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## Open Your Eyes: Teaching and Learning about Anti-Asian Racism and the Law in Canada

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*Recently, policymakers, institutional actors, and the public have made greater efforts towards being attentive to issues relating to anti-racism and discrimination, as well as equity, diversity, and inclusion more broadly, prompted in part by growing calls for reconciliation with Indigenous peoples and the increasing visibility of the Black Lives Matter movement. Yet, there has been a relative dearth of attention paid to the specific ways in which anti-Asian racism manifests and is maintained, particularly in the Canadian context. More than just being a relic of the past, anti-Asian racism is an ongoing phenomenon both within and beyond Canada's borders, as events in the wake of the COVID-19 pandemic have painfully demonstrated.*

*This article identifies some of the ways that laws and policies have contributed and continue to contribute to the oppression of Asian people in Canada. It considers the role of legal education in both perpetuating and addressing systemic racism, especially vis-à-vis Critical Race Theory and the recent backlash against it and argues that members of the legal profession—and by extension, the law schools that educate them—have a professional and moral responsibility to take seriously the historic and contemporary experiences of exclusion to which all marginalized groups have been subjected. In so doing, it emphasizes the importance of understanding various struggles for racial justice as profoundly interconnected and inseparable, but also distinct.*

*Récemment, les décideurs, les acteurs institutionnels et le public ont fait de plus grands efforts pour être attentifs aux questions liées à l'antiracisme et à la discrimination, ainsi qu'à l'équité, à la diversité et à l'inclusion de manière plus générale, en partie en raison des appels croissants à la réconciliation avec les peuples autochtones et de la visibilité accrue du mouvement Black Lives Matter. Pourtant, on a accordé relativement peu d'attention aux façons spécifiques dont le racisme anti-asiatique se manifeste et se maintient, en particulier dans le contexte canadien. Plus qu'une relique du passé, le racisme anti-asiatique est un phénomène permanent, tant à l'intérieur qu'à l'extérieur des frontières du Canada, comme l'ont douloureusement démontré les événements qui ont suivi la pandémie de COVID-19.*

*Cet article identifie certaines des façons dont les lois et les politiques ont contribué et continuent de contribuer à l'oppression des personnes asiatiques au Canada. Il examine le rôle de l'enseignement du droit dans la perpétuation du racisme systémique et dans la lutte contre celui-ci, en particulier en ce qui a trait à la théorie critique de la race et aux récentes réactions contre celle-ci. Il soutient que les membres de la profession juridique—et par extension, les facultés de droit qui les forment—ont la responsabilité professionnelle et morale de prendre au sérieux les expériences historiques et contemporaines d'exclusion auxquelles tous les groupes marginalisés ont été soumis. Ce faisant, il souligne l'importance de comprendre les diverses luttes pour la justice raciale comme étant profondément interconnectées et inséparables, mais aussi distinctes.*

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*Introduction*

- I. *Race and anti-Asian racism in Canada*
- II. *Anti-Asian racism in Canadian law*
- III. *Critical Race Theory and Asian race scholarship*
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*Introduction*

The COVID-19 pandemic has profoundly changed our lives. In addition to affecting the ways that we live, work, and socialize in the short-term, it has also created lasted long-term effects, the full extent of some of which remain to be seen (such as those related to mental health and wellbeing). The scope and scale of this pandemic has also illuminated significant inequalities in our society, including but not limited to those along the lines of race and ethnicity. In September 2020, the Federal Anti-Racism Secretariat and the Canadian Human Rights Commission convened a virtual event on the topic of “Confronting Racism and Addressing Human Rights in a Pandemic.” The summary report prepared following the event acknowledges that, in Canada, “[r]acialized communities and Indigenous peoples, as well as religious minorities, are among the most affected due to the enduring legacy and ongoing effects of colonialism, discrimination and systemic racism.”<sup>1</sup> This is by no means a coincidence, and instead serves to underscore the intimate connections between colonialism, racism, and inequality in this country.

Beyond the disproportionate rates of COVID-19 infection and mortality in racialized and lower-income communities,<sup>2</sup> there have been

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1. Canadian Human Rights Commission, *Conference Summary Report: “Confronting Racism and Addressing Human Rights in a Pandemic”* (Ottawa: CHRC, 16 September 2020) at 3, online (pdf): <[www.chrc-ccdp.gc.ca/sites/default/files/publication-pdfs/racism-in-a-pandemic-web-conference\\_en\\_v7.pdf](http://www.chrc-ccdp.gc.ca/sites/default/files/publication-pdfs/racism-in-a-pandemic-web-conference_en_v7.pdf)> [perma.cc/YQ6L-N9XH].

2. See e.g. Emily Thompson et al, “COVID-19: A Case for the Collection of Race Data in Canada and Abroad” (2021) 47:7/8 *Can Community Disease Report* 300, DOI: <10.14745/ccdr.v47i78a02>; Denio Lourenco, “How COVID-19 affects different communities based on race and ethnicity,” *CTV*

myriad downstream impacts and ancillary social consequences flowing from the pandemic that have affected vulnerable groups in negative ways. Notably, there has been a marked spike in the stigmatization of certain communities,<sup>3</sup> and wanton displays of anti-Asian racism. Cities across Canada have reported increased instances of Asian people being verbally harassed, coughed at, spat on, and physically attacked in public,<sup>4</sup> among other forms of discrimination and abuse, leading some to describe anti-Asian racism as a “shadow pandemic.”<sup>5</sup> Wearing a mask or other forms of personal protective equipment (PPE) is sometimes an aggravating factor,<sup>6</sup> although the simple fact of being Asian—or even appearing Asian<sup>7</sup>—is seemingly sufficient to warrant vitriol.<sup>8</sup>

The use of terms like “kung flu” and “Chinese virus” has only further fanned the flames of racial or ethnic discrimination and hatred, especially

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*News* (29 December 2020), online: <[www.ctvnews.ca/health/coronavirus/how-covid-19-affects-different-communities-based-on-race-and-ethnicity-1.5247269](http://www.ctvnews.ca/health/coronavirus/how-covid-19-affects-different-communities-based-on-race-and-ethnicity-1.5247269)> [perma.cc/UT82-976R].

3. See e.g. Rishi Nagar, “Stop stigmatizing South Asians for high infection rates,” *CBC News* (8 December 2020), online: <[www.cbc.ca/news/canada/calgary/road-ahead-calgary-south-asian-covid-stigma-1.5831196](http://www.cbc.ca/news/canada/calgary/road-ahead-calgary-south-asian-covid-stigma-1.5831196)> [perma.cc/Z37H-SGY6].

4. See e.g. Justin Kong et al., “A Year of Racist Attacks: Anti-Asian Racism Across Canada One Year Into the COVID-19 Pandemic” (2021), online (pdf): *Chinese Canadian National Council Toronto Chapter* <[mcusercontent.com/9fbfd2cf7b2a8256f770fc35c/files/35c9daca-3fd4-46f4-a883-c09b8c12bbca/covidracism\\_final\\_report.pdf](http://mcusercontent.com/9fbfd2cf7b2a8256f770fc35c/files/35c9daca-3fd4-46f4-a883-c09b8c12bbca/covidracism_final_report.pdf)> [perma.cc/EPD6-5KUZ]. See also Shanifa Nasser, “Racism ‘still very much alive’ in Canada as stereotypes around coronavirus spread, some warn,” *CBC News* (1 February 2020), online: <[www.cbc.ca/news/canada/toronto/racism-coronavirus-canada-1.5449023](http://www.cbc.ca/news/canada/toronto/racism-coronavirus-canada-1.5449023)> [perma.cc/C7ZW-XG8E]; Amanda Kline & Adam Kovac, “Asian Montrealers say they’ve increasingly been victims of racism during COVID-19 crisis,” *CTV News* (2 April 2020), online: <[montreal.ctvnews.ca/asian-montrealers-say-they-ve-increasingly-been-victims-of-racism-during-covid-19-crisis-1.4880671](http://montreal.ctvnews.ca/asian-montrealers-say-they-ve-increasingly-been-victims-of-racism-during-covid-19-crisis-1.4880671)> [perma.cc/HV5B-RFXK]; Mike Hager & Ian Bailey, “Hate crimes against Vancouver’s East Asian population surge for second straight month,” *The Globe and Mail* (1 May 2020), online: <[www.theglobeandmail.com/canada/british-columbia/article-hate-crimes-against-vancouver-east-asian-population-surge-for-second/](http://www.theglobeandmail.com/canada/british-columbia/article-hate-crimes-against-vancouver-east-asian-population-surge-for-second/)> [perma.cc/W2DK-8UGD].

5. Fiona Tinwei Lam, “The ‘Shadow Pandemic’ of Anti-Asian Racism,” *The Tyee* (7 May 2020), online: <[thetyee.ca/Analysis/2020/05/07/Shadow-Pandemic-Anti-Asian-Racism/](http://thetyee.ca/Analysis/2020/05/07/Shadow-Pandemic-Anti-Asian-Racism/)> [perma.cc/BNU7-483R].

6. See e.g. Kathy Le, “Asian people become targets of racist attacks during the pandemic,” *CTV News* (6 November 2020), online: <[www.ctvnews.ca/w5/asian-people-become-targets-of-racist-attacks-during-the-pandemic-1.5176366](http://www.ctvnews.ca/w5/asian-people-become-targets-of-racist-attacks-during-the-pandemic-1.5176366)> [perma.cc/C2CT-KBU7]; Shibao Guo & Yan Guo, “Combating Anti-Asian Racism and Xenophobia in Canada: Toward Pandemic Anti-Racism Education in Post-COVID-19” (2021) 3:2 *Beijing Intl Rev Education* 187 at 198-199, DOI: <10.1163/25902539-03020004>.

7. Guo & Guo, *supra* note 6 (“[a]s the COVID-19 pandemic drags on, there have also been an escalating series of attacks on people who look...Asian, including Indigenous peoples in Canada” at 199).

8. See e.g. Statistics Canada, *Perceptions of personal safety among population groups designated as visible minorities in Canada during the COVID-19 pandemic*, by Loanna Heideringer & Adam Cotter, Catalogue No 45280001 (Ottawa: Statistics Canada, 8 July 2020), online (pdf): <[www150.statcan.gc.ca/n1/en/pub/45-28-0001/2020001/article/00046-eng.pdf?st=LxrjyOq3](http://www150.statcan.gc.ca/n1/en/pub/45-28-0001/2020001/article/00046-eng.pdf?st=LxrjyOq3)> [perma.cc/3TPS-4AU2].

when invoked by powerful actors.<sup>9</sup> As Paula Larsson puts it, “historical incidents of discrimination clearly demonstrate how the language of disease is often encoded with underlying racial prejudice. ...language can easily spark discrimination in times of fear, with dire consequences.”<sup>10</sup> The confluence of recent events has painfully demonstrated that anti-Asian racism is an ongoing phenomenon, both within and beyond national borders.<sup>11</sup> Indeed, after the Atlanta shootings in March 2021 (where six of the victims were Asian American women), members of Canada’s Parliament unanimously passed a motion to “condemn the rise of anti-Asian racism and racist attacks throughout North America, and urge the government to take further action to tackle hate crimes.”<sup>12</sup> Likewise, in the United States (US), President Biden signed a bill in May 2021 intended to address the rise in hate crimes against Asian Americans since the outbreak of the COVID-19 pandemic.<sup>13</sup>

To what can these unfortunate contemporary developments be attributed? Looking to academic attention paid to the experiences of Asian people in North America can help shed light on some of the underlying causes of anti-Asian racism. Historians, sociologists, and scholars from other disciplines in the social sciences and humanities have contributed to a sizeable literature on this topic,<sup>14</sup> explicating, for example, the ideology

9. For example, former President Donald Trump referred to COVID-19 by terms like “kung flu” and “Chinese virus”: see e.g. Katie Rogers, Lara Jakes & Ana Swanson, “Trump Defends Using ‘Chinese Virus’ Label, Ignoring Growing Criticism,” *The New York Times* (18 March 2020), online: <www.nytimes.com/2020/03/18/us/politics/china-virus.html> [perma.cc/J72R-Q9VJ]; David Nakamura, “With ‘kung flu,’ Trump sparks backlash over racist language—and a rallying cry for supporters,” *The Washington Post* (24 June 2020), online: <www.washingtonpost.com/politics/with-kung-flu-trump-sparks-backlash-over-racist-language—and-a-rallying-cry-for-supporters/2020/06/24/485d151e-b620-11ea-aca5-ebb63d27e1ff\_story.html> [perma.cc/Y37A-AVAL].

10. Paula Larsson, “Anti-Asian racism during coronavirus: How the language of disease produces hate and violence,” *The Conversation* (31 March 2020), online: <theconversation.com/anti-asian-racism-during-coronavirus-how-the-language-of-disease-produces-hate-and-violence-134496> [perma.cc/D628-SSQJ].

11. See e.g. Suyin Haynes, “As Coronavirus Spreads, So Does Xenophobia and Anti-Asian Racism,” *TIME* (6 March 2020), online: <time.com/5797836/coronavirus-racism-stereotypes-attacks> [perma.cc/J9E5-YLY7].

12. *House of Commons Journals*, 43-2, No 73 (22 March 2021) at 658, online (pdf): <www.ourcommons.ca/Content/House/432/Journals/073/Journal073.PDF> [perma.cc/7ZT7-4E8G]. See also Hannah Jackson, “Canadian MPs vote to condemn Atlanta mass shooting, anti-Asian racism,” *Global News* (22 March 2021), online: <globalnews.ca/news/7712225/mps-condemn-anti-asian-hate/> [perma.cc/7H7B-YGXZ].

13. Darlene Superville, “Biden signs bill to counter spike in anti-Asian hate crime,” *CTV News* (20 May 2021), online: <www.ctvnews.ca/world/biden-signs-bill-to-counter-spike-in-anti-asian-hate-crime-1.5436906> [perma.cc/TFL3-SLMA].

14. See e.g. William Ging Wee Dere, *Being Chinese in Canada: The Struggle for Identity, Redress and Belonging* (Madeira Park, BC: Douglas and McIntyre, 2019); Lon Kurashige, *Two Faces of Exclusion: The Untold History of Anti-Asian Racism in the United States* (Chapel Hill, NC: University of North Carolina Press, 2016); Angelo N Ancheta, *Race, Rights, and the Asian American*

of the “yellow peril”<sup>15</sup> and the model minority myth,<sup>16</sup> and the ways in which they intertwine.<sup>17</sup> However, there has not been as much analysis of anti-Asian racism or the experiences of Asian people from the perspective of legal scholars.<sup>18</sup>

In this article, I seek to enrich the dialogue about race in Canada by focusing specifically on the intersection between anti-Asian racism and the law and what that intersection reveals about systemic racism as a whole. I start from the premise that systemic racism not only exists in Canada, but is also a fundamental part of the country’s history that remains imprinted in the fabric of Canada’s politics, society, and culture such that it continues to exert harmful effects. I do not claim to offer any neat solutions, nor to break new ground on this topic—the extant literature to which I decidedly cannot do justice in this piece. Instead, my modest contribution aspires to connect some of the dots between anti-Asian racism and the

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*Experience*, 2nd ed (New Brunswick, NJ: Rutgers University Press, 2006); W Peter Ward, *White Canada Forever: Popular Attitudes and Public Policy Toward Orientals in British Columbia*, 3rd ed (Montreal: McGill-Queen’s University Press, 2002); Peter S Li, *The Chinese in Canada*, 2nd ed (New York: Oxford University Press, 1998); Roger Daniels, *Asian America: Chinese and Japanese in the United States since 1850* (Seattle: University of Washington Press, 1988); Ian G Baird, “An Anti-Racism Methodology: The Native Sons and Daughters and Racism against Asians in Nanaimo, British Columbia, Canada” (2018) 62:3 *Can Geographer* 300, DOI: <10.1111/cag.12406>.

15. See e.g. “Canada’s ‘Yellow Peril’: it happened before, it could happen again,” *CBC Radio: The 180* (31 March 2017), online: <cbc.ca/radio/the180/the-cult-of-innovation-let-s-legalize-heroin-and-who-s-housing-the-middle-class-1.4048195/canada-s-yellow-peril-it-happened-before-it-could-happen-again-1.4048791> [perma.cc/8V5R-UF4X]; Erika Lee, “The ‘Yellow Peril’ and Asian Exclusion in the Americas” (2007) 76:4 *Pacific Historical Rev* 537, DOI: <10.1525/phr.2007.76.4.537>; Stanford M Lyman, “The ‘Yellow Peril’ Mystique: Origins and Vicissitudes of a Racist Discourse” (2000) 13:4 *Intl J Politics, Culture, & Society* 683, DOI: <10.1023/A:1022931309651>.

16. See e.g. Rosalind S Chou & Joe R Feagin, *The Myth of the Model Minority: Asian Americans Facing Racism* (New York: Routledge, 2016); Rob Ho, “Do All Asians Look Alike?: Asian Canadians as Model Minorities” (2014) 4:2 *Studies on Asia* 78, online: <studiesonasia.scholasticahq.com/article/14458-do-all-asians-look-alike-asian-canadians-as-model-minorities> [perma.cc/7CTN-AAC5]; Jessica K Padgett et al, “Too Asian? The Model Minority Stereotype in a Canadian Context” (2020) 11:4 *Asian American J Psychology* 223, DOI: <10.1037/aap0000203>.

17. See e.g. Natsu Taylor Saito, “Model Minority, Yellow Peril: Functions of ‘Foreignness’ in the Construction of Asian American Legal Identity” (1997) 4 *Asian LJ* 71, DOI: <10.15779/Z38FZ9V>; Doobo Shim, “From Yellow Peril through Model Minority to Renewed Yellow Peril” (1998) 22:4 *J Communication Inquiry* 385, DOI: <10.1177/0196859998022004004>; Yuko Kawai, “Stereotyping Asian Americans: The Dialectic of the Model Minority and the Yellow Peril” (2005) 16:2 *Howard J Communications* 109, DOI: <10.1080/10646170590948974>; Yao Li & Harvey L Nicholson Jr, “When ‘Model Minorities’ Become ‘Yellow Peril’ — Othering and the Racialization of Asian Americans in the COVID-19 Pandemic” (2021) 15:2 *Sociology Compass* e12849, DOI: <10.1111/soc4.12849>.

18. But see Rosa Kim & Katrina Lee, “Asian American Inclusion in Legal Academia” (31 March 2022), online: *Michigan State Law Review Forum* <www.michiganstatelawreview.org/vol-2021-2022/2022/3/28/Asian-american-inclusion-in-legal-academia> [perma.cc/GA54-6WTW] (a recent essay exploring the topic of the experience of Asian American faculty members in the legal academy). I am grateful to Anna Lund for bringing this piece to my attention.

importance of diversity and representation in legal education and in the legal profession more broadly. In stressing the reasons behind cultivating nuanced understandings of race and racism and explicitly tying these to effective, culturally competent, and trauma-informed lawyering, the hope is that this piece will help legal educators, whatever their own racial identity may be, to better prepare the next generations of law students to be engaged participants as opposed to complicit bystanders in issues involving systemic racism and discrimination.

Though there is important work that has been done in the area of Asian legal scholarship, the majority of it is American in focus, and more broadly, much of the influential legal academic scholarship on race and racism is couched in the particular context of the US.<sup>19</sup> As a consequence, it reflects a separate historical and sociopolitical reality than Canada's, where race relations have played out differently. For one, the Black/White paradigm dominates much of the racial discourse in the US, attributable to a complex blend of reasons, including the more overt legacy of slavery across the border.<sup>20</sup> Arguably, to the extent that systemic racism is acknowledged here, reconciliation with Indigenous, First Nations, and Métis Peoples has

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19. The Asian American Law Journal (AALJ) "is one of only two law journals in the United States focusing on Asian American communities in its publication agenda. Known as the Asian Law Journal until 2007, AALJ was first published in October 1993 in a joint publication with the California Law Review": "About This Journal" (last visited 27 September 2022), online: *Asian American Law Journal at Berkeley Law* <law.berkeley.edu/library/ir/aalj/about.php> [perma.cc/FU9R-VSL8]. For some representative pieces of Asian legal scholarship published in other journals, see e.g. Robert S Chang, "Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space" (1993) 81 Cal L Rev 1241, DOI: <10.2307/3480919>; Pat K Chew, "Asian Americans: The 'Reticent' Minority and Their Paradoxes" (1994) 36:1 Wm & Mary L Rev 1, online: <scholarship.law.wm.edu/wmlr/vol36/iss1/2/> [perma.cc/G8NQ-NT93]; Neil Gotanda, "Critical Legal Studies, Critical Race Theory and Asian American Studies" (1995) 21:1/2 Amerasia J 127, DOI: <10.17953/amer.21.1-2.2j46202k85658662>; Anthony S Chen, "Beyond Modernism and Postmodernism: Working Notes Towards an Asian American Legal Scholarship" (1997) 4:1 Asian LJ 97, DOI: <10.15779/Z38B29Z>; Harvey Gee, "Beyond Black and White: Selected Writings by Asian Americans within the Critical Race Theory Movement" (1999) 30:3 St Mary's LJ 759; Frank H Wu, "The Arrival of Asian Americans: An Agenda for Legal Scholarship" (2003) 10:1 Asian LJ 1, online <repository.uchastings.edu/faculty\_scholarship/1209> [perma.cc/9FRD-57ZQ]; Elbert Lin, "Identifying Asian America" (2004) 33:2 Southwestern U L Rev 217; Kris Song, "The Present Contours of Asian American Legal Scholarship: Its Themes, Objectives, and the Search for an Asian American Legal Perspective" (2004) 9:1 UCLA Asian Pac Am LJ 83.

20. See e.g. Chang, *supra* note 19 ("[m]ost discussions of race and the law focus on African Americans to the exclusion of non-African American racial minorities" at 1265); Mari Matsuda, "Planet Asian America" (2001) 8:1 Asian LJ 169 at 170-171 [Matsuda, "Planet Asian America"], DOI: <10.15779/Z38DW01>; Juan F Perea, "The Black/White Binary Paradigm of Race: The 'Normal Science' of American Racial Thought" (1997) 85:5 Cal L Rev 1213, DOI: <10.15779/Z38MF05>; Dorothy A Brown, "Moving Beyond the Black/White Paradigm: An Introduction" (2005) 12:1 Washington & Lee J Civ Rights & Soc Justice 1, online: <scholarlycommons.law.wlu.edu/crsj/vol12/iss1/3> [perma.cc/ANZ2-XFRW].



been a more central concern.<sup>21</sup> However, anti-Black racism is becoming an increasingly prominent part of conversations about equality in Canada, especially in light of the growing international visibility of the Black Lives Matter movement following the murder of George Floyd at the hands of a police officer in 2020.<sup>22</sup> Against this backdrop, racism against other groups is sometimes seen to not be “as bad,” and talking about anti-Asian racism in particular can be further complicated by the feeling that “it is inappropriate or even disloyal to highlight [Asian] marginality when others face greater needs and oppressions.”<sup>23</sup>

To be sure, efforts to tackle anti-Indigenous and anti-Black racism are to be lauded. The experiences of various racialized groups are distinct and significant, and the legacy of settler colonialism uniquely impacts the lives of Indigenous peoples in Canada in ways that must be acknowledged (namely, the large-scale violence sanctioned and enacted against them at the hands of the state). I am in no way claiming that different struggles for justice are to be ranked in some kind of priority order: oppression is not a contest. Rather, since the overarching logic of white supremacy lurks beneath all manifestations of racism,<sup>24</sup> more sophisticated understandings of anti-Asian racism can help reinforce other kinds of anti-racist efforts,

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21. Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, (Winnipeg: TRCC, 2015), online (pdf): <publications.gc.ca/collections/collection\_2015/trc/IR4-8-2015-eng.pdf> [perma.cc/YG8J-C6B3]. See also Vincent Wong, “Ethno-racial Legal Clinics and the Praxis of Critical Race Theory in Canada” (2020) 16:1 *JL & Equality* 63, online: <jps.library.utoronto.ca/index.php/utjle/article/view/32758> [perma.cc/X6XE-HHWZ] (“[a]lthough both the United States and Canada are ongoing settler colonial projects that persist through the ongoing taking of Indigenous land and the marginalization of Indigenous societies across Turtle Island, decolonization and resistance to settler colonialism have a more important role in Canadian critical race scholarship as compared to its American counterpart” at 68-69).

22. See e.g. Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Halifax: Fernwood, 2017); Eddy S Ng & Andrew Lam, “Black Lives Matter: On the Denial of Systemic Racism, White Liberals, and Polite Racism” (2020) 39:7 *Equality, Diversity & Inclusion* 729, DOI: <10.1108/EDI-09-2020-297>; Graham Slaughter & Mahima Singh, “Five charts that show what systemic racism looks like in Canada,” *CTV News* (4 June 2020), online: <www.ctvnews.ca/erkek/five-charts-that-show-what-systemic-racism-looks-like-in-canada-1.4970352> [perma.cc/CB48-834Z].

23. Margaret Chon, “On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences” (1995) 3:1 *UCLA Asian Pac Am LJ* 4 at 30, online: <digitalcommons.law.seattleu.edu/faculty/331/> [perma.cc/XV3W-AFM7].

24. Derald Wing Sue, “The Invisible Whiteness of Being: Whiteness, White Supremacy, White Privilege, and Racism” in Madonna G Constantine & Derald Wing Sue, eds, *Addressing Racism: Facilitating Cultural Competence in Mental Health and Educational Settings* (Hoboken, NJ: John Wiley & Sons, 2006) 15 (Wing Sue defines white supremacy as: “A doctrine of White racial superiority and non-White inferiority that justifies domination and prejudicial treatment of minority groups. It strongly conveys positive qualities to Whiteness and negative qualities to non-White groups” at 17). I am grateful to Fay Faraday for emphasizing to me the importance of this point.



instead of threatening or diluting them. As Mari Matsuda has put it, “all forms of oppression are relevant to the struggle for racial justice.”<sup>25</sup>

The remainder of this article proceeds as follows. I begin in Part I by discussing the concept of race and providing a brief summary of anti-Asian racism in Canada, with Part II delving deeper into the ties between race, racism, and the law. In Part III, I draw on the contributions of Critical Race Theory in general, and Asian race scholarship in particular, to help make sense of both historic and modern-day racism and the role of the law therein. Part IV focuses on the issue of representation and inclusion in the Canadian legal sphere, arguing that law schools have a professional and moral responsibility to take seriously the experiences of exclusion to which all marginalized groups have been subjected and to equip future legal professionals to effect change for the better. The final Part summarizes and concludes.

### I. *Race and Anti-Asian racism in Canada*

Though it defies easy definition, race as a system of classification is something with which most people become familiar very early on, and which has regularly been used to make overt and covert claims to power in our society. Race is commonly understood to be a social construct that is frequently used as a means of subordination.<sup>26</sup> This contrasts with an understanding of race as being a fixed, biological attribute that operates as an objective fact. According to law professor Ian Haney López, who specializes in race and racism, “[r]ace is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions.”<sup>27</sup> Thus, the question is less about what race *is* and more about what it *does*: “In short, race mediates every aspect of our lives.”<sup>28</sup>

At least facially, Canada is a country that celebrates diversity and multiculturalism. Canada’s approach to ethnic diversity has been described by former Chief Justice Beverley McLachlin as one not of “equality by homogeneity,” but rather as “a mosaic, an equality of recognition and respect—recognition of our differences, respect for our various traditions,

25. Matsuda, “Planet Asian America,” *supra* note 20 at 180.

26. See e.g. Canadian Heritage, *Building a Foundation for Change: Canada’s Anti-Racism Strategy 2019–2022*, Catalogue No CH37-4/29-2019E (Gatineau: Department of Canadian Heritage, 2019) at 23, online (pdf): <erkl.ca/content/dam/pch/documents/campaigns/anti-racism-engagement/ARS-Report-EN-2019-2022.pdf> [perma.cc/DJ4U-MJ2S].

27. Ian F Haney López, “The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice” (1994) 29 Harv CR-CL L Rev 1 at 7 [Haney López, “Social Construction”], online: <lawcat.berkeley.edu/record/1115043?ln=en> [perma.cc/2EVG-T87Y].

28. *Ibid* at 3.

and the innate dignity of every individual, regardless of race or ethnicity.”<sup>29</sup> Indeed, the *Canadian Multiculturalism Act* explicitly stipulates that

the Government of Canada recognizes the diversity of Canadians as regards race, national or ethnic origin, colour and religion as a fundamental characteristic of Canadian society and is committed to a policy of multiculturalism designed to preserve and enhance the multicultural heritage of Canadians while working to achieve the equality of all Canadians in the economic, social, cultural and political life of Canada.<sup>30</sup>

Equality rights are further entrenched in section 15 of the *Canadian Charter of Rights and Freedoms*,<sup>31</sup> as well as in provincial and territorial human rights codes.<sup>32</sup> On these bases and more, it is reasonable to see why, as legal scholar Carol Aylward has written, “most Canadians would deny the existence of widespread racism.”<sup>33</sup>

Yet there is a long legacy of racism in Canada, including anti-Asian racism.<sup>34</sup> When it comes to the latter, certain historic examples are often used as representative cases in point. The Chinese head tax is perhaps one of the best known,<sup>35</sup> as is the harsh treatment of the Chinese labourers who came to the country to work on the Canadian Pacific Railway in the 1800s,<sup>36</sup> and the internment of Japanese-Canadians during the Second World War.<sup>37</sup> However, an overreliance on these limited historic examples belies the reality that anti-Asian racism is far from a relic of the past,

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29. Rt Hon Beverley McLachlin, “Racism and the Law: The Canadian Experience” (2002) 1:1 JL & Equality 7 at 22.

30. *Canadian Multiculturalism Act*, RSC 1985, c 24 (4th Supp), Preamble, para 8.

31. *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

32. See e.g. *Human Rights Code*, RSO 1990, c H.19 (“[e]very person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability,” s 1).

33. Carol A Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood, 1999) at 14.

34. See e.g. Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900–1950* (Toronto: University of Toronto Press, 1999); Sanjeev S Anand, “Expressions of Racial Hatred and Racism in Canada: An Historical Perspective” (1998) 77:1/2 Can Bar Rev 181, online: <cbr.ca.org/index.php/cbr/article/view/3754> [perma.cc/VG4U-UZX7].

35. See e.g. Arlene Chan, *Righting Canada’s Wrongs: The Chinese Head Tax and Anti-Chinese Immigration Policies in the Twentieth Century* (Toronto: James Lorimer & Company, 2014) at 26–29, 44–47.

36. See e.g. *ibid* at 22–25.

37. See e.g. Pamela Hickman & Masako Fukawa, *Japanese Canadian Internment in the Second World War* (Toronto: James Lorimer & Company, 2011); Roy Miki, *Redress: Inside the Japanese Canadian Call for Justice* (Vancouver: Raincoast Books, 2004); Mary Anne Vallianatos, “Marginal Citizens: Interracial Intimacies and the Incarceration of Japanese Canadians, 1942–1949” (2021) 37:1 CJLS 49, DOI: <10.1017/cls.2021.18>.

and is relevant beyond narrow questions of borders, nation building, and citizenship. Like racism more generally, anti-Asian racism is deeply embedded in the institutions, ideologies, and individuals comprising our legal system and social structures. In fact, the tendency in Canada to “erase” the history of racism makes deconstructing the role racism plays in law a greater challenge in Canada than in the US,<sup>38</sup> as well as exacerbates the difficulties associated with making white supremacy and the attendant “societal racial curriculum...based on White superiority and minority inferiority” discernible to those who benefit from its existence.<sup>39</sup>

Despite the historic erasure of racism in Canada, recent years have seen policymakers, institutional actors, and the Canadian public all making greater efforts towards being attentive to issues relating to equity, diversity, and inclusion (EDI), discrimination, and anti-racism. For example, the federal government announced an Anti-Racism Strategy (ARS) in 2019, supported by a \$45 million investment.<sup>40</sup> The strategy “is guided by a vision of Canada where all Canadians benefit from equitable access to and participation in the economic, cultural, social and political spheres.”<sup>41</sup> Its three guiding principles are demonstrating federal leadership, empowering communities, and building awareness and changing attitudes.<sup>42</sup> To accomplish its goals, the strategy recognizes that “[w]e need to increase awareness of the historical roots of racism and discrimination, and their impacts on our communities and Indigenous Peoples.”<sup>43</sup>

In its first iteration, the ARS was criticized for its failure to mention anti-Asian racism<sup>44</sup>—an absence that feels particularly conspicuous in the aftermath of COVID-19. That deficiency was subsequently remedied, and in the current version of the ARS, anti-Asian racism in Canada is defined as:

[the] historical and ongoing discrimination, negative stereotyping, and injustice experienced by peoples of Asian descent, based on others’ assumptions about their ethnicity and nationality. Peoples of Asian descent are subjected to specific overt and subtle racist tropes and stereotypes at individual and systemic levels, which lead to their ongoing social, economic, political and cultural marginalization, disadvantage

38. Aylward, *supra* note 33 at 49.

39. Wing Sue, *supra* note 24 at 18.

40. Canadian Heritage, *supra* note 26 at 3.

41. *Ibid* at 4.

42. *Ibid* at 5.

43. *Ibid*.

44. See e.g. Ryan Patrick Jones, “Asian Canadians see flaws in federal anti-racism strategy,” *CBC News* (8 April 2021), online: <[www.cbc.ca/news/politics/anti-racism-strategy-asian-canadians-1.5977980](http://www.cbc.ca/news/politics/anti-racism-strategy-asian-canadians-1.5977980)> [perma.cc/4S8F-8Z69].

and unequal treatment. This includes perceptions of being a “Yellow Peril,” a “Perpetual Foreigner,” a “Model Minority,” “exotic,” or “mystic.” These stereotypes are rooted in Canada’s long history of racist and exclusionary laws, and often mask racism faced by peoples of Asian descent, while erasing their historical contributions to building Canada.

The term Asian encompasses a wide range of identities that the very term Asian can obscure. While all may experience being “otherized,” specific experiences of anti-Asian racism vary. Some are constantly being perceived to be a threat, some face gendered exotification and violence, some are more likely to be subjected to online hate and racist portrayals in the media, while others face Islamophobia and other forms of religion-based discrimination.<sup>45</sup>

Notably, the above definition, which was “co-developed with diverse Asian community leaders,”<sup>46</sup> recognizes the heterogeneity of Asian people, and the various forms in which anti-Asian racism can manifest. It also unequivocally acknowledges that pervasive stereotypes of Asian people “are rooted in Canada’s long history of racist and exclusionary laws, and often mask racism faced by peoples of Asian descent, while erasing their historical contributions to building Canada.”<sup>47</sup>

## II. *Anti-Asian racism in Canadian law*

Whether one looks to history or to the present, the relationship between race and the law is uniquely significant, because by virtue of its guise of neutrality, law can and has been used to legitimize otherwise racist policies.<sup>48</sup> Intentionally or otherwise, “the law serves not only to reflect but to solidify social prejudice, making law a prime instrument in the construction and reinforcement of racial subordination.”<sup>49</sup> Essentially, the law is a potent tool of exclusion. In virtually every area of law, it is possible to identify the effects of race and racism. Indeed, scholars have

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45. Canadian Heritage, *supra* note 26 at 21.

46. *Ibid* at fn 1.

47. *Ibid* at 21.

48. Aylward, *supra* note 33 at 12.

49. Haney López, “Social Construction,” *supra* note 27 at 3.

already traced these impacts in the context of constitutional law,<sup>50</sup> tax law,<sup>51</sup> immigration law,<sup>52</sup> and investment law,<sup>53</sup> among others.

Criminal law is an area in which differential treatment on the grounds of race is often apparent. For example, the 2019 Supreme Court of Canada (SCC) decision of *R v Le* dealt with a situation involving a young Asian male accused.<sup>54</sup> Mr. Le was gathered in the private backyard of a building complex in Toronto with four friends, all of whom were young, racialized men. The police entered the space without a warrant or consent and asked questions that led to Mr. Le fleeing the scene and ultimately being apprehended and searched. Mr. Le was arrested and criminal charges were laid when the police discovered a loaded firearm, illicit drugs, and cash on his person. Mr. Le invoked his constitutional right to be free from unreasonable search and seizure and from arbitrary detention in seeking the exclusion of this evidence at his trial.

At the SCC, a narrow 3-2 majority held that the apprehension of Mr. Le by police amounted to arbitrary detention such that his section 9 *Charter* rights were infringed, the evidence should be excluded under section 24(2) of the *Charter*, the convictions at the trial level set aside, and acquittals entered.<sup>55</sup> This holding, and the discussion of racial profiling therein,<sup>56</sup> aligns with the findings of a 2021 report examining public perceptions of and experiences with the Ontario criminal justice system, which revealed that “Black and Asian respondents evaluate the police more negatively than White respondents...perceive much higher levels of police bias...[and] are more likely to perceive bias in the criminal court system than White respondents.”<sup>57</sup> In the important recent conversations about anti-Black

50. See e.g. Michael C Davis, “Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values” (1998) 11 Harv Hum Rts J 109, online: <hdl.handle.net/10739/204> [perma.cc/6CWL-4BZV].

51. See e.g. Mylinh Uy, “Tax and Race: The Impact on Asian Americans” (2004) 11:1 Asian Pac Am LJ 117, DOI: <10.15779/Z38G00V>.

52. See e.g. Bruce Ryder, “Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884–1909” (1991) 29:3 Osgoode Hall LJ 619, online: <ssrn.com/abstract=1742076> [perma.cc/55CM-RV5V].

53. See e.g. Timothy Webster, “Why Does the United States Oppose Asian Investment?” (2017) 37:2 Nw J Intl L & Bus 213, online: <scholarlycommons.law.northwestern.edu/njilb/vol37/iss2/2> [perma.cc/N3BF-XSER].

54. *R v Le*, 2019 SCC 34.

55. *Ibid* at para 166.

56. *Ibid* at paras 72-106.

57. Scot Wortley, Akwasi Owusu-Bempah & Huibin Lin, “Race and Criminal Injustice: An examination of public perceptions of and experiences with the Ontario criminal justice system” (February 2021) at 6-7, online (pdf): *Toronto Metropolitan University*, <torontomu.ca/content/dam/law/documents/CABL\_Report\_Race\_and\_Criminal\_Injustice\_Feb\_10\_2021.pdf> [perma.cc/PR8S-5ZLT].

racism and discrimination in the criminal justice system,<sup>58</sup> an emphasis on the particularly high costs paid by Black and Indigenous communities does not have to be mutually exclusive with the point that criminal law affects all racialized groups in disparate ways, especially when discussions of culture are engaged.<sup>59</sup>

While some legally sanctioned forms of racism are direct and/or obvious, there are many others that are subtler. For example, discussing the 1997 case of *RDS v R*, Richelle Samuel notes that during oral arguments, Lamer CJ (as he then was) “referred to Chinese-Canadians as having a penchant for gambling.”<sup>60</sup> She goes on to point out the racism implicit in this statement:

[w]hile Lamer later asserted that he had no intention to offend, his remarks show that he bought into stereotypes of Chinese-Canadians on two levels. First, [his] comment captures the increasingly prevalent stereotype of the wealthy Chinese, and the corresponding notion that Chinese capital is ‘taking over Canada.’ Second, the remark embodies a backlash against Chinese capital in that the reference to gambling may be seen as negating the economic advancement of Chinese-Canadians. Psychoanalytic theory would suggest that Lamer’s comments were the result of repressed stereotypes that had ‘momentarily slipped past [his realm of consciousness].’<sup>61</sup>

Subsequently, the Chinese Canadian National Council (CCNC) and a consortium of other social justice organizations filed a formal complaint against Lamer CJ with the Canadian Judicial Council (CJC),<sup>62</sup> contending that “when judges begin to embrace racial stereotypes as facts about certain racialized communities, then serious questions must be raised about the

58. See e.g. *R v Morris*, 2021 ONCA 680; *R v Anderson*, 2021 NSCA 62.

59. See e.g. Sonia Lawrence, “Cultural (in)Sensitivity: The Dangers of a Simplistic Approach to Culture in the Courtroom” (2001) 13:1 CJWL 107, online: <ssrn.com/abstract=1599717> [perma.cc/4VSH-67EA] (arguing that “[w]hen faced with cultural questions, the legal system often produces distorted and questionable versions of the content of non-mainstream cultures. At the same time, it paints an equally distorted, but often more flattering picture, of the mainstream” at 111).

60. Richelle Samuel, “Legal Ethics and Moral Dilemmas: Strategizing around Race in the Provision of Client Service” (2001) 16 J L & Soc Pol’y 63 at 68, online: <digitalcommons.osgoode.yorku.ca/jlsp/vol16/iss1/3/> [perma.cc/C3EP-SN3W]. See also Constance Backhouse, “Turning the Tables on RDS: Racially Revealing Questions Asked by White Judges” (2021) 44:1 Dal LJ 181 at 188, [Backhouse, “Turning the Tables”], online: <digitalcommons.schulichlaw.dal.ca/dlj/vol44/iss1/9/> [perma.cc/7WMC-7648]; Sherene Razack, “R.D.S. v. Her Majesty the Queen: A Case About Home” (1998) 9:3 Const Forum 59 at 61, DOI: <10.2191/C9G66N>.

61. Samuel, *supra* note 60 at 68.

62. “Sample of complaints received during 1997–1998” (1 January 1997) at “Complaint 16,” online: *Canadian Judicial Council* <cjc-ccm.ca/en/resources-center/publications/sample-complaints-received-during-1997-1998> [perma.cc/LP2K-YGXV] [Canadian Judicial Council, “Sample of complaints”].

ability of our judiciary to deliver judgment in an even-handed manner, particularly when it comes to racial minority groups.”<sup>63</sup>

In 2002, the CCNC again filed a complaint to the CJC, this time against MacPherson J of the Ontario Court of Appeal. MacPherson J was accused of making racially insensitive comments about Chinese people in the course of an appeal of a class action lawsuit against the Canadian government, launched by descendants of Chinese immigrants who were subjected to a head tax.<sup>64</sup> Some of the impugned comments in that case included that “[p]aying the head tax is made worthwhile when someone can see a granddaughter playing first cello in the Toronto Symphony Orchestra, [m]any other immigrant groups suffered more than those who paid the head tax, [and] [t]he money from the head tax was spent on good causes.”<sup>65</sup> Avvy Go, who was a lawyer with the CCNC at the time (and is now herself a Justice of the Federal Court), noted that “the propagation of the ‘happy immigrant’ stereotype only harms efforts by historically marginalized groups for redress.”<sup>66</sup>

Both of the CCNC’s complaints were dismissed by the CJC. In the former instance, the CJC reasoned that “it was apparent from the context that the Chief Justice’s remarks were hypothetical in nature,”<sup>67</sup> and in the latter instance, it was emphasized that “[t]here was no intention on the judge’s part to offend or be insensitive to any individual or group.”<sup>68</sup> As these examples show, the evaluation of the impugned conduct took place not from the perspective of the racialized group, focusing on the harms claimed by the victims, but rather, based on the judge’s purportedly neutral intentions, and from within an “experiential gap”<sup>69</sup> between white judges and racialized groups as to the lived experience of racism. This outcome

63. Backhouse, “Turning the Tables,” *supra* note 60 at 190.

64. See e.g. “The Chinese Canadian National Council (CCNC) alleged that Justice James MacPherson of the Ontario Court of Appeal made inappropriate comments to counsel during the course of argument on an appeal” (1 January 2002), online: *Canadian Judicial Council* <cjc-ccm.ca/en/resources-center/publications/chinese-canadian-national-council-ccnc-alleged-justice-james> [perma.cc/ZJA5-8NM2] [CJC, “Justice James MacPherson”].

65. Kirk Makin, “Head-tax judge no stranger to controversy,” *The Globe and Mail* (19 September 2002), online: <www.theglobeandmail.com/news/national/head-tax-judge-no-stranger-to-controversy/article25305548/> [perma.cc/5ZCZ-ULGY].

66. Jeremy Luedi, “The long shadow of Canada’s Chinese head tax” (22 August 2019) *True North Far East*, online: <truenorthfareast.com/news/chinese-head-tax-canada-legacy>.

67. CJC, “Sample of complaints,” *supra* note 62.

68. CJC, “Justice James MacPherson,” *supra* note 64.

69. Backhouse, “Turning the Tables,” *supra* note 60 (“[w]hile insensitivity to racism is not an inevitable consequence, for most of us the experiential gap means that we are not well-equipped to assess racism claims. It is impossible to know from the available records whether the nine Supreme Court judges in the *RDS* case had any significant exposure to racialized communities, but we do know that these nine judges studied in mostly white educational institutions, they practised in predominantly white law firms and government offices, and they sat on all-white courts” at 195).



demonstrates how “Whiteness, White supremacy, and White privilege are three interlocking forces that disguise racism so it may allow White people to oppress and harm persons of color while maintaining their individual and collective advantage and innocence.”<sup>70</sup>

Unfortunately, when discrimination is not overt or explicit, manifesting instead as unconscious or implicit forms of bias,<sup>71</sup> including on the part of legal actors like judges, it becomes more difficult both to identify and to challenge. Further, each of the mechanisms of explicit bias, implicit bias, and structural forces are often mutually reinforcing, and “pose different threats to fairness everywhere, including the courtroom.”<sup>72</sup> Though aspirations of being so-called “colour-blind” is sometimes considered to be a precondition of treating others fairly, being more conscious of race, gender, and other social categories as a relevant consideration can actually help foreground the inevitable impacts that these variables do have in influencing the framing and the perception of the issues at hand.<sup>73</sup>

Beyond problematic judicial attitudes, negative perceptions of racialized persons can also come into play in jury trials, where members of the public act as the arbiters of justice. Prejudicial attitudes towards Asian males, rooted in stereotypes, have been raised as creating a risk of bias in jury members, particular in the context of charges involving youth crime and gang-related activity.<sup>74</sup> In the 1998 ruling on a voir dire in the case of *R v Cho*, where the Crown intended to call evidence linking the accused with gang-related activity, Romilly J of the Supreme Court of British Columbia explicitly acknowledged that, “[b]ased on the evidence adduced...it seems clear that anti-Chinese racism does exist in British Columbian society.”<sup>75</sup> Based on the “possibility of some jurors having racist biases which are so ingrained that they may not be able to put them aside at the direction of

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70. Wing Sue, *supra* note 24 at 15.

71. See e.g. Jerry Kang et al, “Implicit Bias in the Courtroom” (2012) 59:5 UCLA L Rev 1124, online: <law.ucla.edu/news/implicit-bias-courtroom> [perma.cc/P5SX-EFLT]; Sheri Lynn Johnson, “Unconscious Racism and the Criminal Law” (1988) 73:5 Cornell L Rev 1016, online: <scholarship.law.cornell.edu/facpub/870> [perma.cc/2VV2-TJFJ]; Anthony G Greenwald & Linda Hamilton Krieger, “Implicit Bias: Scientific Foundations” (2006) 94:4 Cal L Rev 945, DOI: <10.2307/20439056>; Christine Jolls & Cass R Sunstein, “The Law of Implicit Bias” (2006) 94:4 Cal L Rev 969, DOI: <10.2307/20439057>.

72. Kang et al, *supra* note 71 at 1134.

73. *Ibid* at 1184-1185.

74. *R v Cho* (1998), 41 WCB (2d) 222, 1998 CanLII 6357 (BCSC) (“[i]n this case, the Crown intends to call evidence linking the accused with gang related activity, culminating in this murder. Such evidence constitutes circumstances which would serve to reinforce stereotypes regarding Asian gangs which may be held by potential jurors. Existing stereotypes about Asian gangs would increase the likelihood that a juror’s prejudice would be reinforced by the evidence, and his or her verdict more likely affected by his or her bias” at para 27).

75. *Ibid* at para 15.

the trial judge,” Romilly J allowed the challenge for cause in that instance, and enumerated specific procedures to follow when selecting jurors in the case to reduce the potential for bias.<sup>76</sup>

In his ruling, Romilly J also cites the 1996 case of *R v Ho* decided at the Ontario Court of Justice, in which Watt J stated: “Racism exists. It is *not* confined to anti-black racism. ...racism is not unique or indigenous to anti-black racism. Racism exists in relation to persons of Asian/Chinese origin.”<sup>77</sup> However, Watt J went on to say that in the case of anti-Asian racism, “[i]t may not be quite so broadly based as in the case of anti-black but it is nonetheless extant.”<sup>78</sup> As reflected in this statement, the belief that anti-Asian racism is less insidious, less relevant in contemporary society, or otherwise less of a cause for concern is part of what makes it such a slippery target. Put differently, there is a specific kind of illegibility, erasure, and minimization that attaches to anti-Asian racism. Not only is anti-Asian racism alive and well today, but also, understanding it is an integral part of recognizing how “racialization, racism, and white privilege are constitutive elements of Canadian life, including the Canadian legal system.”<sup>79</sup> All forms of racialization and racism are linked, rendering discussion of Asian experiences “not only valuable but necessary.”<sup>80</sup>

In a ground-breaking article, Claire Jean Kim has compellingly highlighted how the racialization of Asian people in the US did not occur in a vacuum, but “relative to and through interaction with Whites and Blacks. As such, the respective racialization trajectories of these groups are profoundly interrelated.”<sup>81</sup> By recognizing the importance of all of our histories and experiences, and the unique insights that can be drawn from the differences therein, we can better “show that instances of racial discrimination are not aberrations but the consequences of our social structures, and...illustrate [the] ways in which our legal system supports those structures.”<sup>82</sup> Ultimately, critical race scholarship in general, regardless of its specific focus, has a vital role to play in scrutinizing and challenging the status quo.

76. *Ibid* at para 28. When empanelling a jury, a prosecutor or an accused is entitled to challenge the seating of a potential juror on the ground that a juror is not impartial: *Criminal Code*, RSC 1985, c C-46, s 638(1)(b).

77. *R v Ho*, 1996 CarswellOnt 5522 at para 47, [1996] OJ No 5344 (ON Ct J (Gen Div)).

78. *Ibid*.

79. Wong, *supra* note 21 at 70.

80. *Ibid*.

81. Claire Jean Kim, “The Racial Triangulation of Asian Americans” (1999) 27:1 Politics & Society 105 at 106, DOI: <10.1177/003232929902700100>.

82. Natsu Saito Jenga, “Finding our Voices, Teaching our Truth: Reflections on Legal Pedagogy and Asian American Identity” (1995) 3:1 UCLA Asian Pac Am LJ 81 at 87, online: <readingroom.law.gsu.edu/faculty\_pub/581> [perma.cc/EW3T-79YE].

### III. *Critical Race Theory and Asian race scholarship*

The foundations of Critical Race Theory (CRT) date back to the 1970s, when legal scholars like Derrick Bell at Harvard Law School began to explicate the connections between history, legal institutions, and the role of race and racism in society.<sup>83</sup> Though CRT is an academic project in many ways, it is one that was born of struggle, including “real issues and real needs in Asian American communities.”<sup>84</sup> Consequently, CRT is applicable not just to analyses of law, but also to analyses of areas like education<sup>85</sup> and public health:<sup>86</sup> domains that have direct, material consequences for people’s everyday lives and capacities for flourishing.

CRT is grounded in the claim that ideas about race and racial bias are a deeply rooted part of present-day reality (in North America, and elsewhere), and one that is far more entrenched than what classic legal discourse and society at large acknowledge.<sup>87</sup> Rather than being a problem limited to a couple of bad actors acting in isolation, racism is something that is codified and sustained at a much higher level. To this end, CRT also points to the limitations of the law and the “inadequacy of liberal solutions to racial injustice.”<sup>88</sup> Moreover, the pioneering work of scholars like Kimberlé Crenshaw on intersectionality has made clear that it is not race or ethnicity alone that determines someone’s relative advantages or disadvantages at any given point.<sup>89</sup> Rather, our identities (and the experiences or empowerment or disempowerment stemming from those identities) are negotiated through multiple and overlapping grounds, including gender, class, (dis)ability, age, sexuality, and so on.<sup>90</sup> Critical

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83. Derrick A Bell, *Race, Racism, and American Law* (Boston: Little, Brown & Company, 1973).

84. Mari Matsuda, “Mari Matsuda: Critical Race Theory is not Anti-Asian” (12 March 2021), online (blog): *Reappropriate* <reappropriate.co/2021/03/mari-matsuda-critical-race-theory-is-not-anti-asian/> [perma.cc/96TX-LVSJ] [Matsuda, “Critical Race Theory”].

85. See e.g. Marvin Lynn & Adrienne D Dixon, eds, *Handbook of Critical Race Theory in Education*, 2nd ed (New York: Routledge, 2021).

86. See e.g. Chandra L Ford & Collins O Airhihenbuwa, “Critical Race Theory, Race Equity, and Public Health: Toward Antiracism Praxis” (2010) 100:Suppl 1 *American J Public Health* S30, DOI: <10.2105/AJPH.2009.171058>.

87. See generally Khiara M Bridges, *Critical Race Theory: A Primer* (St Paul, MN: Foundation Press, 2019); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction*, 3rd ed (New York: New York University Press, 2017).

88. Lauren Michele Jackson, “The Void that Critical Race Theory was Created to Fill,” *The New Yorker* (27 July 2021), online: <newyorker.com/culture/cultural-comment/the-void-that-critical-race-theory-was-created-to-fill> [perma.cc/D54E-6VSN].

89. Kimberle Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) 1 *U Chicago Legal F* 139, online (pdf): <chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf> [perma.cc/GKP8-E37Z].

90. See e.g. Patricia Hill Collins & Sirma Bilge, *Intersectionality* (Cambridge, UK: Polity Press, 2016) (defining intersectionality as: “a way of understanding and analyzing the complexity in the

theorizing about race and racism is certainly a fundamental part of CRT, especially in relation to the law, but its scope can be interpreted quite broadly.

Once a relatively niche movement, CRT has received renewed attention as of late, with some contending that CRT marks some kind of radical, ideological crusade that should be banned from classrooms at all levels for its potential to foment discord,<sup>91</sup> and others calling for more critical race analysis as a social justice imperative.<sup>92</sup> However, CRT is not just about studying or indicting the injustices of the past or the present state of affairs, but also about enabling alternative ways to imagine a more equitable future. The ideologies, structures, and foundational tenets that animate our current legal system are not natural and inevitable, and CRT is one technique that can be used to expand the range of possibilities that seem within our grasp. Thus, while it interrogates the ways in which structural racism has fundamentally shaped laws, policies, and society,<sup>93</sup> what follows from that is mutable, in terms of intellectual or political commitments. As such, there are many ways that insights derived from CRT and other critical perspectives can be used to help create a more just legal system and society for all.

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world, in people, and in human experiences. The events and conditions of social and political life and the self can seldom be understood as shaped by one factor. They are generally shaped by many factors in diverse and mutually influencing ways. When it comes to social inequality, people's lives and the organization of power in a given society are better understood as being shaped not by a single axis of social division, be it race or gender or class, but by many axes that work together and influence each other. Intersectionality as an analytic tool gives people better access to the complexity of the world and of themselves" at 11).

91. See e.g. David Theo Goldberg, "The War on Critical Race Theory," *Boston Review* (7 May 2021), online: <bostonreview.net/race-politics/david-theo-goldberg-war-critical-race-theory> [perma.cc/RP5M-2ZYL]; Peter Greene, "Critical Race Theory Bans Are Expanding To Cover Broad Collection Of Issues," *Forbes* (29 September 2021), online: <forbes.com/sites/petergreene/2021/09/29/critical-race-theory-bans-are-expanding-to-cover-broad-collection-of-issues/?sh=751894dc5e5d> [perma.cc/D5L6-LATH].

92. See e.g. Doug Beazley, "Using critical race theory to form lawyers," *CBA National* (3 August 2021), online: <nationalmagazine.ca/en-ca/articles/the-practice/legal-education/2021/using-critical-race-theory-to-form-lawyers> [perma.cc/8YQY-37PY]; Melinda D Anderson, "'These are the facts': Black educators silenced from teaching America's racist past," *The Guardian* (14 September 2021), online: <theguardian.com/education/2021/sep/14/black-us-teachers-critical-race-theory-silenced> [perma.cc/SX9D-5L8H]; Erin O Crosby, "Opinion: Critical race theory and the danger of white comfort," *Stamford Advocate* (18 September 2021), online: <stamfordadvocate.com/opinion/article/Opinion-Critical-race-theory-and-the-danger-of-16468557.php> [perma.cc/Q6VC-M4DA]; Steve Raven, "Critical race theory's demonisation bodes ill for social justice research" (17 July 2021), online (blog): *Times Higher Education* <timeshighereducation.com/blog/critical-race-theorys-demonisation-bodes-ill-social-justice-research> [perma.cc/SD6C-LC75].

93. Janel George, "A Lesson on Critical Race Theory," *Human Rights Magazine* (11 January 2021), online: <americanbar.org/groups/crsj/publications/human\_rights\_magazine\_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/> [perma.cc/HK28-35DG].

Though CRT is often associated with Black scholars and activists, it is far from an exclusively Black domain. As Matsuda has recently written, “Asian Americans are at the center of CRT analysis and have been from the start.”<sup>94</sup> Not only were Asian, Latinx, and other voices a crucial part of the CRT origin story, but they have also influenced the development of more specialized offshoots, such as LatCrit<sup>95</sup> and TribalCrit.<sup>96</sup>

When it comes to Asian race scholarship in particular, it is American academics who are responsible for the majority of the existing work, though there is a small but growing number of publications applying CRT analyses to issues affecting Asian people in Canada.<sup>97</sup> As Asian CRT has revealed, the challenges facing Asian people in the US and Canada are complex, including the way in which the extraordinary diversity captured under the Asian umbrella itself is often flattened, presenting a distorted and essentialist picture of “the Asian experience” as though it were one singular thing.<sup>98</sup> Nevertheless, despite the historical differences between the way Asian Americans are situated with respect to other marginalized groups, “the commonality found in shared oppression can bring different disempowered groups together to participate in each others’ struggles.”<sup>99</sup> Calling attention to legal issues faced by Asian people in Canada and the US, then, can serve not only to highlight the needs of those particular communities, but also to transform and advance race relations more generally.

Though I do not have the space to provide a comprehensive overview here, Kris Song has consolidated a number of specific themes emerging from Asian American legal scholarship, such as the model minority myth, the persistence of Asian American discrimination and stereotypes, and the perspective of Asian Americans in affirmative action.<sup>100</sup> Notably, one of the themes identified is Asian American representation in legal institutions

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94. Matsuda, “Critical Race Theory,” *supra* note 84.

95. See e.g. Ian F Haney López, “Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory” (1997) 85:5 Cal L Rev 1143, DOI: <10.2307/3481058>; Enid Trucios-Haynes, “Why ‘Race Matters:’ LatCrit Theory and Latina/o Racial Identity” (2000) 12:1 Berkeley La Raza LJ 1, DOI: <10.15779/Z38VQ11>.

96. See e.g. Bryan McKinley Jones Brayboy, “Tribal Critical Race Theory: An Origin Story and Future Directions” in Marvin Lynn & Adrienne D Dixson, eds, *Handbook of Critical Race Theory in Education*, 1st ed (New York: Routledge, 2013) 88-100; LaWanda WM Ward, “A TribalCrit Sensibility Toward Critical Conscious Legal Literacy: Engaging ACPA’s Framework for Racial Justice and Decolonization” (2020) 61:6 J College Student Development 797, DOI: <10.1353/csd.2020.0076>.

97. See e.g. Hijin Park, “Racialized Women, the Law and the Violence of White Settler Colonialism” (2017) 25 Fem Leg Stud 267, DOI: <10.1007/s10691-017-9356-x>; Vallianatos, *supra* note 37; Wong, *supra* note 21.

98. See e.g. Song, *supra* note 19 at 98-99; Kim & Lee, *supra* note 18.

99. Chang, *supra* note 19 at 1249.

100. Song, *supra* note 19.

and law school faculty.<sup>101</sup> Song notes that, to the extent that they exist, many studies on the topic of Asian American representation in legal institutions and law school faculty “emphasize a disconnect between high-representation of Asian Americans in undergraduate schools and a non-correlating low-representation of Asian Americans in faculty positions or other executive positions.”<sup>102</sup> Hence, the gap between performance and the corresponding rewards or recognition in the legal realm, and race-based explanations for said gap, is something that has been on the radar of Asian CRT for decades.

#### IV. *Anti-racism and legal education*

Education can play a crucial role in anti-racist efforts,<sup>103</sup> as evidenced by recent research that looks at the proliferation of EDI strategies in Canadian universities.<sup>104</sup> Yet, as Merli Tamtik and Melissa Guenter observe, “[d]espite interest in and commitment to equity, diversity and inclusion, there continues to be considerable variations in whether and how institutions of higher learning define, understand, and respond to equity-related issues.”<sup>105</sup> Further, as Sara Ahmed has argued, the language and practices of “diversity” in higher education are not necessarily a cure-all, and when institutionalized, can in fact serve to obscure racism.<sup>106</sup>

Legal education is certainly no exception when it comes to the possibilities for addressing systemic racism therein. Though challenges related to definitions and quantification remain, law schools in Canada are increasingly creating and championing EDI-related initiatives. For example, the University of Toronto’s Faculty of Law contends that their vision “is a law school and legal profession that fully reflect the diversity of our society.”<sup>107</sup> Similarly, Canada’s newest law school, the Lincoln Alexander School of Law, counts “equity, diversity and inclusion” as one

101. *Ibid* at 92.

102. *Ibid*.

103. See e.g. Divya Anand & Laura M Hsu, “COVID-19 and Black Lives Matter: Examining Anti-Asian Racism and Anti-Blackness in US Education” (2020) 5:1 Intl J of Multidisciplinary Perspectives in Higher Education 190, DOI: <10.32674/jimphe.v5i1.2656>; Madonna G Constantine & Derald Wing Sue, eds, *Addressing Racism: Facilitating Cultural Competence in Mental Health and Educational Settings* (Hoboken, NJ: John Wiley & Sons, 2006); Guo & Guo, *supra* note 6.

104. Merli Tamtik & Melissa Guenter, “Policy Analysis of Equity, Diversity and Inclusion Strategies in Canadian Universities – How Far Have We Come?” (2019) 49:3 Can J Higher Education 41, DOI: <10.47678/cjhe.v49i3.188529>.

105. *Ibid* at 42.

106. Sara Ahmed, *On Being Included: Racism and Diversity in Institutional Life* (Durham, NC: Duke University Press, 2012).

107. “Inclusivity and Diversity at the Faculty of Law” (last visited 17 October 2022), online: *University of Toronto Faculty of Law* <law.utoronto.ca/about-law-school/inclusivity-and-diversity-faculty-law> [perma.cc/D6NN-MGKB].



of the “four foundational pillars” of the law school.<sup>108</sup> However, in order to move beyond vague and meaningless commitments, it is important to properly understand and acknowledge the various forms in which racism and discrimination manifests, including in legal education.

1. *Who law students and law professors are*

More than in many other disciplines, law has historically been the domain of a select few groups of people. Up until relatively recently, law students and law faculty in Canada and the US were disproportionately white men of a certain class and socio-economic status.<sup>109</sup> Though the composition of law student cohorts has become markedly less homogenous, this diversity has not necessarily translated to the upper echelons of power, prestige, or pay, and the legal profession continues to confront charges that it is exclusionary and classist.<sup>110</sup>

Just as partners at top law firms and justices of the highest courts are not demographically representative of society, neither are law professors. Based on one quantitative study from the US, the professoriate generally tends to come from highly educated families who grew up in wealthy, urban neighbourhoods.<sup>111</sup> Canadian research has also found that the

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108. “Our Pillars” (last visited 17 October 2022), online: *Lincoln Alexander School of Law* <torontomu.ca/law/about/our-pillars/> [perma.cc/DAV2-2FH5].

109. See e.g. Richard F Devlin, “Towards An/Other Legal Education: Some Critical and Tentative Proposals to Confront the Racism of Modern Legal Education” (1989) 38 UNBLJ 89 at 94-95, online: <digitalcommons.schulichlaw.dal.ca/scholarly\_works/448/> [perma.cc/45W7-L8X6]; Michelle J Anderson, “Legal Education Reform, Diversity, and Access to Justice” (2009) 61:4 Rutgers L Rev 1011 at 1011-1012, online: <academicworks.cuny.edu/cl\_pubs/170/> [perma.cc/35HW-AB53]; Nancy E Dowd, Kenneth B Nunn & Jane E Pendergast, “Diversity Matters: Race, Gender, and Ethnicity in Legal Education” (2003) 15:1 U Fla JL & Pub Pol’y 11 at 12, online: <scholarship.law.ufl.edu/facultypub/165> [perma.cc/A5F4-W9JN]; Cruz Reynoso & Cory Amron, “Diversity in Legal Education: A Broader View, a Deeper Commitment” (2002) 52:4 J Leg Educ 491 at 493-494, online: <jstor.org/stable/42898300> [perma.cc/883D-MN6A].

110. See e.g. Hassan Kanu, “‘Exclusionary and classist’: Why the legal profession is getting whiter,” *Reuters* (10 August 2021), online: <reuters.com/legal/legalindustry/exclusionary-classist-why-legal-profession-is-getting-whiter-2021-08-10/> [perma.cc/CK2E-SMAZ]; Hadiya Roderique, “Black on Bay Street: Hadiya Roderique had it all. But still could not fit in,” *The Globe and Mail* (4 November 2017), online: <theglobeandmail.com/news/toronto/hadiya-roderique-black-on-bay-street/article36823806/> [perma.cc/G7L7-5KFZ]; Christine Dobby, “Why are there still so few Black lawyers on Bay Street?,” *The Globe and Mail* (17 July 2020), online: <theglobeandmail.com/business/article-why-are-there-still-so-few-black-lawyers-on-bay-street/> [perma.cc/R5HH-TLN4]; Robyn Doolittle & Christine Dobby, “Female partners earned nearly 25 per cent less than their male colleagues at a major Toronto law firm, document shows,” *The Globe and Mail* (9 February 2021), online: <theglobeandmail.com/canada/article-female-partners-earn-less-than-male-colleagues-at-big-law-firm/> [perma.cc/J5ZL-LTYS]; Robyn Doolittle, “Wage gap between male, female equity partners at top law firm averages \$371,596,” *The Globe and Mail* (30 September 2021), online: <theglobeandmail.com/canada/article-wage-gap-between-male-female-equity-partners-at-top-law-firm-averages/> [perma.cc/NR29-B2BZ].

111. Allison Morgan et al, “Socioeconomic Roots of Academic Faculty” (2022) *Nature Human Behaviour*, DOI: <10.1038/s41562-022-01425-4>.



professional experiences of faculty members from working-class or lower-income backgrounds are more difficult than those of their more privileged colleagues.<sup>112</sup>

When it comes to race and ethnicity, there is no authoritative source of quantitative data available on the racial or ethnic identity of Canadian law professors, making accurate or comprehensive analysis challenging. Nevertheless, a crude visual inspection of the faculty composition at law schools indicates that Asian people, broadly construed (including East Asian, South Asian, and Southeast Asian), are few and far between.<sup>113</sup> To use just one subset as an example, there are roughly 20 East Asian law professors in full-time faculty roles across the country, with just under half of these being women. In total, this represents about three per cent of full-time faculty in Canadian common law programs. This is out of step not only with the racial makeup of law students,<sup>114</sup> but also with the racial makeup of Canadian society.

Based on 2016 Census data, 22.3 per cent of the total population of Canada identified as belonging to a visible minority group, and almost half (48.1 per cent) of the foreign-born population was born in Asia.<sup>115</sup> This number is expected to increase in the future, due in part to an increase in immigration.<sup>116</sup> The disparity between who Canadians are and who the legal professionals who educate, train, and serve them are is troubling, because “[w]ith whiteness—more precisely white settler colonialism—as the norm, i.e., the assumed, unstated, invisible measure of neutrality and objectivity, comes a profession being constructed to uphold it.”<sup>117</sup> To counter this inertia, there needs to be a demonstrable commitment to hiring

112. Timothy J Haney, “Factory to Faculty: Socioeconomic Difference and the Educational Experiences of University Professors” (2015) 52:2 *Can Rev Sociology* 160, DOI: <10.1111/cars.12069>; Bea Waterfield, Brenda L Beagan & Tameera Mohamed, “‘You Always Remain Slightly an Outsider’: Workplace Experiences of Academics from Working-Class or Impoverished Backgrounds” (2019) 56:3 *Can Rev Sociology* 368.

113. Data on file with author.

114. Comprehensive data on the demographics of law student admissions are not available, but some schools do offer select information in the form of class profiles: see e.g. “Class Profile” (last visited 18 October 2022), online: *Queen’s Law* <law.queensu.ca/programs/jd/class-stats> [perma.cc/8DXA-8L9J]; “Class Profiles” (last visited 18 October 2022), online: *Western Law* <law.uwo.ca/future\_students/jd\_admissions/class\_profiles.html> [perma.cc/Z4RC-REU5]; “Student Diversity” (last visited 18 October 2022) online: *Windsor Law* <uwindsor.ca/law/1089/diversity> [perma.cc/42Y8-GLD9].

115. Statistics Canada, “Immigration and ethnocultural diversity: Key results from the 2016 Census,” *The Daily* (25 October 2017), online: <www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025b-eng.htm> [perma.cc/2QM5-WU9Y].

116. *Ibid.*

117. Eduardo RC Capulong, Andrew King-Ries & Monte Mills, “Antiracism, Reflection, and Professional Identity” (2021) 18 *Hastings Race & Poverty LJ* 3 at 14-15, online: <ssrn.com/abstract=3726328> [perma.cc/DW5C-ZWWG].

faculty members who are not only more diverse, but also prepared to bring critical reflections on white settler colonialism and white supremacy into their teaching, scholarship, and contributions to service. Indeed, it stands to reason that the paucity of Asian perspectives in Canadian legal scholarship is attributable, in part, to the lack of Asian Canadian legal scholars.

It is important to note that I am not making the claim that there is some essential connection between quality of teaching or scholarship and any other variable, such as race, gender, class, sexuality, (dis)ability, or so on. White, cisgender, able-bodied men and women can and do make excellent law professors. Yet, the vast and frequently invisible privileges afforded by virtue of race, gender, class, ability, and so on can also make it difficult to meaningfully identify and work through the nuanced ways in which inequality and injustice can manifest, whether at the scale of the classroom, the wider law school, or within society.

A growing body of research demonstrates that representation matters a great deal in education, as in other areas.<sup>118</sup> When it comes to diversity among the law school student body, Cruz Reynoso and Cory Amron explain that, among the positive impacts of diversity on the educational experience, “[a] student’s exposure in law school to classmates with a variety of experiences and perspectives develops her cultural competence and intellectual dexterity, qualities vital to graduates entering our fast-changing and increasingly diverse profession and society.”<sup>119</sup> However, as previously mentioned, diversity is not necessarily an unqualified good in and of itself, because “despite efforts to make legal education and the profession more representative, minorities...often recount experiences of marginalization in law school.”<sup>120</sup>

Speaking to these experiences of marginalization, Reynoso and Amron note that, based on one study conducted by the American Bar Association, “women, and particularly women of color, are less likely to participate in the classroom and are more likely to report feeling isolated or alienated, even by the language and culture of the law itself.”<sup>121</sup> To make matters worse, “[w]hen women do participate...they are less often recognized for their contributions, and the comments are more likely to be devalued.”<sup>122</sup>

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118. See e.g. Seth Gershenson, Michael Hansen & Constance A Lindsay, *Teacher Diversity and Student Success: Why Racial Representation Matters in the Classroom* (Cambridge, MA: Harvard Education Press, 2021).

119. Reynoso & Amron, *supra* note 109 at 498.

120. Faisal Bhabha, “Towards a Pedagogy of Diversity in Legal Education” (2014) 52:1 Osgoode Hall LJ 59 at 64, online: <digitalcommons.osgoode.yorku.ca/ohlj/vol52/iss1/2> [perma.cc/AJ4X-V34V].

121. Reynoso & Amron, *supra* note 109 at 496.

122. *Ibid.*

Another study corroborates the fact that “a significant differential in experience, comfort, and challenge exists for those who are latecomers and outsiders to legal education, especially women and people of color.”<sup>123</sup>

Fortunately, there are measures that can mitigate the discomfort and alienation experienced by students who are marginalized on one or more grounds. Both survey and observational findings support the conclusion that law students “seem to be responding differently to teaching along lines of gender, race, and class.”<sup>124</sup> Elizabeth Mertz, Wamucii Njogu and Susan Gooding discovered “that students of color participated more in classrooms with teachers of color and in several of the classes in which there was a larger percentage or cohort of minority students.”<sup>125</sup> Thus, greater representation in the composition of law faculties can generate meaningful qualitative benefits over and above the superficial quantitative ones.

Additionally, minority faculty members serve as important role models, confirming to law students who are part of marginalized groups “that they can be effective lawyers, can succeed, and do belong in the legal profession.”<sup>126</sup> That being said, there are downsides associated with the expectation that one will act as a role model to minority students.<sup>127</sup> With heightened (or at the very least, different) expectations comes a greater degree of scrutiny. For example, it is a well-documented fact that women professors—particularly racialized women professors—tend to fare worse in student evaluations of teaching.<sup>128</sup> Racialized women are not afforded as much benefit of the doubt by students, fellow faculty members, and

123. Dowd, Nunn & Pendergast, *supra* note 109 at 16.

124. Elizabeth Mertz, Wamucii Njogu & Susan Gooding, “What Difference Does Difference Make? The Challenge for Legal Education” (1998) 48:1 J Leg Educ 1 at 32, online: <jstor.org/stable/42893534> [perma.cc/9G7P-GSLV].

125. *Ibid* at 3.

126. Kevin R Johnson, “The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective” (2011) 96:5 Iowa L Rev 1549 at 1557, online: <researchgate.net/publication/228212599\_The\_Importance\_of\_Student\_and\_Faculty\_Diversity\_at\_Law\_Schools\_One\_Deans\_Perspective> [perma.cc/UB72-YVEM].

127. See e.g. Anita L Allen, “On Being a Role Model” (1990) 6 Berkeley Women’s LJ 22, online: <scholarship.law.upenn.edu/faculty\_scholarship/613> [perma.cc/FD98-RU9X].

128. See e.g. Meera E Deo, “A Better Tenure Battle: Fighting Bias in Teaching Evaluations” (2015) 31:1 Colum J Gender & L 7, DOI: <10.7916/cjgl.v31i1.2739> (focusing specifically on teaching evaluations in law faculties); Friederike Mengel, Jan Sauermann & Ulf Zölitz, “Gender Bias in Teaching Evaluations” (2019) 17:2 J European Economic Assoc 535, DOI: <10.1093/jeea/jvx057> (drawing on a dataset of 19,952 student evaluations and finding that women, particularly junior faculty members, receive systematically lower teaching evaluations than their male colleagues); Kerry Chávez & Kristina MW Mitchell, “Exploring Bias in Student Evaluations: Gender, Race, and Ethnicity” (2020) 53:2 PS: Political Science & Politics 270, DOI: <10.1017/S1049096519001744> (observing that instructors who are women and persons of colour receive lower scores on student evaluations than white males).

administrators alike, and the opportunities to stumble are manifold.<sup>129</sup> More generally, people of colour often experience an “emotional tax” at work, reporting that they anticipate and consciously prepare for potential bias or discrimination in a range of settings, with women of colour being more likely to feel this way than men “because they expect both gender and racial bias.”<sup>130</sup> Both in the workplace and beyond, Asian women experience particularized forms of violence and harassment by virtue of the intersection of their race and gender.<sup>131</sup> Hence, racialized women professors carry the dual burden of different expectations and different outcomes, and should not be expected to bear the entirety of the weight of the work necessary to address these kinds of disparities.<sup>132</sup> Rather, attention must be paid to longstanding structural barriers and how to dismantle them if the transformative possibilities of true EDI in legal education are to be effectively realized.

## 2. *What law students learn and what law professors teach*

Because higher education remains out of reach for many, the demographics of post-secondary institutions can be somewhat skewed. However, educational institutions can also be seen as microcosms of larger society to the extent that they both reflect and shape social, political, and economic beliefs, patterns, and experiences. As a result, schools can be significant sites of racism.<sup>133</sup>

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129. See e.g. Gabriella Gutiérrez y Muhs et al, eds, *Presumed Incompetent: The Intersections of Race and Class for Women in Academia* (Boulder, CO: University Press of Colorado, 2012); Yolanda Flores Niemann, Gabriella Gutiérrez y Muhs & Carmen G González, eds, *Presumed Incompetent II: Race, Class, Power, and Resistance of Women in Academia* (Louisville, CO: Utah State University Press, 2020).

130. Dnika J Travis & Jennifer Thorpe-Moscon, “Day-to-Day Experiences of Emotional Tax Among Women and Men of Color in the Workplace” (2018) at 10, online (pdf): *Catalyst* <catalyst.org/wp-content/uploads/2019/02/emotionaltax.pdf> [perma.cc/PZ7X-RBEV].

131. See e.g. The Learning Network at the Centre for Research & Education on Violence Against Women & Children in collaboration with Avvy Go & Jiyoung Lee-An, “Examining the Intersections of Anti-Asian Racism and Gender-Based Violence in Canada” (July 2021), online (pdf): *Vaw Learning Network* <vawlearningnetwork.ca/our-work/backgrounders/examining\_the\_intersections\_of\_antiasian\_racism\_and\_genderbased\_violence\_in\_canada\_/Examining-the-Intersections-of-Anti-Asian-Racism-and-Gender-Based-Violence-in-Canada.pdf> [perma.cc/8UD4-YDJR]; Sumi K Cho, “Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong” (1997) 1:1 J Gender Race & Just 177.

132. For more on the issue of academic staff members in equity-deserving groups facing increased workloads, see Rita Kaur Dhamoon, “Racism as a Workload and Bargaining Issue” (2020) 14:1 *Socialist Studies*.

133. See e.g. Lindsay Perez Huber, Robin N Johnson & Rita Kohli, “Naming Racism: A Conceptual Look at Internalized Racism in U.S. Schools” (2006) 26 *Chicana/o-Latina/o L Rev* 183; Devlin, *supra* note 109; Elizabeth Adjin-Tettey & Maneesha Deckha, “Promises and Challenges of Achieving Racial Equality in Legal Education in Canada” (2010) *Can Leg Education Annual Rev* 171, online: <hdl.handle.net/1828/5880> [perma.cc/5Q85-LE8W].

Law schools are, in some ways, a particularly interesting case study in this respect because of the fairly standardized nature of what is taught and how: “[w]hile the face of many law faculties has slowly begun to change, the substance remains largely the same.”<sup>134</sup> Though clinical and experiential learning opportunities are frequently touted as being important sites for learning skills not taught in the mainstream curriculum (including those relating to social justice),<sup>135</sup> these types of programs often face challenges such as “[f]unding, lack of pedagogical coherence and marginalized status when compared with other more highly regarded models.”<sup>136</sup> Meanwhile, across the country, all law students generally undertake the same first-year coursework in core subjects like contracts, torts, constitutional law, and criminal law, and often, in ways that “leav[e] the relationship between law and relations of power hidden or unacknowledged.”<sup>137</sup> Beyond key omissions when it comes to the substantive material that is taught, this kind of race-neutral approach obscures the reality that “[r]ace enters the legal academic setting through racialized facts, history, and classroom dynamics. ... [R]ace is endemic to all cases.”<sup>138</sup>

It would be an error, of course, to take what is as what will always be. In Canada, as in the US, there has been a heated debate simmering over the past few decades about the law school curriculum. On one hand, a staunchly conservative faction laments developments like the proliferation of “law and” courses, which are seen to reflect an inappropriate centring of social justice,<sup>139</sup> and urges a recommitment to so-called “black letter

134. Brenna Bhandar, “Always on the Defence: The Myth of Universality and the Persistence of Privilege in Legal Education” (2002) 14:2 CJWL 341 at 351.

135. See e.g. Lucie E White, “The Transformative Potential of Clinical Legal Education” (1997) 35:3/4 Osgoode Hall LJ 603, online: <digitalcommons.osgoode.yorku.ca/ohlj/vol35/iss3/13/> [perma.cc/D4TT-SXKW]; Shin Imai, “A Counter-pedagogy for Social Justice: Core Skills for Community Lawyering” (2002) 9:1 Clinical L Rev 195, online: <digitalcommons.osgoode.yorku.ca/scholarly\_works/452/> [perma.cc/6BPZ-NCPY]; Cynthia Pay, “Teaching Cultural Competency in Legal Clinics” (2014) 23 JL & Soc Pol’y 188, online: <digitalcommons.osgoode.yorku.ca/jlsp/vol23/iss1/12> [perma.cc/S9KQ-ZBCG]; Sarah Buhler, “‘I Am Not a Caped Crusader’: Clinical Legal Education and Professional Identity Formation” (2016) 49:1 UBC L Rev 105; Patricia Barkaskas & Sarah Buhler, “Beyond Reconciliation: Decolonizing Clinical Legal Education” (2017) 26 JL & Soc Pol’y 1, online: <digitalcommons.osgoode.yorku.ca/jlsp/vol26/iss1/1/> [perma.cc/4KWZ-W9DB].

136. Gemma Smyth, Samantha Hale & Neil Gold, “Clinical and Experiential Learning in Canadian Law Schools: Current Perspectives” (2018) 95:1 Can Bar Rev 151 at 155, online: <scholar.uwindsor.ca/lawpub/49/> [perma.cc/FQU2-PANK]. For more on critiques of clinical legal education in Canada, see Sarah Buhler, “Clinical Legal Education in Canada: A Survey of the Scholarship” (2015) 7 Can Leg Education Annual Rev 1, online: <canlii.ca/t/7jhm> [perma.cc/LS7N-VZQP].

137. Bhandar, *supra* note 134 at 350.

138. Erin C Lain, “Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment” (2018) 67:3 J Leg Educ 780 at 782, online: <jstor.org/stable/26890967> [perma.cc/9WQV-TU7K].

139. See e.g. Christie Blatchford, “Christie Blatchford: The wrong kind of justice warriors at Canada’s law schools,” *National Post* (13 March 2018), online: <nationalpost.com/opinion/christie-blatchford-

law.” This line of thinking parallels similar developments within the legal profession, as exemplified by the StopSOP<sup>140</sup> (and more recently, FullStop<sup>141</sup>) movements initiated by a group of benchers of the Law Society of Ontario.

Concurrently, there are mounting calls for change in the way things have conventionally been done, especially insofar as the greased groove tends to favour the already privileged.<sup>142</sup> In terms of how the law is presented to students, Professors Lisa Kerr and Lisa Kelly advance the claim that “[c]alls for a return to legal formalism—a legal education stripped of politics—are themselves deeply political.”<sup>143</sup> Likewise, Professor Brenna Bhandar has argued that “[t]o teach law as though it is wholly constituted by universal, objective, rational principles is to deny the histories and experiences of [students who do not necessarily view and experience the law as universal, objective, or rational].”<sup>144</sup> Though it remains open for law professors to approach their pedagogy in a manner that is bleached of context, it must be recognized that this too, is an ideological choice, not just some neutral or apolitical default.

As the people who teach and train future lawyers, it is incumbent upon legal educators to at least try to help ensure that students are equipped to serve a range of different populations effectively and with sensitivity (including to trauma),<sup>145</sup> especially those who have traditionally been

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the-wrong-kind-of-justice-warriors-at-canadas-law-schools> [perma.cc/S9N6-3DS6]; Bruce Pardy, “The social justice revolution has taken the law schools. This won’t end well,” *National Post* (27 February 2018), online: <nationalpost.com/opinion/the-social-justice-revolution-has-taken-the-law-schools-this-wont-end-well> [perma.cc/PK7T-A85R].

140. StopSOP (last visited 19 October 2022), online: <stopsop.ca/> [perma.cc/WQ7V-AY5M]. For a full discussion of the StopSOP controversy, see Joshua Sealy-Harrington, “Twelve Angry (White) Men: The Constitutionality of the Statement of Principles” (2020) 51:1 *Ottawa L Rev* 195, online: <canlii.ca/t/srk2> [perma.cc/X5YE-FYJ8].

141. A number of associations representing equity-deserving groups put out a joint statement condemning the divisive messaging of FullStop: “Joint Statement from SABA Toronto, FACL, CABL and CMLA - #FullStop Movement at Law Society of Ontario” (16 April 2021), online (pdf): *Canadian Association of Black Lawyers* <cabl.ca/wp-content/uploads/2021/04/Joint-Statement-on-Full-Stop-April-16.pdf>.

142. Here, it is important to note that individual students and faculty members, law schools, professional regulatory bodies, and institutions are working in the context of significant systemic limitations that make it especially difficult to effect (or can even actively disincentivize) transformative change, including tuition costs and cutbacks to funding for education.

143. Lisa Kerr & Lisa Kelly, “Yes, law schools must be political,” *The Globe and Mail* (17 March 2018), online: <theglobeandmail.com/opinion/article-yes-law-schools-must-be-political/> [perma.cc/H6CM-FXEW].

144. Bhandar, *supra* note 134 at 350.

145. For more about the importance of trauma-informed lawyering, see e.g. Gemma Smyth, Dusty Johnstone & Jillian Rogin, “Trauma-Informed Lawyering in the Student Legal Clinic Setting: Increasing Competence in Trauma Informed Practice” (2021) 28:1 *Intl J Clinical Leg Education* 149, DOI: <10.19164/ijcle.v28i1.1130>; Sarah Katz, “The Trauma-Informed Law Classroom: Incorporating



underserved by the legal community. In an increasingly diverse society, this is an imperative that speaks not only to social justice, but also to the realities of legal practice and the professional and ethical responsibilities that lawyers have by virtue of the privileged position and relative power that they hold in society.<sup>146</sup>

Though the specific ideals of legal “professionalism,” in their current iteration, have themselves been problematized,<sup>147</sup> it is fairly uncontroversial to expect that lawyers should be subject to heightened expectations when it comes to their professional conduct. These expectations are codified in the form of rules of professional conduct. In addition to the Federation of Law Societies of Canada’s *Model Code of Professional Conduct*,<sup>148</sup> which is a national initiative, the rules of professional conduct of nearly every provincial regulatory body governing the legal profession in Canada can be interpreted to include a responsibility to advance the interests of equity-deserving groups. Taking the Law Society of Ontario’s *Rules of Professional Conduct* as an example, the commentary for Rule 2.1-1, relating to integrity, states that a lawyer has “a special responsibility to recognize the diversity of the Ontario community, to *protect the dignity of individuals, and to respect human rights laws in force in Ontario*.”<sup>149</sup>

More narrowly, Rule 5.6-1 holds that “[a] lawyer shall encourage public respect for and try to improve the administration of justice.”<sup>150</sup> The commentary that follows elaborates that “[t]he admission to and continuance in the practice of law implies on the part of a lawyer a basic commitment to the concept of equal justice for all within an open,

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Principles of Trauma-Informed Practice into the Pandemic Age Law School Classroom” (2020) 25:1 UC Davis Soc Justice L Rev 17, online: <ssrn.com/abstract=3810982> [perma.cc/3H3Y-A54R]; Florence Hwang, “Justice system needs more trauma-informed training, says Métis lawyer,” *CBC News* (9 December 2021), online: <cbc.ca/news/canada/saskatchewan/justice-system-needs-more-trauma-informed-training-says-m%C3%A9tis-lawyer-1.6276829> [perma.cc/8VLR-RW3H]; Aidan Macnab, “Trauma-informed approach necessary in every legal practice area, says Myrna McCallum,” *Law Times* (5 May 2021), online: <lawtimesnews.com/resources/legal-education/trauma-informed-approach-necessary-in-every-legal-practice-area-says-myrna-mccallum/355698> [perma.cc/N4XP-P4XC].

146. Bhabha, *supra* note 120 at 68-69.

147. Constance Backhouse, “Gender and Race in the Construction of ‘Legal Professionalism’: Historical Perspectives” in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) 126-149; Leah Goodridge, “Professionalism as a Racial Construct” (2022) 69 UCLA L Rev Discourse (Law Meets World) 38, online: <uclalawreview.org/professionalism-as-a-racial-construct> [perma.cc/4G63-Z2ZH].

148. “Model Code of Professional Conduct” (last modified 19 October 2019), online (pdf): *Federation of Law Societies of Canada* <flsc-s3-storage-pub.s3.ca-central-1.amazonaws.com/Model-Code-October-2019.pdf> [perma.cc/ZA2S-V4UR].

149. Law Society of Ontario, *Rules of Professional Conduct*, Rule 2.1-1, Commentary 4.1 (emphasis added).

150. *Ibid.*, Rule 5.6-1.



ordered, and impartial system.”<sup>151</sup> Therefore, some have contended that legal professionals not only have a negative duty to avoid discriminating against others, but also that “professionalism requires a commitment to the lawyer’s role—as advocate, court officer, and public citizen responsible for the quality of justice—as champion of racial justice and equality.”<sup>152</sup>

Unfortunately, being a champion of justice and equality is easier said than done, particularly given the empirical and anecdotal evidence revealing that systemic racism remains an ongoing and pervasive problem within the legal profession.<sup>153</sup> The concept of race-conscious or (multi) culturally competent lawyering seeks to ameliorate or blunt the edges of racial bias (and inversely, racial privilege) by asking legal professionals to face “discomforting truths about [themselves] and our society, especially for those...who enjoy the privileges of the dominant culture.”<sup>154</sup> As a precondition to this work, Eduardo Capulong, Andrew King-Ries, and Monty Mills explain that “[c]ompetent race-conscious lawyering requires a recognition of the history, social construction, intersectionality, and fluidity of race and racism (and for that matter the fluidity of identity). Competence also requires sensitivity to how these issues manifest in the present-day.”<sup>155</sup> Because developing racial and cultural competencies is not a straightforward endeavour, especially for those who have benefited from racial or cultural privilege, we cannot expect that law students will be willing or able to develop them on their own. Accordingly, the law school is the ideal site for furnishing students with the necessary tools to undertake “the individual, personal, and difficult process of confronting one’s own racial identity and how it’s been shaped by a racist system.”<sup>156</sup>

Even in the absence of a clear roadmap for educators grappling with this kind of work, there are several key starting points that can be teased out. For one, there is arguably a positive responsibility upon law professors to teach students about the roles that race and racism have played and continue to play in upholding institutions of power. Put differently, “the necessary starting point for any...struggle towards a critical, transformative pedagogy is the acknowledgment that racism and interlocking forms of

151. *Ibid*, Commentary 2.

152. Capulong, King-Ries & Mills, *supra* note 1170 at 22.

153. See e.g. “Ontario lawyers to combat systemic discrimination in profession,” *CBC News* (2 December 2016), online: <[cbc.ca/news/canada/toronto/ontario-lawyers-to-combat-systemic-racism-in-profession-1.3879602](http://cbc.ca/news/canada/toronto/ontario-lawyers-to-combat-systemic-racism-in-profession-1.3879602)> [perma.cc/2UJF-ETGA]; Roderique, *supra* note 110; Kanu, *supra* note 110.

154. Marjorie A Silver, “Emotional Competence, Multicultural Lawyering and Race” (2002) 3 *Florida Coastal LJ* 219 at 230.

155. Capulong, King-Ries & Mills, *supra* note 120 at 22.

156. *Ibid* at 19.

oppression form the social fabric in which we live.”<sup>157</sup> This is because “[w]ithout a knowledge of how systemic oppression and racism shape structures..., including the law, students will go on to be lawyers who simply take the system at face value instead of critically evaluating and improving it.”<sup>158</sup> To this end, an important part of this education is ensuring that students gain a more accurate understanding of the history of Canada (including its legacy of colonialism) than the “winner’s version” that has generally prevailed, and how this history has informed the conditions of the present. The roles of race and racism are not limited to specific groups or areas of law alone, and accordingly, cannot be relegated to specialized courses into which students may self-select.

CRT is a valuable analytical tool for educators, as it illuminates the many ways in which racism is and has been perpetuated through institutionalized and systemic practices, and can be used to encourage students to continually question who has the license to wield power and privilege, using what kinds of methods, and in the service of what aims. This is especially the case when it comes to forms of racism that are not as readily visible or acknowledged, such as anti-Asian racism. In the context of teaching law from a specifically Asian American perspective, Natsu Saito Jenga notes that “[c]onveying substantive information, adding our narrative to the discourse, and encouraging a multi-dimensional approach, all contribute to the restructuring of a system of social relationships, mediated by racial classification and hierarchy.”<sup>159</sup> Margaret Chon buttresses this point in stating that “[t]he study of relations of power cannot be complete if we leave out even a single significant difference.”<sup>160</sup> Making the material being taught relevant to the lived experiences of all students is a crucial component of enhancing the learning experience at law school, regardless of the discomforts that may arise in so doing.<sup>161</sup>

It is important to underscore, however, that while all struggles for racial justice are interconnected, they are also distinct in meaningful ways that should not be elided. Though the histories and effects of racism may vary, the goals of anti-racist education and activism are common,

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157. Bhandar, *supra* note 134 at 358.

158. Lain, *supra* note 138 at 793.

159. Jenga, *supra* note 82 at 93.

160. Chon, *supra* note 23 at 30.

161. Dowd, Nunn & Pendergast, *supra* note 109 (“[i]f legal education is to be meaningful, then it must include what Professor Martha Fineman calls ‘uncomfortable conversations’: challenges to both traditional analysis but also the critiques of traditional analysis; talking about difficult issues and assumptions regarding class, race, ethnicity, and gender; not privileging any perspective by immunizing it from critical consideration and ensuring that all voices in the room are heard and respected” at 41).

and allyship across multiple grounds can go a long way toward realizing a more equitable future. To borrow Matsuda's words again, "[w]hen we work in coalition...we compare our struggles and challenge one another's assumptions. We learn of the gaps and absences in our knowledge. We learn a few tentative, starting truths, the building blocks of a theory of subordination. We learn that while all forms of oppression are not the same, certain predictable patterns emerge."<sup>162</sup> Thus, "[w]orking in coalition forces us to look for both the obvious and non-obvious relationships of domination, helping us to realize that no form of subordination ever stands alone."<sup>163</sup> Coalition building does not only have to pertain to racial groups, but can also occur across disciplines, schools, and other institutions, evidenced by the growing number of organizations and groups that have released statements expressing solidarity with and support of anti-racist efforts in recent years.<sup>164</sup> In this way, heterodox perspectives can serve to synergistically disrupt the "false sense of acontextuality" to which understandings of law and how it operates might otherwise default.<sup>165</sup>

Relatedly, when doing this kind of work, there is a responsibility upon professors not to ignore or gloss over racialized interactions in the classroom, and to work towards better equipping themselves with the tools to engage effectively and non-superficially with such interactions when they arise. Teaching about social justice comes with unique challenges, and tensions can arise between students (whether in or outside of the classroom), or between students and professors.<sup>166</sup> Successfully mediating these tensions is not a skill in which professors are necessarily well-versed, but which is essential to create and maintain a learning environment that

162. Mari Matsuda, "Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition" (1991) 43:6 *Stan L Rev* 1183 at 1188, DOI: <10.2307/1229035>.

163. *Ibid* at 1189.

164. See e.g. Indigenous Bar Association, "IBA Stands in Solidarity with the Black Lives Matter Movement and Calls Upon Federal, Provincial and Territorial Governments and the Media to Put an End to Systemic Anti-Black Racism and Discrimination in Canada," *Nation Talk* (last visited 19 October 2022), online: <nationtalk.ca/story/iba-stands-in-solidarity-with-the-black-lives-matter-movement-and-calls-upon-federal-provincial-and-territorial-governments-and-the-media-to-put-an-end-to-systemic-anti-black-racism-and-discrimination> [perma.cc/TBA4-JRMK]; "Stronger Together – Solidarity Statement" (15 July 2020), online: *Imagine Canada* <imaginecanada.ca/en/360/stronger-together-solidarity-statement> [perma.cc/67XK-JFN8]; "Canada's unions condemn anti-Asian racism and urge solidarity with Asian communities" (30 April 2021), online: *Canadian Labour Congress* <canadianlabour.ca/canadas-unions-condemn-anti-asian-racism-and-urge-solidarity-with-asian-communities/> [perma.cc/K2TF-E2ZR].

165. Chang, *supra* note 19 at 1272.

166. Rakhi Ruparelia, "Guilty Displeasures: White Resistance in the Social Justice Classroom" (2014) 37:2 *Dal LJ* 815, online: <digitalcommons.schulichlaw.dal.ca/dlj/vol37/iss2/12/> [perma.cc/R3H9-P4RB].

allows all students to feel a sense of safety and belonging, in addition to generating “the most effective class dialogues about race.”<sup>167</sup>

Rather than representing an ancillary part of teaching, deftly guiding the process of dialoguing about difficult topics can go to the heart of the student experience. In particular, as Erin Lain, law professor and Associate Provost for Campus Equity and Inclusion at Drake University has observed,

[w]hen [racialized] interactions are effectively navigated, they can improve racial harmony, racial literacy, communication, and learning. When they are ineffectively navigated, they can affect the mental health of all students, perpetuate stereotypes, produce the stereotype threat effect and lower productivity and academic performance, and lessen empathy and compassion for others.<sup>168</sup>

While there is not an optimal, one-size-fits-all pedagogical approach to navigating racialized interactions in the classroom, “the professor’s primary role in helping the class to navigate a racialized interaction is to be aware of and manage the power structures in the room.”<sup>169</sup> In addition to allowing for a plurality of perspectives, “being clear in the concepts being expressed[,] and helping students to make connections[,]...It is also important that the professor makes it clear that emotions are normal and important in difficult conversations.”<sup>170</sup> It is only natural that such aspects of legal education and training, which have been divorced from conventional understandings of what it means to “think like a lawyer” for so long,<sup>171</sup> can generate responses ranging from mild unease to trenchant resistance.<sup>172</sup> Nonetheless, this intransigence must be thwarted, because remaining comfortable is antithetical to stimulating change—change that is badly needed in light of the profound inequalities reflected in Canadian law and society today.

### *Conclusion*

Given the pivotal role that the law and legal institutions have played in upholding an unjust racial hierarchy and social order, law schools should be accountable when it comes to attempts to dismantle the very same. This means that, beyond a simplistic focus on increasing diversity in student admissions, questions like the who, what, and how of law teaching deserve

167. Lain, *supra* note 138 at 792.

168. *Ibid* at 785.

169. *Ibid* at 800.

170. *Ibid* at 799.

171. Susan A Bandes, “Feeling and Thinking Like a Lawyer: Cognition, Emotion, and the Practice and Progress of Law” (2021) 89:1 Fordham L Rev 2427, online: <[ssrn.com/abstract=3830936](https://ssrn.com/abstract=3830936)> [perma.cc/2MZU-5WTG].

172. See e.g. Ruparelia, *supra* note 166.

serious and ongoing consideration. It is not just about who is let in the door—whether at the student or the faculty level—but also about what happens behind it.

Moreover, as Harry Arthurs put it, “[i]n assessing what people learn at law school, it is important to distinguish this from what they study.”<sup>173</sup> What students take away from their legal educations is not limited to the substantive material that they are taught (and how), but instead, encompasses a whole slew of professional, social, and ethical norms with assumptions and implications that deserve questioning, especially insofar as they will go on to inform their conduct as legal professionals for the duration of their careers. The scope of what is taught at law schools has widened in response to changing social circumstances, but the answer to the question of “[w]hether law teachers can (and should) seek, through progressive destabilizing pedagogy, to effect systemic change, economic justice, or the dismantling of hierarchy, remains unclear.”<sup>174</sup> At this critical moment of reckoning, I would answer both the “can” and the “should” questions in the affirmative.

Diversity and inclusion have been proven to be a driver of many benefits, in a wide range of settings. We all benefit from a more equal society. At the same time, representation and diversity, on their own, are insufficient without real equity and inclusion. Evidence has repeatedly shown that there is a pervasive problem on this front in the legal profession which will take concerted effort to remedy. Ideally, teaching and learning about the deeply entrenched inequalities created and enabled by the law would encourage law students to, at minimum, commit to identifying and actively including voices, perspectives, and stories that have been marginalized in legal discourse and in the profession.

Although teaching and learning about topics like race can be a fraught enterprise, “the dangers of recognizing and exploring difference, though real and thorny enough, are not in themselves any justification for continuing to suppress difference and to silence voices from the margin.”<sup>175</sup> Notions of “yellow peril” and the feelings of perpetual foreignness experienced by Asian people, which reflect the contingency of belonging in white society, speak to stakes that affect all racialized and equity-deserving groups. This is not a battle to be fought as factions; the arduous work of changing unjust

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173. Harry W Arthurs, “Paradoxes of Canadian Legal Education” (1977) 3:3 Dal LJ 639 at 644, online (pdf): <[digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1428&context=scholarly\\_works](https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1428&context=scholarly_works)> [perma.cc/XB68-3P6T].

174. Bhabha, *supra* note 120 at 70.

175. Frances Lee Ansley, “Race and the Core Curriculum in Legal Education” (1991) 79:6 Cal L Rev 1511 at 1596, DOI: <10.2307/3480779>.

racial dynamics and rooting out white supremacy must be a burden that is shouldered as a collective enterprise.

Recent events have lent greater urgency to the task at hand. The surge in anti-Asian racism in the wake of the COVID-19 pandemic has made it blatantly clear that xenophobia, discrimination against, and hatred of Asian people in Western society is by no means a bygone phenomenon. Though the historic treatment of Asian people at Canadian law is instructive, it tells a story that is incomplete in that it is one still being written. While anti-Asian sentiment and violence have not typically featured prominently in discussions of racism in Canada, especially relative to other forms of racial injustice, it is a troubling piece of a much larger issue that merits careful attention if we are to target the problem of systemic racism at its core. Only through actively confronting inequality in all forms can the possibility of building a fairer future for all Canadians be brought closer within our reach, instead of grasping at an emancipation that feels eternally elusive.