. The preferential option, premised as it is on solidarity and care, may allow us to rework the idea of affirmative action, to help it transmute from a liberal idea that is embedded in the pseudo-objectivity of individual merit and equality of opportunity, to a more communitarian social and political practice that aspires to group entitlement and equality of condition. Proposals for another legal education such as this are not designed to bury liberalism. Rather they are designed to unmask and transcend its limitations, by developing from within some of its contradictory tensions. A commitment to difference need not necessitate disjunction, merely a recognition of the inequality inherent in sameness.

Finally, to close on a guardedly optimistic note, I want to draw to your attention some recent developments within the Canadian Bar Association, a body not

¹⁰⁸Freire, *The Politics of Education*, *supra*, note 2 at 39.

¹⁰⁹The most helpful Canadian discussion of this topic is Alvin Esau, "Teaching Professional Ethics and Responsibility at Law School" in R. Matas and D. McCawley, *Legal Education in Canada*, *supra*, note 21 at 308. Particularly progressive American discussions include, David Luban ed., *The Good Lawyer* (Totowa, N.J.: Rowan and Allenheld, 1983); T.L. Shaffer and R.S. Redmount, *Lawyers, Law Students and People* (Colorado Springs: Shepard's, 1977).

¹¹⁰They are Alberta, Dalhousie and Manitoba. Prior to Dalhousie joining this group, Esau estimated that "less than twenty per cent of the total Canadian law school population enrolls in a course in professional responsibility" *supra*, note 109 at 336.

¹¹¹The emergence of legal aid also indirectly indicates that there is some awareness within the legal community of the phenomenon of social responsibility.

¹¹²Yet another precedent for dramatic change with reference to educational processes and structures can be found in Quebec during the post war years. As Brooks and Gagnon demonstrate educational reconstruction was a vital "subversive" component in the forging of the Quiet Revolution. *Supra*, note 100 Ch. 1 and 7.

renown for either its progressivism or its reconstructive visions. In a recent report entitled, "Locking Up Natives," the C.B.A.'s Committee on Imprisonment and Release recommended the establishment of "alternative" and "parallel native justice systems . . . designed to incorporate community values." Not only does the report recognize and advocate that the locus of legal authority must shift from the dominant culture to indigenous political structures, it also acknowledges that the relocation will give rise to substantive differences: "In an effort to develop a culturally based system, native groups may propose correctional facilities very different from existing structures." Moreover, the report argues that the dominant culture must proactively encourage and support such differential initiatives in that, "priority should be given by governments in their allocation of criminal justice research funds to encourage the development of pilot projects of working models of contemporary native justice systems."¹¹³ Thus, it is only if difference is prioritized that there can be any hope of equality and participation for those who are marginalized, victimized and oppressed on the basis of their race by the mainstream of contemporary Canadian culture.

To close the circle and to return to the themes articulated by Harry Arthurs, I want to say that nothing in this paper is intended to be a claim to heroic status; it is neither Promethean nor Herculean.¹¹⁴ When all is said and done, Prometheus is mythical, racism is a reality. The critique and tentative proposals that I have outlined are an attempt to confront the embedded racism--conscious or unconscious, intentional or unintentional, direct or systemic--of the legal academy, to create spaces within the legal community for those who have a perspective from the bottom up. My ambition is to help uncouple freedom and domination, to facilitate the decentring of the economy of sameness and to engender a juridical economy of difference.

Postscript

Occasionally, theory becomes practice. In the spring of 1989, Dalhousie Law School adopted a report incorporating some of these proposals and generated funding for two years.

¹¹³ *supra*, note 63. Summary of Recommendations at 9. In light of our heritage of oppression, it is also of significance that the report makes substantial positive recommendations in relation to the importance of native spiritual expression and experience, particularly for prisoners. *Ibid* at 90-95.

¹¹⁴ As always, power is seductive. I have attempted in this paper to be both critical and constructive, yet at the same time to be careful not to fall into the trap of Vanguardism, for as Marx tells us in his third thesis on Feuerbach, "the educator . . . needs education."