

# Toward a Bijural Interpretation of the Principle of Respect in Aboriginal Law

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Volume 61, Number 4, June 2016

Indigenous Law and Legal Pluralism  
Le droit autochtone et le pluralisme juridique

URI: <https://id.erudit.org/iderudit/1038493ar>  
DOI: <https://doi.org/10.7202/1038493ar>

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Publisher(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (print)  
1920-6356 (digital)

[Explore this journal](#)

Cite this article

Manley-Casimir, K. (2016). Toward a Bijural Interpretation of the Principle of Respect in Aboriginal Law. *McGill Law Journal / Revue de droit de McGill*, 61(4), 939–977. <https://doi.org/10.7202/1038493ar>

## Article abstract

Aboriginal law disputes are disputes that arise in the spaces between Indigenous and non-Indigenous societies. To date, the Supreme Court of Canada has resolved Aboriginal law disputes under section 35 by relying heavily on the common law to the exclusion of Indigenous legal traditions and principles. In this article, the author argues that applying a bijural interpretation of the principle of respect provides a promising pathway forward in resolving Aboriginal law disputes in a way that supports the grand purpose of section 35 of the *Constitution Act, 1982*—reconciliation. The author discusses the principle of respect by considering both non-Indigenous and Indigenous theories to propose a robust conception of respect to guide Aboriginal law jurisprudence. She then suggests three ways to implement the principle of respect in the intercultural relationship: (1) making interdependence and relationships primary; (2) rejecting colonial attitudes and stereotypes of Indigenous peoples; and (3) creating political and legal space for the expression and flourishing of cultural difference.

## TOWARD A BIJURAL INTERPRETATION OF THE PRINCIPLE OF RESPECT IN ABORIGINAL LAW

*Kirsten Manley-Casimir\**

Aboriginal law disputes are disputes that arise in the spaces between Indigenous and non-Indigenous societies. To date, the Supreme Court of Canada has resolved Aboriginal law disputes under section 35 by relying heavily on the common law to the exclusion of Indigenous legal traditions and principles. In this article, the author argues that applying a bijural interpretation of the principle of respect provides a promising pathway forward in resolving Aboriginal law disputes in a way that supports the grand purpose of section 35 of the *Constitution Act, 1982*—reconciliation. The author discusses the principle of respect by considering both non-Indigenous and Indigenous theories to propose a robust conception of respect to guide Aboriginal law jurisprudence. She then suggests three ways to implement the principle of respect in the intercultural relationship: (1) making interdependence and relationships primary; (2) rejecting colonial attitudes and stereotypes of Indigenous peoples; and (3) creating political and legal space for the expression and flourishing of cultural difference.

Les disputes de droit autochtone sont des disputes qui surviennent dans les interstices entre les sociétés autochtones et non autochtones. Jusqu'à présent, la Cour suprême du Canada a résolu des disputes de droit autochtone fondées sur l'article 35 en se fiant à la common law, écartant ainsi les traditions et principes juridiques autochtones. Dans cet article, l'auteure plaide que la mise en application d'une interprétation bijuridique du principe de respect est une avenue prometteuse vers la résolution de conflits de droit autochtone, et ce, d'une façon qui donne soutien à la raison d'être de l'article 35 de la *Loi constitutionnelle de 1982* : la réconciliation. L'auteure discute le principe de respect en tenant compte de théories autochtones et non autochtones, de façon à proposer une conception robuste du respect qui guidera la jurisprudence en droit autochtone. Elle suggère trois moyens d'instituer le principe de respect dans la relation interculturelle : (1) prioriser l'interdépendance et les relations; (2) rejeter les attitudes colonialistes et les stéréotypes entourant les peuples autochtones; et (3) créer un espace politique et juridique pour l'expression et l'épanouissement de différences culturelles.

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\* Legal Counsel, Aboriginal Justice Division, Ministry of the Attorney General, Ontario. Kirsten just completed her PhD at the University of British Columbia law school. In her dissertation, she advocated for a relational approach to the duty to consult and accommodate Aboriginal peoples under section 35 of the *Constitution Act, 1982*. She would like to thank the following people for constructive feedback that greatly improved this article: Gordon Christie, Douglas Harris, Renisa Mawani, Michael Manley-Casimir, two anonymous reviewers, and the editorial staff at the *McGill Law Journal*. None of the views expressed in this article represent the Ontario government's views on these issues.

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## Introduction

[T]he power to control their destinies as Aboriginal peoples, to maintain control over their self-definition, must be fundamental, for otherwise we could imagine a people being constructed by another. If Aboriginal communities lose the power to control their self-definition they lose themselves—they effectively become “another.”<sup>1</sup>

Aboriginal law disputes, by their very nature, are disputes that arise in the spaces between Indigenous and non-Indigenous societies.<sup>2</sup> Many of these disputes are decided under section 35 of the *Constitution Act, 1982*,<sup>3</sup> which constitutionalizes the existing Aboriginal and treaty rights of Aboriginal peoples within Canada. In 2010, the Supreme Court of Canada held that the “grand purpose” of section 35 is the reconciliation between Indigenous and non-Indigenous peoples within Canada.<sup>4</sup> To date, the Court has resolved Aboriginal law disputes by relying heavily on the common law to the exclusion of Indigenous legal traditions and principles. In this article, I argue that applying a bijural interpretation of the principle of respect<sup>5</sup> provides a promising pathway forward for resolving Aborig-

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<sup>1</sup> Gordon Christie, “Law, Theory and Aboriginal Peoples” (2003) 2:1 Indigenous LJ 67 at 98 [Christie, “Law, Theory”].

<sup>2</sup> In this article, I use the term “Indigenous” to refer to peoples within Canada who self-identify as First Nations, Métis, Inuit, and any related identities. I use the term “Aboriginal” when discussing the area of law that deals with Aboriginal rights and title claims under section 35(1) of the *Constitution Act*. I use the term “Indian” only to refer to that particular legal status under the *Indian Act*, RSC 1985, c I-5.

<sup>3</sup> Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>4</sup> *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10, [2010] 3 SCR 103.

<sup>5</sup> This discussion of a bijural interpretation of respect is drawn out of my dissertation, in which I develop a relational framework for the duty to consult and accommodate based on four principles—respect, recognition, reciprocity, and reconciliation (see Kirsten Manley-Casimir, *Reconceiving the Duty to Consult and Accommodate Aboriginal Peoples: A Relational Approach* (PhD Thesis, University of British Columbia Peter A Allard School of Law, 2016) [unpublished] [Manley-Casimir, *Duty to Consult*]). Applying the principle of respect to relationships between Indigenous and non-Indigenous peoples is supported in various reports and legal instruments. In its preamble, the *United Nations Declaration on the Rights of Indigenous Peoples* identifies mutual respect as one of the guiding principles for its human rights approach to the rights of Indigenous peoples internationally (see *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007), Preamble). See also *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 649–51 [RCAP Report].

inal law disputes in a way that supports the grand purpose of section 35—reconciliation.<sup>6</sup>

## I. Scope and Limitations

A bijural principle of respect can be useful to guide the development of Aboriginal law jurisprudence and to deal with Aboriginal law disputes more appropriately. Before launching into my substantive discussion, I want to address two perceived limitations. The first limitation is that my focus on the Canadian legal system might seem to support a state-centric approach to the resolution of Aboriginal law disputes. Taking a state-centric approach, however, is not my purpose. Rather, in focusing on the Canadian legal system, I heed John Borrows' call to make non-Indigenous institutions more fully reflective of the Indigenous cultures and legal traditions that have helped shape Canada.<sup>7</sup> I am also mindful of Taiaiake Alfred's warning that non-Indigenous people should be wary of positing ideas and solutions that might be imposed upon Indigenous communities and peoples to "solve" their problems.<sup>8</sup> Instead of positioning Indigenous peoples as "the problem," I focus on the Canadian legal system itself as the problem. I start from the position that non-Indigenous people need to interrogate their own complicity and the structure of their own institutions to determine the ways in which they support the oppression of Indigenous communities.<sup>9</sup>

Despite my focus on the Canadian legal system, I acknowledge that the establishment of separate, culturally appropriate Indigenous justice systems is ideal. Indigenous communities, however, need time to design

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<sup>6</sup> Reconciliation as a concept can be interpreted in various ways. For a detailed discussion, see Chapter 7 of my dissertation (Manley-Casimir, *Duty to Consult*, *supra* note 5). In this article, I do not have the space to engage in a detailed discussion of the various interpretations of reconciliation. I therefore define "reconciliation" as the rebuilding of healthy relationships between Indigenous and non-Indigenous peoples. This idea of reconciliation also includes restructuring and rebuilding relationships between Indigenous and non-Indigenous peoples at all levels of society—between individuals, communities, and governments.

<sup>7</sup> See John Borrows, "Creating an Indigenous Legal Community" (2005) 50:1 McGill LJ 153 at 165–66.

<sup>8</sup> See Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough: Broadview Press, 2005) at 111 [Alfred, *Wasáse*].

<sup>9</sup> See Taiaiake Alfred & Glen Coulthard, "A Conversation on Decolonization" (Presentation delivered at the Department of History and the First Nations Studies Program, University of British Columbia, 15 March 2006) [unpublished]. See also Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (Vancouver: UBC Press, 2010); Roger Epp, *We Are All Treaty People: Prairie Essays* (Edmonton: University of Alberta Press, 2008) at 121–42.

and establish Indigenous legal institutions, as well as to build capacity and gather resources to support the ongoing functioning of these institutions once they are established. In the meantime, reforms to the Canadian justice system are necessary to create more justice and support reconciliation when Aboriginal law disputes come before Canadian judges. Revitalizing Indigenous legal structures and reforming the Canadian justice system need not be seen as either-or propositions. As Mary Ellen Turpel writes,

[w]e spent several years in a distracting debate over whether justice reform involves separate justice systems or reforming the mainstream justice system. This is a false dichotomy and fruitless distinction because it is not an either/or choice. The impetus for change can better be described as getting away from ... colonialism and domination. Resisting colonialism means a reclaiming by Aboriginal Peoples of control of the resolution of disputes and jurisdiction over justice, but it is not as simple or as quick as that sounds. Moving in this direction will involve many linkages.<sup>10</sup>

Turpel makes clear that reforming the Canadian criminal justice system does not detract from the project of revitalizing Indigenous legal traditions. Consistent with Turpel's view, the aim of this article is to make some suggestions on ways to reform the Canadian justice system's approach to Aboriginal law cases until such time as more culturally appropriate dispute resolution mechanisms are in place.

The second limitation in advocating for a bijural interpretation of the principle of respect is that in order to create an understanding based on both Indigenous and non-Indigenous theories, I engage with some non-Indigenous theories that have been historically discriminatory toward Indigenous peoples. I could have focused solely on Indigenous ideas of respect to the exclusion of historically oppressive Eurocentric theories. The purpose of this article, however, is to think constructively about the space between Indigenous and non-Indigenous societies and how best to manage interactions and disputes that may arise within that space. As such, I focus on drawing ideas from both intellectual traditions to see if there is a way that a bijural interpretation of the principle of respect can support a constructive rebuilding of relationships between Indigenous and non-Indigenous peoples within Canada.

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<sup>10</sup> Mary Ellen Turpel, "Reflections on Thinking Concretely about Criminal Justice Reform" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds, *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich, 1994) 206 at 215 (discussing the Canadian criminal justice system).

## II. Substantive Content of a Bijural Principle of Respect

For the purposes of my discussion, I focus on respect in two contexts: respect for persons and respect between cultural groups. I discuss the effect of the historically disrespectful and dehumanizing treatment of Indigenous peoples on the individual self-respect of community members. I engage with Indigenous and non-Indigenous theories of respect and conclude that a bijural conception of respect that draws on both Indigenous and non-Indigenous theories is dynamic, expansive, and appropriate to help resolve Aboriginal law disputes in constructive ways. I conclude by suggesting that a bijural conception of respect can be implemented by embracing attitudinal shifts and practical actions that include making relationships and responsibilities to one another primary, rejecting colonial attitudes and stereotypes, and creating jurisdictional and territorial space for Indigenous communities to express and foster cultural difference.

I have structured my discussion of the substantive content of the principle of respect as follows:

- The *What?* What is respect? What are its central characteristics? How might conceptions of respect differ in Indigenous and non-Indigenous theory and law?
- The *Why?* Why should people engage the principle of respect in the context of relationships between Indigenous and non-Indigenous peoples? Are there moral imperatives that support the implementation of a bijural principle of respect in such relationships?
- And finally, the *How?* How might a bijural principle of respect be implemented concretely to provide a way forward in the complex relationship between Indigenous and non-Indigenous peoples within Canada?

### A. *The What?*

The concept of respect has been the topic of great theoretical inquiry over the years with many attempts to elucidate its meaning. Respect can be generally understood as an attitude, a way of treating something or someone that involves a kind of valuing. Respect involves perceiving something as worthy of a special kind of attention.<sup>11</sup> It may embody both

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<sup>11</sup> See Robin S Dillon, “Respect and Care: Toward Moral Integration” (1992) 22:1 Can J Phil 105 at 108 [Dillon, “Respect and Care”]. Dillon notes that respect “is a particular mode of apprehending something, which is the basis of the attitude, conduct, and valuing. The person who respects something perceives it quite differently from one who does not respect it and responds to it in light of that perception” (*ibid*).

positive aspects of treating a person or thing as valuable and worthy, as well as negative aspects of avoiding “degrading or insulting or injuring or interfering with” other people or valued objects.<sup>12</sup>

### 1. Non-Indigenous Theories of Respect

The modern idea of respect for persons includes a human rights view that stresses each person’s intrinsic value as a member of the human community. In the Western tradition, this view originated with Immanuel Kant’s philosophy,<sup>13</sup> in which he held that the moral law requires that people be treated with respect because people are ends in themselves. In Kant’s view, people are entitled to respect because they are rational, autonomous moral agents, and this fact grounds their intrinsic value.<sup>14</sup> A person’s moral task is to develop his (or her) rational, autonomous capacity, while other people are required to refrain from doing anything to detract from this task.<sup>15</sup>

According to this view, all people are entitled to respect on the basis of their common humanity (respect for persons).<sup>16</sup> Respect is due to the per-

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<sup>12</sup> H Archibald Kaiser, “The *Criminal Code* of Canada: A Review Based on the Minister’s Reference” (1992) 26:3 UBC L Rev 41 at 51.

<sup>13</sup> See Immanuel Kant, *Foundations of the Metaphysics of Morals*, translated by Lewis White Beck (Indianapolis: Bobbs-Merrill, 1959). Due to space constraints I do not focus on all the complex details of Kant’s theory but rather give a broad summary of one aspect of his theory in order to ground my larger discussion. The interpretation of Kant’s theory is subject to debate (see e.g. Stephen L Darwall, “Two Kinds of Respect” (1977) 88:1 *Ethics* 36 at 36).

<sup>14</sup> See Dillon, “Respect and Care”, *supra* note 11 at 113. Theorists have expanded the justification for respect for persons beyond rationality to include further attributes (see e.g. John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971) at 511 (morality); John Stuart Mill, *Utilitarianism* (London: Parker, Son, and Bourn, West Strand, 1863) at 77–78 (the capacity to suffer)). Other theorists have justified respect for persons grounded in the fact that each person is situated within a social, relational, and political structure (see e.g. Margaret A Farley, “A Feminist Version of Respect for Persons” (1993) 9:1–2 *J Feminist Studies in Religion* 183 at 197–98; Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992) at 166–67 (in contrast to Rawls’ theory); Dillon, “Respect and Care”, *supra* note 11 at 115–19; Iris Marion Young, “Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought” (1997) 3:3 *Constellations* 340 at 341 [Young, “Asymmetrical Reciprocity”]; Charles Taylor, *Multiculturalism and “The Politics of Recognition”* (Princeton: Princeton University Press, 1992) at 25). Others justify respect for persons on a groundless and unconditional basis (see e.g. David Wong, “Taoism and the Problem of Equal Respect” (1984) 11:2 *J Chinese Philosophy* 165 at 171).

<sup>15</sup> See Kant, *supra* note 13 at 156.

<sup>16</sup> This idea of respect for persons based on common humanity emerged at the same time as philosophical theories celebrating the universality of reason and the importance of impartiality and rationality (see The Right Honourable Beverley McLachlin, “The Civi-



son *as a person* based on a particular feature considered worthy of this attitude. As such, respect is generalizable to include other people who also share this feature.<sup>17</sup> If one has a view that a person is worthy of respect on the basis of his or her humanity (or on the basis of his or her ability to rationalize, or to make moral decisions, or on another basis), all people are worthy of respect on this same basis. Respect for persons therefore creates a baseline for justifying respect—a reason for demonstrating respect based solely on the fact that one belongs to the human community (rather than based on other factors such as the person’s merit or accomplishments).<sup>18</sup>

It is worth noting that Kant’s theory of respect coded the rational, autonomous subject as both white and male.<sup>19</sup> His theory explicitly excluded women and non-white people on the basis that neither women nor non-white people were complex persons capable of reasoning and rationality. This white, male definition of a rational, autonomous subject therefore deliberately excluded Indigenous peoples and was one of many Eurocentric theories used to justify colonial practices and the dispossession of Indigenous peoples in colonial contexts.<sup>20</sup>

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lization of Difference” (LaFontaine-Baldwin Lecture delivered in Halifax, 7 March 2003) at 7, online: <[www.icc-icc.ca/en/lbs/docs/BeverleyMcLachlinEN.pdf](http://www.icc-icc.ca/en/lbs/docs/BeverleyMcLachlinEN.pdf)>. These ideas have all become central tenets of the Canadian legal system.

<sup>17</sup> See Dillon, “Respect and Care”, *supra* note 11 at 110.

<sup>18</sup> See Darwall, *supra* note 13 at 38 for a useful account of two kinds of respect: (1) recognition respect, which involves “a disposition to weigh appropriately in one’s deliberations some feature of the thing in question and to act accordingly” and (2) appraisal respect, which is “an attitude of positive appraisal of [a] person either as a person or as engaged in some particular pursuit.” See also Stephen D Hudson, “The Nature of Respect” (1980) 6:1 *Social Theory & Practice* 69 at 71–75 for a useful characterization of four different kinds of respect: (1) obstacle respect, where the object of respect is a barrier that must be overcome; (2) directive respect, which is shown to “something which must be capable of being taken as a guide to action”; (3) institutional respect, which is respect for “social institutions, practices, offices, positions, or persons or things which represent such items, or persons who function in roles defined by such items”; and (4) evaluative respect, which “involves a favorable attitude toward an object of respect (under some description) for certain reasons.”

<sup>19</sup> See Emmanuel Chukwudi Eze, “The Color of Reason: The Idea of ‘Race’ in Kant’s Anthropology” in Emmanuel Chukwudi Eze, ed, *Postcolonial African Philosophy: A Critical Reader* (Cambridge, Mass: Blackwell, 1997) 103 at 130.

<sup>20</sup> Later theorists, such as John Locke, theorized that Indigenous peoples were excluded from the definition of “civilized persons” because they were childlike and primitive. See generally John Locke, *Second Treatise of Government*, ed by CB Macpherson (Indianapolis: Hackett, 1980). For a discussion and critique of this view, see James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 70–74.

Despite the historical exclusion of Indigenous peoples from the definition of persons entitled to respect offered by Kant and other modern thinkers, many contemporary non-Indigenous scholars have contributed constructive ideas about how non-Indigenous theories support an understanding of respect that would promote reconciliation between Indigenous and non-Indigenous peoples. Contemporary theorists have evolved the idea of respect for persons to be inclusive and to emphasize the importance of interdependence<sup>21</sup> and situatedness<sup>22</sup> within communities. So although one might be inclined not to use non-Indigenous theories of respect to dismantle colonial attitudes and structures in the context of relationships between Indigenous and non-Indigenous peoples, non-Indigenous theories have evolved significantly since Kant's era and recent theorists have contributed useful ideas for the purposes of articulating a bijural interpretation of respect.

In addition to critiquing Kant's exclusion of women and non-white people from the definition of persons entitled to respect, some theorists raise further criticisms of the limits of Kant's theory: first, the idea of respect for persons is an abstract proposition until it is actually put into action in relationship with another;<sup>23</sup> and second, this theory does not address the way respect might take account of each person's particular identity, situatedness, and specificity.<sup>24</sup> Because putting the abstract proposition of respect for persons into action requires interaction with other people, engaging in this type of respect involves deliberating about its meaning in relationship with someone else and deciding what conduct is appropriate in that relationship.<sup>25</sup> In the context of cross-cultural relationships, the conception of respect as embedded in relationships means that inter-

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<sup>21</sup> In this article, I use the term "interdependence" to denote two related ideas: first, the acknowledgement of our place within a web of relationships and second, that the well-being of Indigenous and non-Indigenous peoples' lives are bound up together. Some Indigenous leaders and thinkers object to the use of the term interdependence because it could be seen as potentially undermining claims to sovereignty. After careful consideration, however, I use this term because various Indigenous mentors and Elders have given me teachings where they use the term interdependence to describe Indigenous conceptions of relationships between people and other animate and inanimate beings. As such, this term is appropriate to be used for the purposes of this article and is not intended to undermine the validity of any claims to Indigenous sovereignty.

<sup>22</sup> I use the term "situatedness" to refer to the recognition that individuals are situated within particular cultural, social, and political contexts that have practical impacts on their lives and development of self.

<sup>23</sup> See Colin Bird, "Status, Identity, and Respect" (2004) 32:2 Political Theory 207 at 215.

<sup>24</sup> See Farley, *supra* note 14 at 187–88; Dillon, "Respect and Care", *supra* note 11 at 121–22; Young, "Asymmetrical Reciprocity", *supra* note 14 at 343; Taylor, *supra* note 14 at 38.

<sup>25</sup> See Bird, *supra* note 23 at 215.

acting with cross-cultural others is central to understanding the principle of respect.

Recognizing a person's history, identity, and personal story is also important in any conception of respect. Seyla Benhabib argues that all theories of respect must seriously acknowledge "difference, alterity and ... the standpoint of the 'concrete other'."<sup>26</sup> This recognition of the concrete other means that respect must include the understanding that there is a difference between myself and someone else—that I see the world in different ways than other people do because of the ways my particular experiences have shaped my identity.

In the context of relationships between Indigenous and non-Indigenous peoples, respect must acknowledge the different experiences Indigenous and non-Indigenous peoples have had within Canada. Any conception of the principle of respect must acknowledge the difficult history of relationships between Indigenous and non-Indigenous peoples, the legacy of oppression, and the power dynamics that influence the current realities of Indigenous and non-Indigenous peoples. Respect must also take account of different experiences among Indigenous peoples (i.e., First Nations, Métis, and Inuit), as well as the particular experiences of each individual Indigenous and non-Indigenous person.

Charles Taylor asserts that any theories based on the absence of differentiation in the context of equal freedom or respect leave a very small margin for the recognition of difference or distinct cultural identities.<sup>27</sup> He therefore advocates taking an open stance toward cross-cultural others to learn about aspects of different cultures worthy of respect and valuing.<sup>28</sup> According to Taylor's view, respect needs to account for the particular identities of individuals and their situatedness within communities.

The reality of people's lives is nuanced, contextual, and requires attention to differences between individuals. Within the Canadian constitutional framework, Indigenous peoples are entitled to different treatment, recognized in the particular constitutionalized protections of Aboriginal and treaty rights under section 35. As Brent Olthuis argues, "[t]he doctrine of Aboriginal rights was born and finds continued sustenance in the reconciliation of inter-societal normative difference."<sup>29</sup> This intersocietal

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<sup>26</sup> Benhabib, *supra* note 14 at 167. See also Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 117.

<sup>27</sup> See Taylor, *supra* note 14 at 51, 53.

<sup>28</sup> See *ibid* at 72–73.

<sup>29</sup> Brent Olthuis, "The Constitution's Peoples: Approaching Community in the Context of Section 35 of the *Constitution Act, 1982*" (2009) 54:1 McGill LJ 1 at 15. Canadian jurisprudence also supports the concept of respect for difference in the context of equality

normative difference, I would argue, is not only due to cultural differences but also to historical differences (that Indigenous peoples lived in what is now Canada first) and jurisdictional differences (that Indigenous peoples exercised sovereignty prior to the arrival of European others).<sup>30</sup> The principle of respect therefore needs to provide enough flexibility to account for the differential treatment of Indigenous communities—treatment that recognizes Indigenous communities' historical entitlements to land and governance authority as well as their particular identities as shaped by their specific histories, locations, and geographies.

For the purposes of this discussion, Robin Dillon's theory of "care respect" is useful, as it highlights, like many Indigenous theories of respect, the importance of interdependence.<sup>31</sup> Care respect involves a commitment to attend to others with "intensely focused perception"<sup>32</sup> and to pay attention to all aspects of each person's particularity within his or her concrete context.<sup>33</sup> Dillon describes the core attitude of care respect as "cherishing, a form of respect that involves profoundness of feeling, treasuring, warm

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claims under section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. In *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 171, 56 DLR (4th) 1, the Supreme Court of Canada held that "[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration." Further, the Court held that differential treatment may be necessary to accommodate differences between people and that such treatment can in fact promote equality between people (see *ibid* at 168–69). See also *R v Big M Drug Mart*, [1985] 1 SCR 295 at 347, 18 DLR (4th) 321 (in the context of religion). The concept of respect for difference, therefore, is central to the promotion of equality under Canadian law. As Donna Greschner highlights, conceptualizing equality as the "identical treatment of women and men ... is at best problematic for aboriginal women and men because ... aboriginal societies are grounded in notions of harmony, complementarity and balance, not sameness" (Donna Greschner, "Aboriginal Women, the Constitution and Criminal Justice" (1992) 26:3 UBC L Rev 338 at 340). Although the idea of equality can be helpful and persuasive in arguments supporting Indigenous rights (see e.g. Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 119–31), I do not engage with the debate around formal and substantive equality in this article due to space constraints.

<sup>30</sup> See Macklem, *supra* note 29 at 4.

<sup>31</sup> Dillon, "Respect and Care", *supra* note 11 at 113–15. Dillon critiques Kant's theory on the basis that its focus on individual pursuits of the good life leads to the conclusion that people's responsibility is primarily to keep our distance from one another. This approach, in Dillon's view, emphasizes separation between people rather than interdependence.

<sup>32</sup> *Ibid* at 120.

<sup>33</sup> See *ibid*.

regard, solicitous concern.”<sup>34</sup> This attitude requires active engagement between people and responsiveness to each other’s needs.<sup>35</sup>

Care respect not only involves a responsibility to avoid degrading, insulting, and harming others, but it also includes positive responsibilities to contribute in constructive ways to other people’s existence.<sup>36</sup> This conception of respect requires “a determination to discover, forge, repair, and strengthen connections among persons in ways that benefit all of us.”<sup>37</sup> Dillon asserts that care respect values both individuality and interdependence, and that it joins people in a community of mutual concern and mutual aid.<sup>38</sup> Care respect therefore provides room for generalized respect for persons (acknowledgement of sameness among people) while also providing a means to acknowledge difference between people due to its focused attention on each person’s identity and particularity.<sup>39</sup>

Theories that emphasize the importance of learning about the specificity and particular identity of cross-cultural others are useful in the context of relationships between Indigenous and non-Indigenous peoples. The importance of learning about the perspectives, values, traditions, and laws of cross-cultural others may lead to a widening of perspectives and transformative learning across cultures. Through this type of interaction, people from different cultural contexts may transform their own understandings of what constitutes respectful relations, and therefore contribute to the creation of a better society.

## 2. Indigenous Theories of Respect

There is a great diversity of Indigenous cultures within Canada, and theories of respect are heavily dependent on the cultural, social, and political context from which they arise. Although there is a danger in generalizing across the rich and diverse Indigenous cultures within Canada, Indigenous theorists point to some commonalities among Indigenous legal traditions and philosophies relating to the principle of respect. For the purposes of this section, I do not claim to provide an authoritative account of Indigenous theories of respect. Rather, I sketch some of the central characteristics of these theories to examine similarities and differences in interpreting the principle of respect.

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<sup>34</sup> *Ibid.*

<sup>35</sup> See *ibid* at 121.

<sup>36</sup> See *ibid* at 128.

<sup>37</sup> *Ibid* at 129.

<sup>38</sup> See *ibid.*

<sup>39</sup> See *ibid* at 122–23.

Just as non-Indigenous theories support the concept of respect for persons, so do Indigenous philosophies. Dale Turner notes, for example, that the Great Law of Peace of the Haudenosaunee peoples holds that “a human being possesses intrinsic value and ought to be accorded respect.”<sup>40</sup> One must recognize therefore that others “have the right to speak their mind and to choose for themselves how to act in the world.”<sup>41</sup> Similarly, Alfred notes that “[t]he freedom and power that come with understanding and living a life of indigenous integrity are experienced by people in many different ways, and respect must be shown to the need for individuals to find their way according to their own vision.”<sup>42</sup> Like the non-Indigenous theories discussed above, this view of respect highlights the fact that people are entitled to create their own vision of how to live their life and to make their own choices in turning that vision into a reality.

Another aspect of Indigenous ideas of respect includes an explicit recognition of respect among all members of Indigenous communities, including women, men, youth, and Elders. Yet, “[w]hile many Indigenous societies have principles about gender relations,”<sup>43</sup> it is important to note that “there is a widespread disjuncture between these ideals and everyday gender norms and practices” within Indigenous communities.<sup>44</sup> Similarly, while there are principles regarding the inclusion of youth and Elders within community decision-making structures, these may or may not be implemented in an ideal way in various communities. I mention this reality not to pass any judgment, but rather to highlight that many of the principles underlying both Indigenous and non-Indigenous legal systems describe idealistic notions of community rather than the actual implementation of such principles. Even as idealistic notions, however, these theories provide a useful starting point for discussing what a bijural principle of respect might be.

Despite apparent similarities to non-Indigenous theories of respect, Indigenous understandings of respect include the explicit recognition that respect takes place and is defined by responsibilities to the larger cultural community. Gordon Christie asserts that “[r]esponsibilities act to define a core of the identity of the individual, just as the existence of a society centred around responsibilities defines the identity of Aboriginal communi-

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<sup>40</sup> Dale Turner, *This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 49.

<sup>41</sup> *Ibid.*

<sup>42</sup> Alfred, *Wasáse*, *supra* note 8 at 39.

<sup>43</sup> Emily Snyder, Val Napoleon & John Borrows, “Gender and Violence: Drawing on Indigenous Legal Resources” (2015) 48:2 UBC L Rev 593 at 606.

<sup>44</sup> *Ibid.*

ties.”<sup>45</sup> In the Haudenosaunee tradition, for example, there is a high emphasis placed on using one’s talents to the benefit of the community.<sup>46</sup> Similarly, in the Anishinabek tradition, there is a strong emphasis on responsibilities in the context of respecting others. Indeed, “Anishinabek peoples have obligations (*daebizitawaugawin*) to their families and community: to support them, to help them prosper, and to exercise their rights to live and work.”<sup>47</sup> Finally, in the Cree tradition, *miyo-wicehtowin* “requires Cree peoples as individuals and as a nation to conduct themselves in a manner such that they create positive good relations in all relationships”;<sup>48</sup> this concept includes the idea that people have positive obligations to support and assist others.<sup>49</sup> These examples demonstrate that embedded within many Indigenous theories of respect is the positive responsibility that people support others, work to maintain positive relationships, and contribute their abilities for the benefit of the community.

Another key feature of Indigenous conceptions of respect is that members of Indigenous communities are taught respect through the transmission of stories, communal values, and teachings. Christie notes that due to their experiences over millennia, Indigenous peoples have worked out the

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<sup>45</sup> Christie, “Law, Theory”, *supra* note 1 at 111. Christie also writes that in Aboriginal communities the ways of living valued and promoted are such as to require years of gentle instruction, a process of maturation aided by a community’s careful system of guidance. Central to this process of moral education is building a core sense of responsibility, one which would come to be an integral part of one’s sense of personal identity. ... This sense must be carefully instilled, carefully nurtured and carefully maintained. An individual possessed of this sense will know what to do and how to act so as to travel the good path, to live a good life. This involves, essentially, doing as one must towards fellow beings, both human and non-human (*ibid* at 109 [references omitted]).

<sup>46</sup> See e.g. Teyowisonte interviewed by Alfred, *Wasáse*, *supra* note 8 at 272. Teyowisonte, a Kanien’kehaka youth, describes the traditional notion of “autonomous responsibility,” which “means that you lead your own life consciously aware of how your actions affect the Nation” (*ibid* at 275). Teyowisonte also notes that in his opinion a key concept in Haudenosaunee culture is “self-betterment for the collective” (*ibid* at 272).

<sup>47</sup> John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 79.

<sup>48</sup> *Ibid* at 85.

<sup>49</sup> See *ibid*; “Cree Legal Synthesis: Examples of Some Legal Principles Applied to Harms and Conflicts between Individuals within a Group” at 32, 42, online: Accessing Justice and Reconciliation Project <[indigenousbar.ca/indigenoulaw/wp-content/uploads/2012/12/Cree-Summary-of-Legal-Principles.pdf](http://indigenousbar.ca/indigenoulaw/wp-content/uploads/2012/12/Cree-Summary-of-Legal-Principles.pdf)>; “Summary of Anishinabek Legal Principles: Examples of Some Legal Principles Applied to Harms and Conflicts between Individuals within a Group” at 22–23, online: Accessing Justice and Reconciliation Project <[indigenousbar.ca/indigenoulaw/wp-content/uploads/2012/12/Sample-document-Anishinabek-Summary-of-Legal-Principles.pdf](http://indigenousbar.ca/indigenoulaw/wp-content/uploads/2012/12/Sample-document-Anishinabek-Summary-of-Legal-Principles.pdf)>.

broad strokes of how to lead a good life. These visions of how to live respectfully with other beings have been worked out “from a combination of wisdom gleaned from mythological time and thousands of years spent reflecting on the best ways to live.”<sup>50</sup> As such, there is a shared philosophical vision of the good life within Indigenous communities. This shared vision is based not only on rational, intellectual grounds but also on “the ‘feel’ and beauty of the truth of the assertion” and on the “connections of this assertion to established ways of living ... laid down by ‘original instructions’ and bolstered by the wisdom of those of experience and reflection.”<sup>51</sup> Indigenous peoples have refined this vision over time using storytelling as well as reflective, sensory, and communal resources to provide a system of belief that gives “essential guidance in the task of living good lives” for both individuals and communities.<sup>52</sup> Much of this learning takes place through direct observation and experiences out on the land in relationships with family members and Elders.<sup>53</sup>

Additionally, Indigenous conceptions of respect may differ from non-Indigenous philosophies in that Indigenous theories hold that a broader range of beings are entitled to a generalized respect. These beings include persons and also non-human entities, animate and inanimate. As the *Report of the Royal Commission on Aboriginal Peoples* (RCAP) notes, “[m]any Aboriginal people, particularly those adhering to traditional ways, accord respect to all members of the circle of life—to animals, plants, waters and unseen forces, as well as human beings.”<sup>54</sup> John Paul Lederach asserts that Indigenous peoples have a

seemingly innate capacity to imagine themselves in relationship not only with the human community but also with everything that surrounds them in the animate and inanimate world. The earth, the rocks, the trees, the sky, the air, the fish, the bear, the deer—all speak to them. ... The marvel for indigenous people is not that rocks

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<sup>50</sup> Christie, “Law, Theory”, *supra* note 1 at 91.

<sup>51</sup> *Ibid* at 108.

<sup>52</sup> *Ibid*.

<sup>53</sup> See John Borrows (Kegedonce), *Drawing Out Law: A Spirit’s Guide* (Toronto: University of Toronto Press, 2010) at 16; Jaime Battiste, “Understanding the Progression of Mi’kmaw Law” (2008) 31:2 Dal LJ 311 at 324–26.

<sup>54</sup> *RCAP Report*, *supra* note 5 at 649. See also Greschner, *supra* note 29 at 347–48. The Supreme Court of Canada recognized the respect for all life that characterizes Indigenous philosophies in *R v Van der Peet*, where it commented that the Sto:lo “viewed salmon as more than just food; they treated salmon with a degree of respect since the Sto:lo community was highly reliant and dependent on the fish resources” ([1996] 2 SCR 507 at para 214, 137 DLR (4th) 289).



speak. It is that they, as a human community, retained a capacity to hear the rocks sing.<sup>55</sup>

Similarly, E. Richard Atleo (Umeek) asserts that the Nuu-chah-nulth aspired “to live, albeit not always successfully, as though personal and community well-being is dependent on, and must be inclusive of, all reality, including water, land, plants, animals, humans, and, indeed, anything that seems to be alive.”<sup>56</sup> Rather than focusing exclusively on the ways in which animals, plants, water, and land can be exploited for the benefit of human beings, Indigenous philosophies consider animate and inanimate beings in decision-making processes.<sup>57</sup> This concept of respect for all life forms therefore stands in stark opposition to non-Indigenous views of land and resources as exploitable commodities.

Indigenous conceptions of respect also include the humble recognition of one’s place within all of creation. Alfred argues that Indigenous peoples “are rooted in the recognition and respect of sensitivity to one’s place in creation and awareness of one’s place in a circle of integrity.”<sup>58</sup> This humble recognition supports the view that all life forms are entitled to equal respect. As Oren Lyons asserts,

[i]t has been the mandate of our people to look after the welfare of the land and its life. Central to this responsibility is a recognition and respect for the equality of all the elements of life on this land. Recognition and respect for the equality of all elements of life is necessary because it brings us into perspective as human beings. If all life is considered equal, then we are no more or no less than anything else. Therefore, all life must be respected. Whether it is a tree, a deer, a fish, or a bird, it must be respected because it is equal.<sup>59</sup>

Since many Indigenous philosophies feature a respect for all life, such philosophies are focused on “relationships of connection to the land and each

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<sup>55</sup> John Paul Lederach, *The Moral Imagination: The Art and Soul of Building Peace* (New York: Oxford University Press, 2005) at 104–05.

<sup>56</sup> E Richard Atleo (Umeek), *Principles of Tsawalk: An Indigenous Approach to Global Crisis* (Vancouver: UBC Press, 2011) at 4.

<sup>57</sup> See Brenda L Gunn, “Protecting Indigenous Peoples’ Lands: Making Room for the Application of Indigenous Peoples’ Laws Within the Canadian Legal System” (2007) 6:1 *Indigenous LJ* 31 at 51–55. As Gunn notes, “in determining the scope of rights Indigenous peoples have to their lands, it is important to recognize that rights to use land are not just distributed amongst humans, but that other animals and plants must be considered in allocations and permissible uses” (*ibid* at 53).

<sup>58</sup> Alfred, *Wasáse*, *supra* note 8 at 39.

<sup>59</sup> Oren Lyons, “Spirituality, Equality, and Natural Law” in Leroy Little Bear, Menno Boldt & J Anthony Long, eds, *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984) 5 at 6.

other.”<sup>60</sup> Much like care respect described above, the focus is on interdependence and connectedness rather than on individuality and separation.

Indigenous theories of respect are also broader than non-Indigenous theories in that Indigenous theories accord respect to past and future generations. Alfred asserts: “We have to refer to both the past and the future in our decision-making. This is where we get the concept of the ‘seven generations’: we’re supposed to be listening to our grandfathers, our ancestors, but we also need to listen to the grandfathers yet to come.”<sup>61</sup> Respecting one’s ancestors and future generations is one of the conditions under which Indigenous peoples believe their lands were given to them by the Creator.<sup>62</sup>

In the context of relationships between societies, Indigenous theories and philosophies require the negotiation of agreements to take place in ways that respect appropriate cultural protocols. One such agreement is embodied in the Two Row Wampum, which envisioned two boats traveling alongside one another with the understanding that neither Indigenous nor non-Indigenous parties to the agreement would interfere in the other’s internal affairs.<sup>63</sup> Osenntonion, a Mohawk woman, argues: “It should be said that when we were given our own ways to life, we were never given a government for any others *but* ourselves, and to this day, *we* maintain our end of the original agreement to co-exist, not to impose our ways on others.”<sup>64</sup> This is just one example of an early treaty that exem-

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<sup>60</sup> PA Monture-Okanee & ME Turpel, “Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice” (1992) 26:3 UBC L Rev 239 at 258.

<sup>61</sup> Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press, 1999) at xxii. See also *The Great Law of Peace of the Longhouse People* (Roosevelt: Akwesasne Notes, 1975) at para 57: “Thus are the Five Nations completely united and enfolded together, united into one head, one body, and one mind. They therefore shall labour, legislate, and council together for the interest of future generations.”

<sup>62</sup> See Gordon Christie, “*Delgamuukw* and the Protection of Aboriginal Land Interests” (2000) 32:1 Ottawa L Rev 85 at 89–90, n 5.

<sup>63</sup> See John Borrows, “Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation” (1994) 28:1 UBC L Rev 1 at 23–25.

<sup>64</sup> Osenntonion & Skonaganleh:rá, “Our World” (1989) 10:2–3 Canadian Woman Studies 7 at 8–10 [emphasis in original]. See also Monture-Okanee & Turpel, *supra* note 60 at 257–58. It is worth noting that the Haudenosaunee have a particular way of relating to the world based on their history and cultural practices that supports the view that people are interconnected yet protects against assimilation and integration (see Borrows, *Canada’s Indigenous Constitution*, *supra* note 47 at 76). As such, the vision articulated through the Two Row Wampum of “coexistence” may be understood to approximate the notion of “tolerance”. There is a lot of literature that examines the idea of tolerance and its distinction from respect (see e.g. Martha Minow, “Putting Up and Putting Down: Tolerance Reconsidered” (1990) 28:2 Osgoode Hall LJ 409; Rainer Forst, “The Limits of Toleration” (2004) 11:3 Constellations 312).

plifies Indigenous conceptions of respect, which place a high value on negotiating mutually agreeable terms to manage intersocietal relationships.

To summarize, Indigenous theorists point to a broader conception of respect that includes within the group entitled to respect not only human beings but also non-human entities. Moreover, Indigenous worldviews include past and future generations within their broader visions of respectful relationships. Such worldviews include a notion of mutuality that involves reciprocal responsibilities for people and other beings taking part in respectful relationships. In addition, failing to abide by appropriate respectful protocols and behaviours may result in negative consequences. Indigenous theories also emphasize the importance of responsibilities to others and of using one's own talents and skills to contribute to the benefit of the larger community. Further, these theories highlight the importance of negotiation processes that respect cultural protocols aimed at setting out terms to manage intersocietal relationships effectively. Having sketched out some key ideas from Indigenous and non-Indigenous theories in this section, I now turn to a discussion of why a bijural principle of respect is important in moving Indigenous and non-Indigenous peoples toward reconciliation.

### *B. The Why?*

There are several reasons why it would be valuable for Indigenous and non-Indigenous peoples to implement a bijural conception of respect as a guiding principle in their ongoing relationships. First, there has been a significant amount of harm created due to a lack of respect toward Indigenous communities, which has had a negative impact on both individual and collective identities. Indeed, the harm and damage inflicted upon Indigenous peoples within Canada is tantamount to the denial of Indigenous peoples' cultural identity and inherent value. The related imperative for implementing the principle of respect is therefore the rectification of harm and the rebuilding of healthy communities.

Second, the lack of respect for Indigenous communities on a social and political level can lead to an internalization of disrespect on a personal level. In turn, this internalized disrespect can erupt into violence against oneself or in close personal relationships, which can have negative impacts on the health of Indigenous communities.

Third, living together in respect is central to rebuilding relationships between Indigenous and non-Indigenous peoples on a morally sound basis. There exist both the potential and the need to restructure these relationships on a more just and legitimate footing, and the principle of respect forms an essential part of this restructuring. I discuss each of these three reasons in more detail below.

### 1. Canada's History of Disrespect Toward Indigenous Peoples

For much of Canada's history, disrespect has characterized the relationship between Indigenous and non-Indigenous peoples.<sup>65</sup> The disrespect shown toward Indigenous communities manifested, and continues to manifest, both on an individual and collective level. Successive governments implemented policies, sanctioned by law, aimed at devaluing and destroying Indigenous identities and cultures within Canada. The federal government's intent in 1920 as expressed by Duncan Campbell Scott, then Deputy Minister of the Indian Department, was "to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department."<sup>66</sup> The Canadian government's policies of assimilation purposefully denigrated Indigenous cultures, degraded Indigenous peoples, and distanced Indigenous peoples from their communities. The forced assimilation of Indigenous peoples included breaking down the cultural ways of such peoples, physically separating family members from one another, and instilling Eurocentric ways "through repetitive drills and exercises in schools, factories, prisons and armies."<sup>67</sup>

European colonizers justified the taking of Indigenous lands as their own by characterizing Indigenous cultures as uncivilized and primitive. This taking of lands needed justification because at the time of colonization, international law did not allow for the claiming of lands occupied by other sovereign nations.<sup>68</sup> In order to dispossess Indigenous peoples of their lands, therefore, European colonizers needed to create a theory that supported the application of European laws in territories outside of their nations' borders.<sup>69</sup> The theory thus created equated sovereignty and nationhood with civilization, and deliberately positioned Indigenous peoples outside of this definition.<sup>70</sup>

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<sup>65</sup> In this section, I use the term "disrespect" to contrast it with my discussion of a bijural principle of "respect." The term disrespect, however, does not fully communicate the enormous amount of harm, violence, and dehumanization that assimilationist policies and laws have inflicted on Indigenous peoples. As such, I have added other descriptors throughout this discussion to try to capture the violence of the colonial encounter as well as the ongoing detrimental effects this violence has on Indigenous peoples, cultures, legal systems, and governance institutions.

<sup>66</sup> JR Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989) at 207.

<sup>67</sup> Tully, *supra* note 20 at 89.

<sup>68</sup> See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, UK: Cambridge University Press, 2005) at 53–54.

<sup>69</sup> See *ibid* at 4.

<sup>70</sup> See *ibid*.

Eurocentric notions of cultural superiority posited European cultures as further along the evolutionary scale than Indigenous cultures.<sup>71</sup> In this view, “all cultures and peoples are mapped hierarchically in accordance with their location on a historical process of progressive development.”<sup>72</sup> European societies and institutions were characterized as the highest and most developed on the scale, while Indigenous peoples were considered primitive, savage, and uncivilized.<sup>73</sup> European institutions were also seen as universal and reasonable in contrast to Indigenous societies, which were seen as primitive and childlike.<sup>74</sup>

As such, efforts to Christianize and Europeanize Indigenous peoples were constructed as benevolent. As James Tully argues, colonizers “saw themselves as enlightened guardians who were preparing lower, childlike and pre-consensual peoples for a superior, modern life; in this way they could regard the destruction of other cultures with moral approval.”<sup>75</sup> By viewing Indigenous peoples and cultures as merely at a lower stage of human development, European powers could justify the violent and unequal treatment of Indigenous peoples in the colonies.

The policies of assimilation legally implemented in Canada included compulsory enfranchisement provisions under the *Indian Act*,<sup>76</sup> whereby First Nations women who married non-Indigenous men lost their status.<sup>77</sup> Other laws were enacted that prohibited raising money for Aboriginal legal claims from 1927 to 1951, and also prohibited cultural ceremonies such as the potlatch and the tamanawas from 1884 to 1951.<sup>78</sup> The residential school system, in which Indigenous children were forcibly removed from their families, was imposed on Indigenous peoples, and its legacy

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<sup>71</sup> See Catherine Bell & Michael Asch, “Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 38 at 58.

<sup>72</sup> Tully, *supra* note 20 at 64.

<sup>73</sup> See *ibid* at 64–65.

<sup>74</sup> See *ibid*.

<sup>75</sup> *Ibid* at 91.

<sup>76</sup> *Supra* note 2.

<sup>77</sup> See Val Napoleon, “Extinction by Number: Colonialism Made Easy” (2001) 16:1 CJLS 113 at 116–17.

<sup>78</sup> See *ibid* at 117. The potlatch is a central economic, political, and legal ceremony practised by west coast First Nations and the tamanawas is the Blackfoot sun dance.

continues to have destructive intergenerational consequences for entire communities.<sup>79</sup>

By theorizing Indigenous inferiority without understanding Indigenous cultures, colonizers made generalizations based on harmful, inaccurate stereotypes. The process of stereotyping “denies the inherent complexity of every individual’s identity, reducing him or her to a mere cipher for the group, to whom a negative enemy-image can then all too easily be attached.”<sup>80</sup> These stereotypes justified the inhumane treatment of Indigenous peoples by colonial authorities and non-Indigenous people.

Unfortunately, these discriminatory attitudes have also surfaced in court decisions. For example, in the heavily criticized British Columbia Supreme Court decision in *Delgamuukw*, Chief Justice McEachern stated that the Gitxsan and Wetsuweten’s “ancestors had no written language, no horses or wheeled vehicles, slavery and starvation were not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbes, that aboriginal life in the territory was, at best, ‘nasty, brutish and short.’”<sup>81</sup> Although this decision was reversed and the above comments were rejected at both the British Columbia Court of Appeal and the Supreme Court of Canada, it is disconcerting, to say the least, that a judge within the Canadian court system would include a comment in 1991 that so vociferously denigrates Indigenous cultures.<sup>82</sup>

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<sup>79</sup> See *Truth and Reconciliation Commission of Canada: Interim Report* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012) at 1; NCSA, “Home/Fire: Ending the Cycle of Family Violence” (20 March 2015), online: YouTube <[www.youtube.com/watch?v=v2QIRj5tSqc](http://www.youtube.com/watch?v=lmstyXc6FnI&index=1&list=PLMG2IaX_R_oAiSEoVWIIIDQEzq7nZfF3V%20(This%20is%20a%20video); Anishinabek Nation, “Mother and Daughter: Inter-Generational Effects of Residential School” (10 April 2013), online: YouTube <<a href=)>.

<sup>80</sup> Robin Wilson, *What Works for Reconciliation?* (Belfast: Democratic Dialogue, 2006) at 12.

<sup>81</sup> *Delgamuukw v British Columbia*, [1991] 79 DLR (4th) 185 at 208, [1991] 3 WWR 97 (BCSC).

<sup>82</sup> See also Bell & Asch, *supra* note 71 at 60. Bell and Asch point out that a more subtle example occurred in *Baker Lake v Ministry of Indian Affairs* (1979), 107 DLR (3d) 513 at 544, [1980] 5 WWR 193 (FCA), where Justice Mahoney of the Federal Court of Canada said: “The fact is that the aboriginal Inuit had an organized society. It was not a society with very elaborate institutions but it was a society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do: hunt and fish and survive.” Bell and Asch point out that although this comment is not explicitly racist, it makes clear that the court was considering the Inuit’s culture in an evolutionary stages view and characterizing Inuit culture as more primitive than European cultures on the scale of evolution (Bell & Asch, *supra* note 71 at 60–61).

Disrespectful attitudes toward Indigenous peoples have also engendered both a disregard for and mischaracterization of Indigenous governance structures and legal systems. The disregard manifests itself in the assumption that such governance structures and legal systems may have been used in the distant past but are unable to address the circumstances facing Indigenous communities in the present day.<sup>83</sup> The mischaracterization surfaces in the allusion to Indigenous institutions and legal systems as idyllic and utopian, with no negative features.<sup>84</sup> As Val Napoleon and Hadley Friedland assert, Indigenous institutions and legal structures are useful to deal with contemporary disputes because they are a particular response by reasoning people to universal human issues.<sup>85</sup> The devaluation of Indigenous institutions and legal systems contributes to their continued marginalization and dissuades critical engagement with the ideology, principles, and application of Indigenous legal systems in the present day.

## 2. Internalizing Disrespect: Indigenous Identities and Self-Respect

Disrespectful and dehumanizing attitudes toward Indigenous peoples were justified through the construction of stereotypical and inaccurate representations of Indigenous identities and cultures. Frantz Fanon has eloquently described the violence that results internally for colonized peoples as a result of the imposition of inaccurate colonially constructed Indigenous identities:

And then the occasion arose when I had to meet the white man's eyes. An unfamiliar weight burdened me. The real world challenged my claims. In the white world the man of color encounters difficulties in the development of his bodily schema. Consciousness of the body is solely a negating activity. It is a third-person consciousness. The body is surrounded by an atmosphere of certain uncertainty. ...

[A]nd I was battered down by tom-toms, cannibalism, intellectual deficiency, fetishism, racial defects.

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<sup>83</sup> See Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ 1 at 14; Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D Dubber & Tatjana Hörnle, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) 225 at 227–28 [Napoleon & Friedland, "Roots to Renaissance"].

<sup>84</sup> See Valerie Ruth Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria Faculty of Law, 2009) at 29–30 [unpublished]. See also Friedland, *supra* note 83 at 14.

<sup>85</sup> See Napoleon & Friedland, "Roots to Renaissance", *supra* note 83 at 228.

I took myself far off from my own presence. ... What else could it be for me but an amputation, an excision, a hemorrhage that spat-tered my whole body with black blood?<sup>86</sup>

Here, Fanon graphically describes the negative effects of the imposition of colonial stereotypes on his identity and physical experience. The imposition of negative stereotypes on cross-cultural others arises from the erection of imaginative boundaries between non-Indigenous and Indigenous peoples. Such boundaries justify a physical distancing between cross-cultural groups and results from a refusal to put the self into question.<sup>87</sup>

The disrespectful, dehumanizing treatment of Indigenous communities has a direct impact on the development of Indigenous peoples' individual notions of self-respect. Taylor argues that one's sense of identity develops in the context of relationships with others, which can affect the development of self-respect both positively and negatively.<sup>88</sup> Dillon describes self-respect as "a complex of multiply layered and interpenetrating phenomena that compose a certain way of being in the world, a way of being whose core is a deep appreciation of one's morally significant worth."<sup>89</sup> In her view, self-respect requires both intellectual and experiential appreciation of one's worth;<sup>90</sup> in other words, it is not enough to *know* on an intellectual level that you are worthy of respect, it is actually necessary to *feel* that sense of being valued and worthy.<sup>91</sup> In the context of oppressed communities whose identities are constructed as less valuable and less worthy, it may be difficult for some members of those communities to develop both intellectual and emotional aspects of positive self-respect.

Self-respect has also been linked to the respect accorded to cultural groups at a political level. Taylor notes that the respect for group identi-

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<sup>86</sup> Frantz Fanon, *Black Skin, White Masks* translated by Charles Lam Markmann (New York: Grove Press, 1967) at 110–12.

<sup>87</sup> See Jonathan Goldberg-Hiller, "Subjectivity Is a Citizen': Representation, Recognition, and the Deconstruction of Civil Rights" (2003) 28 *Studies in Politics & Society* 139 at 154.

<sup>88</sup> See Taylor, *supra* note 14 at 32–34.

<sup>89</sup> Robin S Dillon, "Self-Respect: Moral, Emotional, Political" (1997) 107:2 *Ethics* 226 at 228 [Dillon, "Self-Respect"].

<sup>90</sup> See *ibid* at 239, where Dillon notes: "Intellectual understanding involves having beliefs which one has reason to accept as true, then coming by inference to have other beliefs which one takes to be true in virtue of their logical relation to warranted beliefs, where the believing, inferring, and assessing need not engage emotions. Experiential understanding involves experiencing something directly and feeling the truth of what is experienced."

<sup>91</sup> See *ibid* at 234. The need to value oneself, in Dillon's view, is one of the deepest human needs (see *ibid* at 242). In the context of self-respect, see also Taylor, *supra* note 14 at 26, who notes that recognition by others can be thought of as "a vital human need."



ties can shape the development of self-respect of members within those particular groups.<sup>92</sup> He argues:

Equal recognition is not just the appropriate mode for a healthy democratic society. Its refusal can inflict damage on those who are denied it, according to a widespread modern view. ... The projection of an inferior or demeaning image on another can actually distort and oppress, to the extent that image is internalized.<sup>93</sup>

Taylor's statement highlights the link between respect among social groups and how the giving or withholding of respect can affect the development of self-respect.

Dillon also asserts that the political and social positioning of groups significantly affects self-respect.<sup>94</sup> The importance of political recognition in the development of self-respect is central in her view, as "damaged self-respect is integrally connected with oppression."<sup>95</sup> She argues:

The source of some damage to self-respect is an implicit interpretive framework of self-perception whose organizing motif is worthlessness. And this framework ... is not a private phenomenon but is a feature of the historical and sociopolitical situatedness of individuals. Self-respect may be damaged not because individuals fail to have appropriate thoughts and emotions but because they fail to have an appropriate situation, one that would support the construction of a basal framework for positive valuation.<sup>96</sup>

Dillon notes that self-respect on an individual level "is constituted by and reflects prevailing forms of social and political life."<sup>97</sup> Self-respect is "constructed in and by social, cultural, and political contexts, which for many categories of persons are contexts of oppression."<sup>98</sup> In Dillon's view, ameliorating damaged self-respect requires work on a personal, emotional level but, in addition, improving the prevailing socio-political contexts may yield improved self-understandings and an improved level of self-respect.<sup>99</sup>

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<sup>92</sup> See Taylor, *supra* note 14 at 36.

<sup>93</sup> *Ibid.*

<sup>94</sup> See Dillon, "Self-Respect", *supra* note 89 at 227, 244.

<sup>95</sup> *Ibid* at 235, n 20.

<sup>96</sup> *Ibid* at 243. To support this claim, Dillon cites a large body of work within philosophy and psychology on the social construction of emotion and personality, especially in connection with gender (see *ibid* at 243–47).

<sup>97</sup> *Ibid* at 244.

<sup>98</sup> *Ibid* at 245.

<sup>99</sup> See *ibid* at 248–49 (describing the "basal interpretive frameworks" that found self-respect).

In the context of Indigenous communities within Canada, the RCAP also highlights the link between respect at the political level and self-respect. The RCAP concludes that

[p]eople can be active and responsible members of their communities only if they have a sense of their own worth and the conviction that what they say and do in both the public and the private sphere can make a significant contribution. However, this sense of self-respect is based in part on society's recognition of the value of an individual's activities and goals. A multinational society that treats the culture of a member nation with derision or contempt may well undermine the self-respect of people belonging to that culture.<sup>100</sup>

The RCAP emphasizes the close link between recognition at the collective level and feelings of self-respect at the individual level.

A lack of recognition at the political level can negatively impact the self-perception of those belonging to marginalized communities. Fanon stresses the way in which violence in the colonial relationship can be internalized by those belonging to cultures that are denigrated and oppressed.<sup>101</sup> As such, members of colonized communities internalize the devaluing messages and may turn the violence they experience toward themselves or others in close personal relationships. Violence within Indigenous communities, such as violence against women, "is connected to larger social structures of inequality within any society" and "is therefore intimately linked with the broader colonial context."<sup>102</sup> Lack of respect at a political and cultural level may damage Indigenous peoples' self-respect and contribute to social problems present in some Indigenous communities. One imperative for implementing the principle of respect is therefore to rectify the harm disrespect causes at an individual level, and thereby contribute to the health of Indigenous communities at the collective level.

### 3. Restructuring the Relationship to Live Together in Respect

Indigenous peoples have approached relationships with non-Indigenous people and governments by applying Indigenous principles of respect. The early treaties provide a useful example of the development of

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<sup>100</sup> *RCAP Report*, *supra* note 5 at 648.

<sup>101</sup> See Frantz Fanon, *The Wretched of the Earth*, translated by Constance Farrington (New York: Grove Press, 1963) at 52. See also Val Napoleon, "Who Gets to Say What Happened? Reconciliation Issues for the Gitksan" in Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) 176 at 180.

<sup>102</sup> Snyder, Napoleon & Borrows, *supra* note 43 at 604. The authors note that Indigenous law could usefully and appropriately address these issues within Indigenous communities.

intersocietal agreements that embodied the ideal of living together in respect. In the negotiation of the early treaties, each side observed ceremonies from both colonial and Indigenous traditions to solidify the terms of the agreement.<sup>103</sup> Although the two sides to the early treaties may have had different motivations—securing military alliances for the colonizers and ensuring that their cultural, territorial, and national integrity remained intact for Indigenous peoples—such agreements were based on an imperfect yet palpable sense of mutual respect.

Even though Indigenous peoples have taken up respect in complicated ways and respect has operated unevenly throughout the colonial encounter, Indigenous peoples have historically approached relationship building with other societies (both Indigenous and non-Indigenous) on the basis of respect. Indigenous peoples' one-sided application of the principle of respect has created an imbalance in relationships between Indigenous and non-Indigenous peoples that requires righting.

Implementing a bijural principle of respect that draws on the best ideas from Indigenous and non-Indigenous theories and law holds potential for reconciliation. There are many challenges, however, to implementing a bijural interpretation of the principle of respect to resolve Aboriginal law disputes. The basis of the Canadian legal system and many of the key premises upon which it relies stem from non-Indigenous, Eurocentric theories that were overtly hostile to Indigenous peoples. In fact, many theorists (myself included) argue that Canadian law continues to perpetuate and embody colonial assumptions in dealings with Aboriginal law disputes.<sup>104</sup> If Canadian law is colonial, it raises the question of whether and how it could take up respect in the context of Aboriginal law disputes. One answer is that non-Indigenous judges, lawyers, and people must engage in the difficult work of decolonizing ourselves—of interrogating our own complicity in the oppression of Indigenous communities and examining the various ways in which we continue to benefit from this oppression. We then need to examine the systemic biases within Canadian law and policy

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<sup>103</sup> See Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33:4 *Osgoode Hall LJ* 623 at 656 (on the reciprocal exchange of gifts).

<sup>104</sup> See e.g. Kirsten Manley-Casimir, "Creating Space for Indigenous Storytelling in Courts" (2012) 27:2 *CJLS* 231 [Manley-Casimir, "Creating Space"]; Kirsten Manley-Casimir, "Incommensurable Legal Cultures: Indigenous Legal Traditions and the Colonial Narrative" (2012) 30:2 *Windsor YB Access Just* 137; Gordon Christie, "A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*" (2005) 23:1 *Windsor YB Access Just* 17; Mary Ellen Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989–1990) 6 *Can Hum Rts YB* 3; James (Sákéj) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1:1 *Indigenous LJ* 1; Alfred & Coulthard, *supra* note 9.

that operate (intentionally or unintentionally) to oppress Indigenous peoples. Only when we acknowledge our personal interests and the systemic biases of Canadian law can we begin to envision ways in which this bijural principle of respect could be operationalized within the Canadian legal system.

Engaging in this difficult work of decolonization necessarily requires that significant attitudinal shifts take place. It requires recognition of Indigenous peoples on a nation-to-nation basis, which in itself requires a questioning of the state-centric assumptions upon which Canadian law is based. What if we were to imagine a totally different reality in which both Canadian courts and Indigenous courts had jurisdiction to consider Aboriginal law disputes? In this scenario, it is possible to envision a situation where Canadian judges engage in legal analysis that acknowledges the unlawful taking of Indigenous lands and suppression of Indigenous jurisdiction, while at the same time asserting the jurisdiction of a Canadian court to rectify this imbalance through Canadian legal processes.<sup>105</sup> We could also imagine that such a decision would be considered through Indigenous legal processes and Indigenous decision makers could agree or disagree with that decision. What if we added the requirement that both Canadian and Indigenous courts would need to be in agreement for a decision to be binding? My point here is that there may be a way for Canadian law to shed its cloak of colonialism and apply a bijural interpretation of respect. To do so, however, would require significant changes and loosening the Canadian law's tight grip of certainty about its superiority.

In my view, interrogating the complicity of the Canadian legal system (and the actors within it) in the oppression of Indigenous communities and reformulating the relationship between Canadian law and Indigenous legal traditions are prerequisites to requesting that Indigenous peoples respect the Canadian state and legal system. Until some monumental shifts in attitudes are made and significant restructuring of the institutions and relationships has taken place, it is entirely reasonable for Indigenous peoples to question whether Canadian institutions deserve Indigenous peoples' respect. Despite justifiable caution in placing trust in the Canadian legal system on the part of Indigenous peoples, however, Indigenous conceptions of respect do make room for respect across cultural boundaries for institutions and practices that differ in form and substance. I would venture to guess that if non-Indigenous people made the leap to challenge their complicity, reformulated relationships, and redistributed power between Indigenous peoples and themselves, at least some

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<sup>105</sup> I expand on this point in Manley-Casimir, "Creating Space", *supra* note 104 at 246.

Indigenous peoples might consider re-engaging with non-Indigenous people and institutions in pursuit of reconciliation.

There are many advantages to be gained from shifting from a relationship characterized by disrespect to one based on respect, cooperation, and interdependence.<sup>106</sup> In addition to increasing the capacity and health of Indigenous peoples both individually and collectively through the creation of social and political conditions that support positive self-respect, implementing the principle of respect in relationships between Indigenous and non-Indigenous peoples would prioritize proactive, constructive collaboration over adversarial, destructive conflicts.

For example, in the area of litigation, if the Canadian government were to create a neutral mediation body that tried to proactively deal with disputes prior to them going to litigation, and provide support for Indigenous leaders and government representatives to negotiate realistic solutions prior to escalation, many disputes may be resolved without recourse to the courts. Litigation is notoriously expensive, risky, and stressful. Diverting conflicts away from the court system may allow for more resources to be put into capacity building, negotiating mutually agreeable courses of action, and managing intercultural relationships.

Implementing the principle of respect may also allow Indigenous peoples to focus on reclaiming and reconstructing Indigenous institutions and legal traditions from within. The onslaught of assimilationist policies has positioned Indigenous peoples in a defensive stance. Correspondingly, this stance has diverted Indigenous peoples' attention away from proactively creating and implementing their visions of what they want their societies to be and how they want to express their cultural identities. Living together in respect would reduce the need for a defensive posture and provide a positive space for Indigenous peoples to live in accordance with their own sense of collective identity and values.

### C. *The How?*

Reflecting on the history of the relationship between Indigenous and non-Indigenous peoples within Canada suggests that the relationship to date has not been constructive and that conflicts will continue to bubble to the surface due to the dysfunction in the intercultural relationship. The first and most important precondition to implementing the principle of respect to restructure this relationship is therefore *acknowledgement that the relationship needs to be improved*. This acknowledgment supports the

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<sup>106</sup> See *supra* note 21 for the definition of interdependence used in this article.

idea that the intercultural relationship needs to be restructured on a sounder basis, which includes implementing a bijural principle of respect.

One of the difficulties with this precondition is that at least some non-Indigenous people are likely to resist accepting responsibility for what has occurred and, concomitantly, that they have a role to play in repairing the relationship between Indigenous and non-Indigenous peoples within Canada. In the area of law and politics, it is common to hear the refrain “forgive and forget,”<sup>107</sup> which is unhelpful in moving toward reconciliation. Forgive and forget places an enormous burden on Indigenous peoples and lets non-Indigenous people off the hook for the harms caused to Indigenous jurisdiction, legal systems, lands, and peoples by successive colonial and Canadian governments. Rather, as Nicholas Frayling suggests, what is needed for reconciliation is to “remember and change.”<sup>108</sup> We need to carry the past carefully with us as we link arms with Indigenous peoples to create a vision of where we want to be and work together to move constructively from where we are now to where we want to be.

There will inevitably be non-Indigenous people who are unwilling to engage in critical self-reflection and act to rebuild damaged relationships with Indigenous peoples. Similarly, due to the enormous amount of (one-way) harm that has been inflicted on Indigenous peoples and communities, there will also be Indigenous peoples who are unwilling to engage with non-Indigenous people and institutions on the basis of respect. There will be some people in both groups, however, who will be willing to take the necessary steps to repair relationships between Indigenous and non-Indigenous peoples on an individual and collective level. Importantly, it takes just a few committed, persistent individuals to start an avalanche of large-scale change. As Lederach notes, what matters is not the sheer number of persons working for change, but that the individuals themselves are positioned strategically. He asserts that what is needed is “a small set of the right people involved at the right places.”<sup>109</sup>

In addition to the precondition that there must be an acknowledgment that the relationship needs to be repaired and individuals willing to engage in actions to repair those relationships, I suggest that there are three starting points to begin transforming the relationship between Indigenous and non-Indigenous peoples and put it on a more solid footing.

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<sup>107</sup> For a discussion of the problems with this position, see Nicholas Frayling, “Towards the Healing of History: An Exploration of the Relationship Between Pardon and Peace” in Joanna R Quinn, ed, *Reconciliation(s): Transitional Justice in Postconflict Societies* (Montreal: McGill-Queen’s University Press, 2009) 26 at 28–29. See also Judith Lewis Herman, *Trauma and Recovery* (New York: BasicBooks, 1992) at 8.

<sup>108</sup> Frayling, *supra* note 107 at 29.

<sup>109</sup> Lederach, *supra* note 55 at 91.

These three starting points include both attitudinal shifts and concrete actions. The starting points are: (1) making our interdependence and responsibilities toward one another primary; (2) rejecting colonial attitudes and stereotypes; and (3) creating space to express and foster cultural difference.

### 1. Making Our Interdependence and Mutual Responsibilities Primary

A first way to implement the principle of respect is to make our interdependence and responsibilities toward one another primary.<sup>110</sup> Respect requires a shift in understanding from a perspective that we are valuable solely as individuals to one that recognizes that we all exist within a web of relationships. Rather than starting from the Eurocentric perspective that sees people as valuable because they have the capacity for rational, individualistic thought, we need to shift our perspective to understand that we are in fact constituted by our relationships with others. As Patricia Monture asserts, “I am because I know my name, my family, my clan, and my nation.”<sup>111</sup> Similarly, Jennifer Nedelsky argues that we need to recognize that “our essential humanity is neither possible nor comprehensible without the network of relationships of which it is a part.”<sup>112</sup> This relational understanding requires a paradigm shift from a consideration of not only what is best for oneself but also what is best for everyone else. It requires that people take a wide-angle, long-term view of the effects of decisions on everyone, both Indigenous and non-Indigenous.

In settings of protracted violence, John Paul Lederach asserts that recognizing the centrality of relationships is pivotal to constructive social change.<sup>113</sup> He asserts that we need to understand that “the well-being of our grandchildren is directly tied to the well-being of our enemy’s grandchildren.”<sup>114</sup> In Lederach’s view, conflict is embedded in relational spaces, networks, and connections, and, therefore, the solutions must emerge “from relational resources, connections and obligations.”<sup>115</sup> Intercultural relational spaces, therefore, need to be created in order to facilitate dia-

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<sup>110</sup> See Goldberg-Hiller, *supra* note 87 at 175.

<sup>111</sup> Patricia A Monture, “Women’s Words: Power, Identity and Indigenous Sovereignty” in Patricia A Monture & Patricia D McGuire, eds, *First Voices: An Aboriginal Women’s Reader* (Toronto: Inanna Publications and Education, 2009) 116 at 121.

<sup>112</sup> Jennifer Nedelsky, “Reconceiving Rights as Relationship” (1993) 1:1 Rev Const Stud 1 at 12.

<sup>113</sup> See Lederach, *supra* note 55 at 34–35. Lederach defines constructive social change as “the pursuit of moving relationships from those defined by fear, mutual recrimination, and violence toward those characterized by love, mutual respect, and proactive engagement” (*ibid* at 42).

<sup>114</sup> *Ibid* at 35.

<sup>115</sup> *Ibid* at 76–77.

logue that might lead to appropriate processes for resolving disputes. The creation of such spaces might include ensuring that cultural protocols are followed at the beginning of meetings between Indigenous and non-Indigenous leaders (such as inviting an Elder or Senator to open the meeting, inviting a drum group to open, and participating in sacred ceremonies). It might also include minimizing power imbalances by meeting on Indigenous territory rather than in a government building.<sup>116</sup>

Viewing our interdependence as primary corresponds with Indigenous perspectives that value all life forms. If solutions need to emerge from relational spaces, communication needs to occur within all relevant relationships. Atleo asserts that, according to Nuu-chah-nulth worldviews, humans can engage in dialogue with all life forms through the vision quest. The vision quest, called *?uusumč*, enables people to “see beyond the purely physical reality of nature.”<sup>117</sup> The vision quest

also allowed [the Nuu-chah-nulth] to discover that creation is a unity in spite of its apparent fragmented appearance and contradictory nature. For example, although deer, wolf, and salmon are scientifically classified as animals within the biological dimension of existence and therefore as separate from humans, Nuu-chah-nulth peoples also know and experience these animals as *quu?as*, as people like themselves. The same is true of trees and the multitude of other life forms.

What this means is that Nuu-chah-nulth peoples had to find some way to live with these other *quu?as* who were recognized as life forms, as living beings who were originally part of one language and community.<sup>118</sup>

Finding ways to communicate with other life forms through vision quests enabled Nuu-chah-nulth peoples to establish respectful protocols for such interactions.<sup>119</sup>

The crucial idea stemming from Atleo’s description of the vision quest is the aspect of spiritual connection, which might also be understood as an emotional or embodied connection. In the context of the various life forms that make up our world, a prerequisite is spending more time physically in areas where other life forms live. Reconnecting with nature, therefore, constitutes a first important step to being alive to the various life forms with whom we are interrelated and upon whom our realities depend.

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<sup>116</sup> For a discussion of how Canadian judges might create more respectful court processes to encourage Indigenous storytelling, see Manley-Casimir, “Creating Space”, *supra* note 104 at 241–46.

<sup>117</sup> Atleo, *supra* note 56 at 35.

<sup>118</sup> *Ibid* at 35–36.

<sup>119</sup> See *ibid* at 37.



Once we accept our relationality as primary, the idea of responsibilities between all life forms make sense. If our well-being is bound up with the well-being of others, we have a responsibility to take good care of ourselves and of others. In this view, responsibilities to past and future generations also make sense. It is easy to understand, from a non-Indigenous perspective, that the quality of our grandchildren's lives depends on the decisions we make today. It also becomes easier to understand how our past ancestors might be affected: we may do damage to their memory by making irresponsible decisions of which they would have disapproved.

Conceptualizing ourselves as embedded within a web of relationships made up of all life forms justifies the notion of mutual respect and responsibility among animate and inanimate beings. Making our interdependence and mutual responsibilities primary requires a radical shift in focus away from individualism toward an understanding of our embeddedness in a complex web of relationships. This complex web includes Indigenous and non-Indigenous peoples and other life forms across a wider expanse of time than non-Indigenous peoples are accustomed to considering.

## 2. Rejecting Colonial Attitudes and Stereotypes

The desire to control and assimilate is based on a negative view of Indigenous peoples and cultures. In order to rebuild relationships between Indigenous and non-Indigenous peoples on the basis of respect, we need to reject colonial attitudes and the harmful stereotypes such attitudes engender.<sup>120</sup> Some ways in which to shift attitudes and jettison stereotypes include non-Indigenous people learning more about the history of relations between Indigenous and non-Indigenous peoples within Canada,<sup>121</sup> and learning about Indigenous peoples and cultural values by engaging with Indigenous peoples on a personal level.

Canada's international reputation as a peaceful, democratic nation is a source of pride for many Canadians. Most Canadians, however, are sore-

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<sup>120</sup> In the context of critically engaging with Indigenous legal traditions, Friedland suggests several ways to move past stereotypes when dealing with materials in which one might find descriptions of Indigenous law. She argues for a shift in assumptions that starts from three related premises: (1) Indigenous peoples were and are reasoning people with reasonable social and legal orders; (2) Indigenous legal orders exist in the present and those engaging with them should describe them in the present tense; and (3) Indigenous laws are a particular response to universal human issues (Friedland, *supra* note 83 at 34).

<sup>121</sup> There are several ways in which to improve the understanding of the history of relationships between Indigenous and non-Indigenous peoples on a broad scale, including curriculum reform in schools and public education campaigns through traditional and social media.

ly misinformed or completely ignorant about the history of colonialism and the impact that assimilationist policies and laws have had on Indigenous peoples within Canada. This ignorance continues to exist despite the work of the Truth and Reconciliation Commission of Canada, which documented survivors' stories, held National Events and brought media attention to the Indian Residential School legacy.

Expressing genuine willingness to learn from Indigenous peoples is in itself a demonstration of respect.<sup>122</sup> Moreover, genuine interest in learning about Indigenous cultures affirms the value of such cultures. Iris Marion Young advocates modes of cross-cultural interaction such as greeting, rhetoric, and storytelling to craft a more comprehensive intercultural understanding.<sup>123</sup>

Non-Indigenous people might learn about Indigenous cultural values in attending Indigenous events. In doing so, it is imperative that non-Indigenous visitors to such events observe and listen respectfully to try and figure out what to do. They may have the important and uncomfortable experience of being the only person in the room who does not know how to act. This positioning as an outsider may create a transformative learning experience whereby non-Indigenous people might begin to understand some of the foreign experiences Indigenous peoples face when they participate in Canadian institutions, like schools, courts, and prisons. With increased exposure to Indigenous cultural events, non-Indigenous people may also start to understand the meanings associated with different cultural practices and ceremonies.

Attempting to understand (however imperfect that understanding might be) Indigenous peoples' perspectives and cultural values is important for non-Indigenous peoples to be able to appropriately contextualize disputes that arise involving Aboriginal rights. Without attempts to understand Indigenous perspectives and cultures, the actions of Indigenous communities in living their laws through blockades, peaceful protests, and public demonstrations may be misunderstood and mischaracterized. As Wapshkaa Ma'iingan (Aaron Mills) points out, Indigenous communities participate in blockades and other public protests as an act of jurisdiction in accordance with the laws governing their peoples.<sup>124</sup> When this perspective is made explicit, one's understanding of acts of pro-

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<sup>122</sup> See Greschner, *supra* note 29 at 340. As Greschner argues, "[o]ne indication of respect is the willingness to learn from another" (*ibid.*).

<sup>123</sup> See Iris Marion Young, "Communication and the Other: Beyond Deliberative Democracy" in Seyla Benhabib, ed, *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996) at 120.

<sup>124</sup> See Wapshkaa Ma'iingan (Aaron Mills), "Aki, Anishinaabek, kaye tahsh Crown" (2010) 9:1 *Indigenous LJ* 107 at 161–62.

tests shifts: instead of Indigenous peoples being seen as criminal, unruly, and unlawful, the blockades are reframed as a symptom of a clash of jurisdiction resulting from unresolved historical grievances. In other words, Indigenous protests and blockades take place because there has been a lack of respect in the relationship to date and the relationship is broken.

The willingness to learn from Indigenous peoples requires engagement on a personal level. Such engagement involves the ability and willingness to listen to the voices and accept the truths of Indigenous experiences.<sup>125</sup> More engagement will inevitably increase the amount of knowledge that non-Indigenous and Indigenous peoples have about one another<sup>126</sup> and may increase the level of intercultural respect.<sup>127</sup> Napoleon and Friedland, for example, describe a story common to several Indigenous legal traditions, including the Gitksan, Cree, Taigish, and Secwepemc, about “a member of one group spending time with another people—human or animal—and returning with new knowledge that is incorporated into the practices and intellectual frameworks of his or her own people.”<sup>128</sup> A key message in these stories is that the experience of spending time with another group increases respect between the different peoples and/or animals.<sup>129</sup> Similarly, in the context of intersocietal human relationships, one of Wilson’s interview participants in his research on reconciliation in Ireland, Ms. Montague, asserts that

it’s very easy to have an enemy when you can’t see the enemy’s face. So, once there’s some kind of direct interaction and people meet one another on a face-to-face basis, the dynamics change. And it’s not as easy to hate, because the faceless monster on the other side of that wall has got my blue eyes or brown eyes, has a name, has a family—they are a person.<sup>130</sup>

Robin Wilson asserts that “the more we can not only know of others but also the more empathy we can feel with them, the less likely are we to be dependent on stereotyped representations in intercultural encounters.”<sup>131</sup> As a result, increasing intercultural contact is a key strategy necessary to deconstruct stereotypes.

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<sup>125</sup> See Greschner, *supra* note 29 at 349–50.

<sup>126</sup> See Wong, *supra* note 14 at 174–75.

<sup>127</sup> See *ibid* at 177. See also Samar El-Masri, “Interethnic Reconciliation in Lebanon After the Civil War” in Quinn, *supra* note 107, 263 at 274 (suggesting that living in mono-ethnic neighbourhoods increases levels of fear of other ethnic groups).

<sup>128</sup> Val Napoleon & Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions through Stories” (2016) 61:4 McGill LJ 725 at 742.

<sup>129</sup> See *ibid*.

<sup>130</sup> Wilson, *supra* note 80 at 35.

<sup>131</sup> *Ibid* at 13.

Increased contact alone, however, is not enough. Wilson asserts that intercultural contact is only effective to deconstruct stereotypes when it is repeated and extended over time.<sup>132</sup> This extended contact is necessary because it takes time to build trust between people; they will only start to share stories about themselves after repeated contact. In addition, although repeated contact is necessary, it is not sufficient in itself without deeper engagement between people through dialogue. As Ms. Lynagh—another of Wilson’s interview participants—notes, mere contact “doesn’t shift anything—I could sit with you for hours and I wouldn’t have any greater understanding of your values, your beliefs, or I wouldn’t have any greater respect.”<sup>133</sup> As a result, extended, recurrent, high-quality engagement is what is necessary to deconstruct stereotypes and effectively change people’s attitudes.

It is important to note that non-Indigenous people who actively seek out interactions with Indigenous peoples need to take responsibility for their own learning. Historically, non-Indigenous people have relied on Indigenous peoples to educate them about Indigenous cultures and traditions. In order to engage meaningfully with Indigenous peoples, non-Indigenous allies must demonstrate that they are trustworthy, which requires a significant, long-term commitment and a stance of humility. Demonstrating you are trustworthy can occur in a variety of ways, ranging from having a well-respected Indigenous person vouch for you (which may fast track but does not guarantee trust), to consistently and persistently showing up to genuinely learn and engage with Indigenous peoples. Distrust is a natural starting point in relationships between Indigenous and non-Indigenous peoples. Non-Indigenous people who want to engage with Indigenous peoples need to understand that they are responsible for demonstrating they are trustworthy through their thoughtful words and consistent actions.

In his legal historical study of early interactions between Indigenous and non-Indigenous peoples in North America, Jeremy Webber provides an example that supports the need for sustained, regular contact across cultures to produce increased understanding and respect. Webber notes that “[t]he intensity of [the] interaction [of early colonists] with Aboriginal peoples often generated a high level of mutual understanding and respect.”<sup>134</sup> Specifically, he noted that fur traders and missionaries, who had more contact with Indigenous peoples, had more solicitude toward Indigenous communities than agricultural settlers due to their respective

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<sup>132</sup> See *ibid* at 42.

<sup>133</sup> *Ibid* at 43.

<sup>134</sup> Webber, *supra* note 103 at 636.

amounts of interaction.<sup>135</sup> Webber notes that agricultural settlers had “few amicable contacts with Aboriginal peoples” and “little opportunity for discussion and exchange.”<sup>136</sup> In addition, agricultural settlement created more conflicts over lands between settlers and Indigenous peoples, which increased the likelihood that settlers would have negative cross-cultural experiences. Higher amounts of personal interaction between non-Indigenous and Indigenous peoples may therefore increase the amount of respect between cultures.

### 3. Creating Space to Express and Foster Cultural Difference

Finally, implementing the principle of respect includes relinquishing the historic control that the Canadian government has exerted over the lives of Indigenous communities and creating physical and jurisdictional space for such communities to express and foster cultural difference. With respect to the need for physical space, Indigenous communities rely on and maintain close relationships with their ancestral territories. Indigenous peoples not only depend on the resources within their territories for economic and physical sustenance, their relationships with their specific ancestral territories sustain their cultural and spiritual identities.<sup>137</sup> The centrality of territory to Indigenous peoples makes the protection of the territorial relationship of utmost importance. As Matthew Chapman argues “the maintenance of the territorial connection *must* be the condition precedent for the survival of indigenous cultures and, therefore, the survival of indigenous peoples as peoples.”<sup>138</sup> Chapman argues that states around the world are more willing to support the protection of the cultural rights of Indigenous peoples but are much more reluctant to support the protection of territorial and self-determination rights.<sup>139</sup> The stability provided to Indigenous communities by securing territorial rights, however, is central to the survival and identities of Indigenous peoples.

The need to create physical space for Indigenous communities to flourish is closely related to the need to create jurisdictional space for the protection of cultural difference. Indigenous governments need space to gov-

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<sup>135</sup> See *ibid* at 636–37.

<sup>136</sup> *Ibid* at 637.

<sup>137</sup> See Matthew Chapman, “Indigenous Peoples and International Human Rights: Towards a Guarantee for the Territorial Connection” (1997) 26:3 *Anglo-Am L Rev* 357 at 360.

<sup>138</sup> *Ibid* at 361–62 [emphasis in original]. Borrows also notes that in many Indigenous worldviews, severing ties to traditional territories is seen as genocide (see John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia*” (1999) 37:3 *Osgoode Hall LJ* 537 at 592).

<sup>139</sup> See Chapman, *supra* note 137 at 362.

ern their communities according to their cultural traditions and values. Indigenous governments therefore may differ in form and design both from mainstream institutions and from those of other Indigenous communities based on differing cultural values. As Kerry Wilkins asserts, the Canadian legal system

must dedicate sufficient 'constitutional space for Aboriginal peoples to be Aboriginal,' to borrow Donna Greschner's wonderful phrase. This entails respecting and protecting communities' power, and indeed duty, to defend such individuals, lands and resources as may remain to them against mainstream 'laws and policies which are demonstrably threatening to their culture,' and generally to address their own needs and imperatives in ways that they themselves consider effective and appropriate, even when those aims and ways differ substantially from what we in the mainstream culture might have done or preferred. This, in turn, necessarily involves 'the significant letting go of Canadian government power over the lives of Aboriginal citizens,' and accepting that self-governing Aboriginal communities are bound sometimes to make mistakes—even by their own reckoning—that it cannot be our business, uninvited, to correct.<sup>140</sup>

Respecting jurisdictional space for Indigenous peoples therefore includes the acceptance that such communities may design different institutions, legal systems, and processes that are culturally appropriate to their communities.

Respecting jurisdictional space also involves recognizing Indigenous sovereignty as an effective way to protect collective difference.<sup>141</sup> As Patrick Macklem suggests,

[e]ach side cherishes its own collective difference and values sovereignty as a way of expressing that difference and protecting it from the encroaching views of the other. Collective difference, far from being a reason for refusing to recognize a community's sovereignty, is in fact a precondition of such recognition. The value of sovereignty lies in the legal space it establishes for a community to construct, protect, and transform its collective identity. Sovereignty, simply speaking, permits the legal expression of collective difference.<sup>142</sup>

Here Macklem asserts that the recognition of Indigenous sovereignty would create a legal space for Indigenous governments to envision and support their collective identity as a community. He is careful to point out that because sovereignty is socially constructed, it is not tied to one insti-

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<sup>140</sup> Kerry Wilkins, "Take Your Time and Do It Right: *Delgamuukw*, Self-Government Rights and the Pragmatics of Advocacy" (2000) 27:2 Man LJ 241 at 251–52 [references omitted].

<sup>141</sup> See Macklem, *supra* note 29 at 110.

<sup>142</sup> *Ibid* at 111.

tutional form but can be sculpted and recreated to serve the purposes of Indigenous communities, one of which is to protect collective difference.<sup>143</sup> The recognition of sovereignty is therefore a central way that Aboriginal law could protect the expression of Indigenous collective difference.

The creation of jurisdictional space includes the ability to design and implement legal institutions that reflect and enforce Indigenous legal traditions. Indigenous peoples need to participate in “defining the meaning, institutions and standards of justice in their own communities.”<sup>144</sup> Greschner asserts that designing a just legal system requires “ensuring that [Aboriginal peoples] are the systems’ dreamers, architects and caretakers.”<sup>145</sup> Indigenous governments need to be supported, therefore, in designing culturally appropriate solutions to the problems facing their own communities<sup>146</sup> and, equally importantly, that non-Indigenous people trust their ability to do so.

The creation of this jurisdictional space would support Indigenous peoples’ ability “to define who they are”; it would provide the “potential for self-definition which includes their capacity to project their own theories and particular forms of knowledge.”<sup>147</sup> The creation of such space would enable Indigenous communities to make laws and policies that reflect Indigenous conceptions of respect for all life forms and past and future generations. It would enable Indigenous communities to reinvigorate governance structures specifically formulated to protect Indigenous cultural difference.

The recognition of Indigenous territorial, jurisdictional, and governance rights poses the most difficulty for the Canadian constitutional structure and Canadian society as a whole. Inevitably, such rights will create conflicts between Indigenous and non-Indigenous peoples because these rights compete for scarce resources (land) and conflict with the vision that Canada has created of how it should be governed. The federal structure, however, already allows for different levels of jurisdictional and governance powers. With enough support and a new vision of how Canada might be restructured on the basis of mutual respect, Indigenous governance and territorial rights might become a reality.

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<sup>143</sup> See *ibid* at 112.

<sup>144</sup> Monture-Okanee & Turpel, *supra* note 60 at 249 (discussing the Canadian criminal justice system).

<sup>145</sup> Greschner, *supra* note 29 at 342.

<sup>146</sup> See Monture-Okanee & Turpel, *supra* note 60 at 249.

<sup>147</sup> Christie, “Law, Theory”, *supra* note 1 at 72.

## Conclusion: Visions of Respect

The principle of respect seems reasonable to implement in the context of managing the relationships between Indigenous and non-Indigenous peoples. History, however, has demonstrated that respect has not characterized these relationships to date. An appropriate interpretation of the principle of respect to govern relations between Indigenous and non-Indigenous peoples would be informed by and reflect Indigenous and non-Indigenous visions. Engendering respect in the intercultural relationship would involve deliberately rejecting stereotypes and negative attitudes toward Indigenous peoples and recognizing the cultural, territorial, and governance rights of Indigenous communities.

Negotiating and implementing a bijural interpretation of the principle of respect poses challenges on all sides. It poses a challenge for the Canadian state itself in that it is based upon and reflective of colonial values and ideas. It raises difficult questions like whether the Canadian state can engage in and take up a bijural interpretation of respect when its colonial tendency will be to assert the superiority of Eurocentric ideas over Indigenous ideas. This approach also poses a challenge for Indigenous peoples, who might ask questions about whether they should negotiate the meaning of law in a mutually respectful way with the Canadian state when settlers continue to occupy Indigenous lands unlawfully.

Despite these challenges, there is much to gain from implementing the principle of respect and having this principle guide government and legal decision making in the context of Aboriginal rights claims. As the RCAP notes, “[r]espect among cultures creates a positive, supportive climate for harmonious relations, as opposed to the acrimonious and strife-ridden relations of a culture of disdain. Respect for the unique position of Canada’s First Peoples ... *should* be a fundamental characteristic of Canada’s civic ethos.”<sup>148</sup> Implementing an intercultural principle of respect to guide relations between Indigenous and non-Indigenous peoples provides a useful way forward in fairly and appropriately resolving Aboriginal law disputes. It also has the potential to move Indigenous and non-Indigenous peoples within Canada forward on the most important journey facing us today—the journey of reconciliation.

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<sup>148</sup> RCAP Report, *supra* note 5 at 651 [emphasis in original].