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Essential Reading on Race and Law

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REVIEW ESSAYS / NOTES CRITIQUES

Essential Reading on Race and Law

Tracey Lindberg

Constance Backhouse, *Colour-Coded Law: A Legal History of Racism in Canada 1900-1950* (Toronto: Osgoode Society for Canadian Legal History / University of Toronto Press 1999)
Sidney L. Harring, *The White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: The Osgoode Society 1998)
James W. St. G. Walker, *"Race," Rights and the Law in the Supreme Court of Canada* (Toronto: Osgoode Society for Canadian Legal History / Wilfrid Laurier Press 1997)

WHEN I WAS PRACTICING law, I had the good fortune to be approached by representatives of a First Nation that was dealing with the immediate and aggressive reality of many First Nations: territorial invasion. During the year and a half that I worked with them, they taught me what I wished I had learned in law school. They took me to their land in order to ground my education. In a very real and enduring lesson, they taught me what law is and why the work that lawyers do is so fundamental to their existence. In the time that I was there I was schooled in federal duplicity, provincial negligence, and acts of bureaucratic cowardice. It was a steep learning curve.

I did not have the words to name what was happening to their territory. If a provincial law was found favourable to them, the law was repealed. If their homes were found to be in the "way of development" they were razed. If they brought

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attention to their claim in an international arena, they were labeled "angry." If they united in their struggle, differential entitlements were made to different citizens in the nation to divide and conquer. It was a very painful thing to participate in — I have no idea what it was like to live that reality.

In the last year that I practiced law, in an effort to buy some firm goodwill, I brought a representative of the nation to the law firm's office in the city to inform and motivate the partners at the firm. For two hours we sat in my office. The litany of legal and jurisdictional abuses flowed uneasily into the room. The firm's representative partner shifted uncomfortably. At the end of this horrific soliloquy, the partner said aloud, "That's not fair."

He did not have the words to name this, and his naïveté angered me. Of course, he was right, it was and is not fair. The legal texts do not tell this story and do not inform about the collective experience that we as First Nation people share. No *Hansard* reports or law reporters detail the incredible legal and political onslaught that First Nation people have faced in Canada's "nation building" exercise. The lack of information is understandable. We as the First people, as brown people, and as economically poor people have not had access to the same tools of recording and information sharing that judges, lawyers, politicians, and historians have had. The lack of appropriate language — indeed the lack of a critical filter through which to analyse the oppressive activity and inactivity of the Canadian judicial system — leads to misinformation. In fact, it leads to suppression of the information needed to assess the extent of the scars that oppressive colonial systems have left on original peoples.

Indeed, this is not fair.

But to understand the nature of the exclusion and oppression of those who did not create the system, there has to be a dialogue which defines. Which names. Which attempts analysis of an accurate history of laws and legality in Canada.

Certainly it is not fair.

The question becomes, then, does it detract from the seriousness of the experience, from the frequency and complexity of the incidents of legislative and judicial injustice, to call it racism?

Certainly, there is ample evidence that structural and personal racism have both defined and maligned the actions of the Canadian judicial system. But a one-word label does not take us that far in understanding what has happened from the point of view of those who have been dispossessed. Because we are all naïve, because we do not possess the terminology to accurately depict, describe, and detail the judicial abuse, and because we cannot separate (nor should we) race and gender, race and religion, race and nationhood, the telling of those particular stories is essential. For all of these same reasons, the way in which these stories are told is as important.

Recently, a number of legal historians and historians who examine law have attempted to tell these stories. The significance of the works must be examined in

light of the scholarly works which have been flooding the intellectual terrain in the area of race relations in America in the last twenty years. Sidney L. Harring, scholar and author of *White Man's Law: Native People in Nineteenth Century Canadian Jurisprudence*, is fairly honest about the limitations of his work. He notes that Indian people's understanding of the "intrusion into their world" and Indian people's law will be examined. Notably, Harring states that this discussion is not much informed by the input of First Nations people and that he knows of individuals who could write this story better. His humility is indicative of the reluctance of scholars in the post-modern era to appropriate voice and to authenticate experience. The difficulty with this approach, humble or not, is that it does not address the actual difficulties and protocols of Aboriginal laws: who has the right to express Natives' stories and explain Native laws, and what are the credentials required to be able to do so?

Can any author tell "the Indian side of the story" without proficiency in the culture and/or language which s/he is detailing? There is very little about Canadian jurisprudence that is reflective of "the Indian experience." Admittedly, our history as Indigenous peoples with respect to Canadian laws is largely a responsive one. Ordinarily, in the 19th century, we were arrested and we responded. Our land was taken (or, more likely, two non-First Nation parties were arguing as to who had title to our lands) and there was a titular dispute. In gauging and interpreting Indigenous responses to settler invasion, there is no doubt that Harring has a role in detailing this story. In fact, his discussion of social history and the roles that Indian people played in their own territories is a good attempt to outline the complexities of settlement and attempted colonization.

From the outset, Harring attempts to contextualize the early cases in which First Nations people found themselves examined by/in conflict with Canadian or provincial laws. The approach he takes is a regional one — traveling across Canada's map, he details court cases that have involved the rights of First Nations people. He reveals Canada's legal history as something less than a pillar of respectability and credibly establishes that political favouritism and expediency were the principal determinants of ever-shifting Indian policies in Canada. However, there is a tendency in Harring's work to use the Master's tools to dismantle this colonial house.[1] By accepting the terminology of power and intrinsically

[1] Audre Lourde, *Sister Outsider* (Freedom, CA 1984). Lourde writes: "Those of us who stand outside the circle of this society's definition of acceptable women; those of us who have been forged in the crucibles of difference – those of us who are poor, who are lesbians, who are Black, who are older — know that *survival is not an academic skill*. It is learning how to stand alone, unpopular and sometimes reviled, and how to make a common cause with those others identified as outside the structures in order to define and seek a world in which we can all flourish. It is learning how to take our differences and make them strengths. *For the master's tools will never dismantle the master's house.* They may allow us to temporarily beat him at his own game, but they will never enable us to bring about genuine change." (112)

locating it in settler societies, Harring has reinforced the authority of the superstructure of settler law.

Harring is limited by his reliance on Euro-Canadian legal documents. This makes it difficult for him to balance the legal authorities' point of view with the intricacies of First Nation governmental and legal authorities and structures. But while any history, legal or otherwise, told as a story of dead "white" men should be suspect, Harring enriches our understanding of the settler perspective in his research and narrative. He details the connections between Chief Justice John Beverly Robinson and his brothers, William and Peter. This material serves as the mirror within which settler treatment of the original nations can be observed. In examining the relationship between John as Chief Justice of the Supreme Court, William as the Commissioner of the Robinson Treaties, and Peter as a crown land commissioner and land speculator, Harring reveals the very close relationship between jurisprudence, legislation, and commerce in colonial Canada. While important and interesting, this discussion is mired in the Canadian political context and does not address either First Nation responses to the settlers or traditional First Nation political, economic, or legal structures except as reactions to settler-created situations.

As reactors, rather than actors, First Nations are relegated to intellectual terrain that reinforces their roles as stoic victims whose response to settler force and action becomes the basis for their involvement in their own histories. This is not a fully developed analysis for two fundamental reasons.

Primarily, in engaging in a narrative in which First Nation people are principally responding to settler action, Harring imposes the limitations that flow from a lack of prior historical documentation about First Nation action and motivations. The race-based theories, records, and understandings that Harring, poring through the Euro-Canadian legal documents, has to review are laden with non-First Nation stories, understandings, and actions. Because he constructs his work upon these sources, he ends up regurgitating some stereotypes and generally-held beliefs about First Nation people. In so doing, Harring, however unwittingly, exonerates the settlers who perpetrated every imaginable fraud and criminal activity to take Indian lands from Indian people. As Cornell West argues in the context of Black intellectuals, the exercise of intellectual emancipation involves gaining thorough knowledge about the "Euro-American regimes of truth."[2] To do so the development of a critical consciousness, which can serve to deconstruct the shared experience of oppressed peoples, is essential. My argument is that this responsibility cannot lie just with the aggrieved and the oppressed — some responsibility must be taken by other intellectuals, academics, and thinkers for this emancipation. This means not only deconstructing the Indigenous experience of settler law but acknowledging and accurately representing Indigenous "regimes of truth."

[2]bell hooks and Cornell West, *Breaking Bread: Insurgent Black Intellectual Life* (Toronto 1991) 144.

Harring does not succeed in de-constructing the Euro-Canadian regimes of truth. The book, interesting and informed, and interesting and uninformed by turns, applies Western standards to Indigenous structures, institutions, and understandings. The resultant analysis is mired in ethnocentric assumptions — Indians are presumed to have applied the same standards as non-Indian people in their economies, their rationales, and their notions of law. Therefore, living arrangements on reserve are "scattered" rather than spaced to ensure that family members live near each other, sacred debts are "contracted," wealth and productivity are assessed on the basis of western property accumulation, and the Canadian law of treason has no meaning for non-English speakers because of a language barrier (rather than an intellectual and moral rationale). (60, 59, 54-55, 240) Failure to further examine this and to extricate information related to parallel systems and understandings results in a monolithic work representative of only one part of the story.

When commonly held principles of western hegemony and settlers' laws are translated as the only possible "legality," it is easy to forget that the values which form the basis for the status quo are not always values which First Nation people share. As a result, First Nation people are destined to fail to meet the externally generated standards that serve as the basis for lawful behaviour and illegality. Further, complex issues related to the ownership of law and wealth stratification are overlooked. Whatever a socio-legal and political analysis can include, it cannot overlook the economic analysis that First Nations had to learn quickly:

settlers + land (and appropriation of the same) = breakdown of Indian economies.

Any accurate socio-legal analysis of settler-Indigenous legal relationships has to examine the embedding of economic wealth rationalizations in western legal principles at the expense of Indian laws, societal values, and traditional territories. Harring does state that the War of 1812 had the effect of undermining and devastating Aboriginal economies and sovereignty. (19) The text falters, however, as a result of his failure to examine parallel systems, Euro-Canadian and First Nation, in a First Nation context.

Secondarily, and related to the failure to examine parallel systems, his attempt to discuss First Nation law is woefully inadequate. While he is bound by the actualities of Indigenous histories and laws — many are recorded orally, in our First Nation languages, and most are inaccessible to individuals living outside of the particular nations — it is important to note that there is almost no traditional First Nation law content in the text. Generally, I would not comment nor find fault with this (preferring to let experts in the area discuss such delicate and spiritually related matters). However, Harring states in his introduction that he will be examining the "meaning of Indian law against the background of nineteenth-century Ontario legal culture." (13) It is in this area that Harring's analysis is suspect.

In this text, the laws of First Nation people are examined in the context of First Nation responses to Canadian law. First Nation laws and traditions are only discussed to the degree that the Canadian judiciary could imagine them, that is in a context of individual crimes (or participation in spiritual ceremonies) perpetrated by individual persons. This simply ignores their meaning for the individuals involved, meaning that is bound up in the intricate web of traditional laws that define individuals within the larger collectivity of the First Nation as a whole. Harring's analysis is limited to individual rights and he seems reticent to address the collective nature of First Nation rights and title. This is Harring's greatest weakness: his analysis cannot encompass collective rights as Harring cannot understand and/or research them. For this reason, the work suffers the same indignity that the Indigenous peoples of the 19th century suffered: what the settlers could not understand, they chose to ignore.

Harring does address several issues that shed light on the settlers' motivations and the impact of the judicial understandings. "The essence of colonial native policy was an ethnocentric paternalism, designed both to protect indigenous people from the depredations of settlers and to re-socialize them with Christian religion and education in preparation for marginal roles in the colonial economy." (18) The intellectualization of racism and white supremacy tends to water down both the intent and the historical retelling of events informed and shaped by racist beliefs. For example, Harring states that the effect of reserve policy was to categorize Indian people as "legal minors." (107) This analysis belies the intent of the racial categorization. First Nation people were not just viewed as requiring protection from settler populations. This protection was to come from settler populations. As well, First Nation people were not just viewed as requiring protection because of their similarities to minors (presumably, not having achieved or being able to achieve adult settler cognitive acuity) but were perceived as being less than human. Similarly, determining that Indian people were treated as "legal minors" divorces the analysis from the distasteful possibility that the decision to legally expunge personhood from Indian peoples was based upon malevolent justification. There is no overt absolution here — there is innocent ignorance.

Interestingly, Harring's work is best when he is reviewing the written historical sources related to legislation, case law, and the judicature and not necessarily the law and its interpretation. The author provides context for the Marshall decisions, *The Gradual Civilization Act*, *Indian Acts*, treaty making, the *St. Catherine's Milling* case, case law from Quebec and Atlantic Canada, and the Douglas Treaties in British Columbia. When reviewed as a tool to aid in interpretation, the Harring work is invaluable. His compilation and research is an important aid to those studying law in the absence of context (it is the myth of legal training that such context is largely unrequired). It is an interesting text, which would accompany the strict casebooks in law school, or Native Studies, or Legislative History courses, because it advances the understanding of the legislative and judicial onslaught

against First Nation people. It fills a much needed gap in the offerings in this area and is a work from which many scholars will be able to advance the study of and dialogue about legislation and judicial decisions related to First Nation people. Of especial interest are those chapters related to the attempted usurpation of title of the Six Nations' peoples, though even here the Six Nations often seem to become bit players in Harring's battle of legal players in Euro-Canadian courts.

James W. St. G. Walker attempts to pin down racism in the Supreme Court of Canada in his work, *"Race," Rights and the Law in the Supreme Court of Canada*. He selects four cases heard by the Supreme Court of Canada in which the parties include a Canadian of Chinese ancestry, a Canadian of Jewish faith and ancestry, a Canadian of Jamaican ancestry, and a person from Trinidad attempting to emigrate to Canada. Walker constructs a recounting of racism as it impacted particular groups at particular times and places. Walker also attempts to recount the legal history with respect to the particular laws and social policy referred to favourably and unfavourably in each case. Each case is discussed (with varying degrees of detail) from its political or personal inception, through its initial presentation at court and its appeal. As well, each case study has a small portion of the chapter dedicated to analysis of the actual decision of the Supreme Court of Canada.

One of the major difficulties in Walker's work is that it does not examine the racial segregation and discrimination experienced by First Nations people. Certainly, it must be evident on the surface that racially influenced jurisprudence as it impacts First Nation people is essential both to understanding juridical racism and also to understanding the social history of racism as a whole in Canada. Indeed, in constructing a social history of Canada with review of legal cases as a basis, it seems ridiculous not to include an Aboriginal case review with the same level of attention and discussion that Walker applies in the four aforementioned cases. The rationale for excluding Aboriginal peoples from this study is difficult to ascertain. In the Orientation of the work, Walker certainly does discuss Aboriginal people (so you know he thinks the subject is relevant). However, there is no case analysis referent to First Nations' peoples and their cases as they have been decided at the Supreme Court of Canada. "Imperial responsibility" and the permit system, Indian Act provisions with respect to citizenship, religion, or participation in economic development certainly could (and should) have a place in a work of this nature. (30)

The second major problem with Walker's text is his ongoing theme in the work that links racialized segregationist and discriminatory policies with populist beliefs, that is, the beliefs of the general citizenship of Canada. Interestingly, this universalistic approach denies the widespread influence of civil rights activists in Canada at the time. Importantly, Walker categorizes the racialized responses of the judiciary as reflective of the commonly held beliefs and understandings with respect to race at the time ("common sense"). This analytical framework is inflexible for a few reasons.

His logic that racism was "common sense" has within it two critical logic errors itself. Firstly, Walker's logic is intrinsically tied to the understanding that "commonly held" notions are those that were represented and included in such publications as *Saturday Night* and *The Globe and Mail*. By this logic, "commonly" held beliefs were those held largely by the readership of such publications (largely members of the English-speaking elite in Canada). Indeed, the readership may be illustrative of the attitudes of that group but to interpret this as an indication of "commonly" held viewpoints on race and race relations is misleading. Secondly, the phrase "common sense" implies that the response is logical or, at least, logical according to the sense common to the times. In fact, racism is illogical and this leads to an unstated suite of illogical assumptions on Walker's part. If it is common, then it is logical (or alternatively, the subject of mass delusion). If it is logical, it is supportable. If it is supportable, it is acceptable. Walker's reliance upon Gertz's understanding that law is an indicator of the reality of people's understandings denies peoplehood to those most oppressed by the law. (44)

As a result, in this study, racism appears to be a logical response to the circumstances in existence during that particular time frame. Indeed, for two of the case studies, the circumstances do not support the subscription to racist beliefs (they are not based upon any such notion as a "common sense"). Post-World War II, many people were alert to the impact and effect of discrimination based upon race. The "common sense" at that time would be that categorizations and discriminations based upon race were heinous and dangerous. By referring to the jurisprudence as a "common sense" reflection of the values and understandings of the public at large at that particular time, Walker escapes the need to actually examine the understandings of a public broader than the members of the bench. As well, common sense becomes limited to "white" people.

Racially limiting "common sense" is fundamentally limiting to the analysis. The work presupposes that the assumptions of "Canadians" (and therefore common sense) were the gauge by which race and race relations were to be constructed, measured, and assessed. There is no room in this analysis for the sense of the people of colour in Canada, for First Nations people, for economically poor people who had no access to literature, or for people who had experienced or understood oppression. For people who faced attempted subjugation as a result of race, creed, religion, or colour, the Master's tools cannot be used to deconstruct the Master's house. When the work presumes that the vocal affluent were the creators of "common sense" it implicitly assumes Canadianness as having a white essence and leaves no room for nationalism of other kinds in these territories still engaged by and betrothed to First Nation people. The definition of Canadianness therefore, excludes all of the peoples who define themselves or who are defined by histories other than European middle-class descent.

Assumed populism, without a referent or defined population, weakens the work. Similarly, to categorize the "have nots" without examining the "haves" does

not convincingly establish the argument that a commonly held understanding of "race" existed, helped, influenced, or was reflected in the jurisprudence of the Supreme Court of Canada. This is not to say that it did not. Four decisions of the court, however, within an expansive period of time do not convincingly establish that the sense reiterated by the court was by any means common to the populace of Canada. The Court's roots in class, gender, and race are simply unexplored, its views supposedly reflective of the denizen of every workplace, tavern, and brothel, rather than of a small, self-perpetuating elite.

It is important to note, that on a particular level, the logic of the work hangs together. Again, race-based analysis, stereotypes, and categorization were certainly occurring. Many Canadians certainly held odious opinions about people of Chinese ancestry, people of African descent, Jewish people, and people originally from Trinidad. However, the contention that the opinions of the Supreme Court of Canada were reflective of the opinions of the Canadian population as a whole has not been proven or established in this work. Indeed, it is dangerous to assume that the membership of a conservative bench was reflecting the entrenched notions of racial superiority and inferiority without examining the presumed conservatism of the judges themselves, the legislators, and the legislation they created.

Walker does refer to a likely explanation for the outcome of the Supreme Court of Canada cases he reviewed: the court was conservative and represented the conservative views that were "commonly" held. While it is certain that Canada's Supreme Court *was* legally conservative it is likely more telling that it was *politically conservative* and very reluctant to become proactive (in the way of the United States Supreme Court during the civil rights movement). An additional factor in the outcomes of the cases reviewed by Walker involves the attempt of the politically conservative judiciary to enforce through legal means the rights of affluent people. It must be said that far from representing the common man or woman, the judiciary often represented moneyed and usually propertied men or women. There is not very much that is common about that. So, while Walker refers to Foucault and the power that comes to people who use words and have power over them, this notion of "common sense" suggests that the power lay with the citizenship and that the judiciary simply was a manifestation of that sense. (38) Walker states of this theory that "in the final analysis this book is about subjectivity, about common sense, and about the participation of the courts in generating and applying common sense through the law of Canada, as revealed in four cases singled out for that purpose."

His usage of the term "subjectivity" is an interesting one and I found myself reading and re-reading this phrase each time I started a new case study to ground myself in the work. In his text, Walker alludes to the "fact" that race relations in Canada have not created many stories to which historians can listen. Subjectivity influences this "finding." This was interesting to me and it made me think about the role of historians, anthropologists, and legal scholars in interpreting the stories

of those impacted by law. Maybe we, as impacted peoples, do not have to tell the stories in a format that they can hear — maybe they need to learn other ways of listening. Those stories certainly exist. It is knowing how to respectfully listen and discuss that is required to travel the terrain of oral storytelling and the literature of people traditionally excluded from historians' telling of history.

It is certain that we are presumed, as studied peoples, to have no objectivity in our storytelling / history. However, the subjectivity of the people who currently tell the stories is usually unobserved. Walker does address the subjectivity of some of the people involved in his case studies. It would have been very interesting to learn of the subjectivity of some of the judges (one of whom Harring identified in his work as having a brother who was actively involved in land speculation and who himself was involved in some jurisprudence which had disastrous results for Aboriginal people). The presumed knowledge of such individuals in the context of understanding not-so-common sense views of racism would be interesting.

The timeliness of this work bears some discussion when explaining subjectivity. The notion and explanation of "social history" seems out of step with many of the works that have appeared for the past twenty years. Robert Williams, Sarah Carter, Vine Deloria Jr., and Jennifer Brown to name a few have advanced the "social history" movement in ways which the Walker work does not seem aware of.[3] His approach seems ironic given the works of the aforementioned authors. He contextualizes his work in this manner:

> In the new social history there is contained an acknowledgement that history is plural, that there can be no definitive interpretation, that historical vision is fragmented and that some of the stories, as told, are mutually contradictory. Stories that have been deliberately excluded and groups that have been ignored are now receiving attention and challenging the predominance of reigning versions, and of the groups who produced these versions. (41)

The work does connect commerce and racism. Beyond examining the "common sense" reasons that the SCC jurisprudence allegedly reflects the opinions and sentiments of the "majority" (along with the inherent weaknesses that produces), the work also seems to suggest that, at root, racist ideologies and behaviours may be in response to perceived threats to the established commercial market in Canada. The four cases involve a statute to limit hiring of Caucasian women by Chinese ancestry Canadians, the purchase of a beverage by a person both African and a Canadian citizen, the sale of property to a Jewish person and Canadian citizen, and the immigration of a person from Trinidad to Canada. All four, arguably, involve some monetary motivation on the part of the racists. But how complete an

[3]Robert A. Williams, *The American Indian in Western Legal Thought* (New York 1990); Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Toronto 1993); Vine Deloria, *American Indians, American Justice* (Austin 1983); Jennifer S.H. Brown, *Strangers in Blood: Fur Trade Families in Indian Country* (Vancouver 1980).

accounting of racism do these four overlapping cases present? Couching racial segregation and exclusion in the terminology of commerce, the right to (or not to) contract and the right of association, the Canadian judiciary has mirrored the legislative history of the United States. To review this history, it is essential to acknowledge that and examine the many notions of "policy," "equitability," and commerce derived from these cases. It is also essential to note that these principles are based upon the American judiciary's in/ability to resolve its own discriminatory legislative and judicial history. Walker does both. His pragmatic approach to this analysis serves his discussion well; it does not, however, advance the dialogue in ways that are significant to social history.

In assessing and determining perceived cause (rather than studying the importance of effect), Walker's work fails to examine the field of racism in its full historical and legal contexts. Racism is also about fear. Fear is not quantifiable. If it cannot be quantified, it cannot be empirically studied, goes the logic. However, empiricism may actually be at the crux of the problem. If we search for what is empirically observable and measurable, we are led down the fallacious path to freedom of commerce and freedom of association as rationales for discriminatory practices.

There is a temptation to try to explain racism "scientifically" or "rationally." But can such explanations justify the response of Canadian citizens (particularly Christian citizens) to participation in the labour force by Canadian citizens of Chinese ancestry, immigration that denies Trinidadian people Canadian citizenship, contractual terms which prohibit sales of property to Jewish people, or policies which limit access to businesses by Canadians who are Black? Surely, the stories that people tell in the face of racism are at least as important as those of the people who visit racism upon them are. They are also no less quantifiable. Maybe people aren't asking the right questions. Maybe people are not talking to the right people, or they are not willing to listen to stories and histories told "In a Different Voice."[4]

Possibly the reason that many academics find it intellectually satisfying to locate racism in the past, with individuals, with certain supposedly rational mindsets, is that it enables people to deny complicity with the creation and continuum of racism. Perhaps they fail to understand that we are all responsible. For that reason, author subjectivity is as relevant and noteworthy as the implicit assumptions of others that authors identify. Walker's subjectivity is certainly interesting from a critical race perspective. Walker states that "the expansion of Europe into regions with populations bearing dramatically different physical features led to a global stratification of conqueror and conquered, superior and subordinate, by which was created, through military and political means, an observable coincidence between phenotype and social position." (13) One of the intellectual difficulties with this passage, particularly from a critical racial theory perspective, is that it presumes

[4]Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass. 1993).

that the governance, structures, and systems the settlers tried to impose, completely replaced operating systems of the original occupants. This perspective implicitly assumes that Indigenous peoples were conquered or subordinated. The generalization, as many generalizations are wont, implicitly assumes settler authority. It does not examine or allow for the complex structuring and withholding of Indigenous and other populations' authorities and law-making.

The significance of racial stereotyping and racially derogatory terminology is used by Walker as an indicator of the level of racism and racial hostility in Canada in the periods that he documents. Whether this is an accurate indicator is one issue, but another is the relevance of repeating the racist statements and obviously stereotypical statements about people of Chinese ancestry. At some level and at some time we come into a generation of people who have not learned racism. What is the important lesson that we teach the next generation of academics and scholars by repeating the terminology of racists? Is there value and merit in it? Having been called racist terminology in almost every room you can name (living, bed, board, kitchen, guest, hotel) I would probably have a different response than some. Surely my experience is relevant. Surely the responses of Chinese people, who are Canadian citizens, to this terminology and stereotyping are relevant. However, I am unsure about the usefulness of teaching racially derogatory language to another generation.

Nor is Walker's lack of inclusiveness limited to his failure to include cases involving Aboriginals. Notably, the cases he discusses all involve male parties exclusively. Legislative and judicial efforts to create racial categories inevitably also involve efforts to impose a particular gender regime on each racialized group. So, for example, the historical exclusion of First Nations women from the benefits of First Nation citizenship cries out for coverage here, particularly in the context of Supreme Court decision making. The particular construct of racism as it is combined with gender adds an essential voice to social history and Walker's work is weaker for its absence.

Despite these shortcomings, the work as a whole leaves the reader with the impression that the Supreme Court of Canada has missed many opportunities to act as a tool of social change. For that reason, the examination is a valuable one.

Constance Backhouse addresses many of the same issues in her work, *Colour-Coded Law: A Legal History of Racism in Canada 1900-1950*. From the outset, it is clear that Backhouse is not doing things in the "regular" way. In fact, her work is exceptionally detailed and it reveals her to be very aware of the weight and importance of language and of voice in storytelling.

The legal storytelling is an area where Backhouse's work is both groundbreaking and respectful. She details the legal stories of Inuit people, Dakota people, a Mohawk person, a Canadian person of Chinese descent, a mixed blood (Cherokee and Black Canadian) person, and a Black Canadian person. In telling these legal stories, she advances the proposition in each case, that they are first and foremost

personal stories. Not content to let legal cases tell the story, the work exhaustively addresses issues relevant to each person victimized by legislation and social policy that was racially discriminatory and prohibitive. Each story addresses the self-identification of the people involved to the degree which written evidence can provide this information. Each examines the tenuous lines Canadian law had drawn on race as it has impacted individuals, communities, and nations. While the work would have been improved by a greater research of and reliance on oral sources, its depth and breadth are still impressive.

Notably, Backhouse demonstrates a perspective that is cognizant and mindful of the existence of First Nation laws. While she does no disservice to First Nations in addressing the inclusion of the laws (many academics tend to overlook the sacred nature of the laws to fit them into western ideological boxes), she tends to ignore the degree to which non-First Nations people were breaking First Nations laws. However, in placing the First Nation experience of non-First Nation laws at the forefront of her discussion, Backhouse has broken new trails. Most reviews of Canada's laws and their impact on First Nation are mired in the analysis of the "unfair" nature of the laws. By including the acknowledgment of First Nation systems of laws and the laws themselves, Backhouse takes her analysis beyond a mere recitation of the historical illegalities and improprieties associated with attempted colonization. For this reason, the work transcends historical and legal analysis and becomes, in a sense, an anti-colonial (as post-colonial does not address the continuing attempts to colonize First Nation people) work.

This is a largely successful but inconsistent attempt to fight colonization (historically and through her work) by ensuring that the work takes seriously inclusiveness and reciprocity. Backhouse's work does address the governmental systems in place in First Nations and also recognizes that First Nations governments were under a tremendous amount of stress by the government of Canada to fit in the governmental box that it understood (and understands). However, her too sharp a focus on "government" to mean the government of Canada weakens her approach in this regard. Importantly, the work demonstrates that First Nation governments were and are valid and based upon principles and precepts unknown to settler peoples. But Backhouse does not address in any depth the particularities and principles guiding First Nations in their governments. This is not a fatal flaw, but an anticipatory concern. Perhaps the author's long-term contribution in this work is opening the door to the possibilities for others to further the work involved in inclusive historic and legal research and writing.

For example, in the area of economic wealth, the work does contend with the issue of cultural interpretations of economic principles and the definition of wealth. The works of several groundbreaking historians who exhaustively researched and established the intellectual bases for comprehensive discussion of First Nation and Metis economies are reinforced by the straightforward declarations with respect to

the nature of and bases for First Nation economies.[5] This is not, however, a detailed analysis (nor arguably would that analysis take its place in this work). The greatest contribution to the historical place of First Nations people comes in the discussion of sovereignty in Backhouse's work.

Chapter Four, a legal history of Eliza Sero's right to catch fish with a net, comprehensively addresses the Mohawk woman's (and Mohawk nation's) understanding of and application of sovereign principles related to their territory and their lives. It is worth noting the delicate balance between an individual claim in the bewildering Canadian legal system and the collective experience and sovereignty that are represented by the Mohawk woman (oddly enough, a plaintiff in this decision and not a defendant). Backhouse establishes the bases of authority within the sovereign Mohawk nation, and the modalities of compliance with its legislation. She distinguishes her work from others in that she does not just address the Mohawk people's belief in and adherence to sovereign principles. She provides evidence of occasional Canadian understanding of and compliance with the same. But she is clear that such understanding and compliance was the exception and not the rule in Canadian-First Nations dealings, including relations between Canada and the Mohawk.

Backhouse convincingly makes the case that the Canadian judiciary seemed (and seems) at times to be completely oblivious to the realities of First Nation sovereignty. No less so than in the Sero decision in which the particularities of Mohawk existence and sovereignty are unacknowledged, misconstrued, and ignored completely. The work examines this "profoundly ignorant" conceptualization (or lack thereof) by the court and addresses "the lack of reciprocity in Canadian political thinking" in establishing the political climate in Canada at the time of deliberation. (124, 128)

This dedication to political and legal contextualization is one of the most apparent strengths of the piece. From her research on a judge who adjudicated a case based upon Mohawk women's roles (a piece called "Old Time Misogyny") to her studies of laws related to racial designation, Backhouse thoroughly examines the nonsense of racial categorization in Canadian law. She does so in the context of assessing the role that presumed white racial superiority has on the people upon whom it is visited. Rather than categorizing the offended and impacted individuals, communities, and nations as "victims," the work successfully attempts to identify and debunk racial myths by identifying and discussing the personal and collective attributes, histories, and stories that negate the racial classification. Less observing than reconstructing, the work affirmatively details the complexities and actualities of living in a racist society (and appearing before courts where much of the judiciary share those racist perceptions).

Perhaps, in part due to this complexity, it seems an awkward choice to identify so many people involved in "white racism" simply as white individuals. Under-

[5]I note particularly the works of Frank Tough and Arthur J. Ray.

standably, the terminology is reflective of the degree to which "white" people were and are a part of the legal and political culture. Contextually (and perhaps politically), the descriptor makes sense. However, in a work where so much uncommon sense is housed it seems simplistic to apply the racial generalization as a response to the hazy identification and race-based categorization of First Nation peoples and people of colour that has occurred and continues to occur in legal and historical works. Certainly, it requires extra effort and an acquaintance with the particularities of circumstance, time, and personal histories to include further racial indicators for every participant. But, in essence, the reader begins to ask if that is not the uncommon sense. That there is a racialized reality is a truism to many of us, that the reality of racism impacts every person is another. To that degree, when racialization is examined and the particularity of people of colour is examined and detailed, the corollary seems to be that all people have race. The assumption that some do not, or do not have race worthy of mention is just as dangerous as the attribution of racial significance to other members. If we accept the truism that we are all racialized and that race matters — then it must matter to everyone and it must be about everyone. [6]

For this reason as well, and for the reasons that I critiqued Walker's approach, the use of racially derogatory terminology (while certainly in the context of detailing the prevailing racist attitudes of the time period) should be examined. Not wanting to "whitewash" history or the significance of naming, the concern becomes: how do we represent or discuss racism while ensuring that we do not entrench the stereotypes, images and racial epithets of racists? It is certainly not wrong to talk about it, intellectual freedom allows people to do so to a great degree, but what is our responsibility as non-racist people? Is it enough to assert that we possess "common sense" or is something more required? What contextual understandings better inform our understanding of race and racism?

While acknowledging the "ridiculous" nature of race as discussed in the judicial decisions in the work, Backhouse also addresses the significance of race by stating that it is an "indisputable fact" in the context in which it is presented. (140) She also takes pains to discuss the folly of historically locating race — we cannot ascribe racism to a particular time to diminish or fully understand its legacy and its presence today. Perhaps the overt nature of racism can be localized, but the

[6]Cornel West, *Race Matters* (New York 1994). Having vetted one of the chapters for Backhouse I can state affirmatively that my position has changed on this issue from the date I received the manuscript until now. In response to terminological generalizations in historical texts, I was also likely to label peoples as "Aboriginal" and "non-Aboriginal." Indeed, it accords with the way that I experience the world. However, in the specific context of inclusiveness, I note that distinguishing people as "white" does not effectively address the particularities of racial torment visited upon Jewish people in Canada (among other places). It also has a politicizing impact acknowledging that race does matter in almost every context.

enduring impact and existence of race hate and race-based stereotyping and categorization escapes placement in time. This is a fundamental understanding and an important lesson. In her discussion of this, Backhouse also details the instability and ambiguity of racial categorization and race in a thoughtful and convincing manner. (273-274) From the pervasive "they all look alike" to the situational "I am 7/8ths white" the approach is at all times respectful of personal representation, definition, and understanding. The approach debunks the myth of race and replaces it with an understanding of racialization as a reality and as a political response to racism.

The reality of racism is that it is not a monolithic experience and there is not just one acceptable response for individuals, nations, or communities. The work makes room for diversity of response and experience by describing the impacted peoples with detail. The response of the Black community in and around Oakville, Ontario to the aggressive acts of the Ku Klux Klan against Ira Junius Johnson and his fiancée Isabel Jones, perceived to be an "interracial couple," certainly demonstrates this. While some members of the Black community politically rallied around Johnson, others implored him not to "make waves." The response was quite similar in the Dakota spirituality suppression trials in Saskatchewan with some members of the Nation supporting the accused and others reviling him. This is an important discussion because the author does not implicitly or explicitly accept the divide and conquer mentality that would be evident on the face of the news and case reports. Backhouse reviews the politically charged situation and does not assess nor judge either the differing opinions nor the groups that hold them. There is a certain quiet respect in this that allows her to review and assess the events without ascribing motivations or blame to individuals or groups. Perhaps without access to oral traditions or unbiased reporting systems this is the most value neutral approach to the situations and their assessment.

Finally, there are two areas in which Backhouse is outstanding in her research and writing. Notably, she includes three historical case studies that are based upon the situation of and racism impacting three women. However, throughout each chapter, Backhouse includes intellectual space for and analytical discussion about women's issues, perspectives, frameworks and understandings. This is no small accomplishment given the dearth of written resources available on women — Canadian or otherwise (particularly Mohawk, Inuit, Dakota, Black, and Chinese women). The work addresses the unique juxtaposition of race and gender as they impacted women. It is all the more remarkable that this information and analysis appears in each chapter of the book. The chapter examining the impact of racism and the politicization of Viola Desmond (denied a seat on the main floor of a theatre in Nova Scotia) and the chapter discussing Eliza Sero's understanding of women's roles in Mohawk governance and society are exceptionally well told, empowering and detailed accounts. They have a conceptual framework which may seem

unfamiliar to some but which, at its root, has its basis in the egalitarian roles of women in their communities and nations as political and legal warriors.

The work is also laudable for the effort the author makes to understand and record the effects that racism has on individuals, communities, and nations. Importantly, within this dialogue are the implicit and explicitly stated understandings that this is painful, that these experiences are sometimes gendered, and that class stratification plays a role in racism. At all times, Backhouse endeavours not to appropriate voice, impute victimization, or resort to simplification to capture the complexities of race and the impact of racism on those to whom it is directed. The thought and development that are applied to the personal impact of racism are particularly important in this type of work as most legal histories tend to "let the facts speak for themselves." Those facts, usually from written sources and often exclusively recorded by individuals with no experience of racism and impervious to its effects, are important. However, there is a need for recognition that the personal stories and responses of individuals, communities, and nations are essential tools in breaking down the verbal barriers that enable racism to flourish. "Common sense" (which Backhouse also refers to), actually becomes more representative of the "common folk."

While the past two paragraphs detailed the most important contributions of Backhouse's work to critical legal theory, there are two other areas in her work that are worth mentioning. Firstly, Backhouse takes pains to locate non-racist thinking and non-racist thinkers in her work. It adds authenticity and hope to the work to understand that Regina's city solicitor, in the face of race-based legislation directed at Canadians of Chinese ancestry, told the Regina city council, "You have no right in the world to discriminate" against Chinese Canadian business owners who wanted to hire "white" women to wait tables — undermining the "common sense" theory discussed by Walker and addressed by Backhouse herself. (160) Most importantly, the work establishes that critical theory requires the review of all perspectives — to identify only racist thinkers and policies simplifies the truth to such a degree as to make people mistrustful. Backhouse trusts her reader and her subject.

Secondly, Backhouse addresses the difficult-to-analyze location of blended families and the children of blended families in her work. Far from a comprehensive examination, the work does situate and identify some of the complex issues related to race, racism, and racialization in societies which insist that issues be "black or white." She eradicates the "continuum" approach to racial identification and again quietly and respectfully identifies self-identification as the criterion by which all identification and consideration must occur.

The work makes a great contribution to the study of law and racism as it views the people who have come into conflict with the law as the essential part of the discussion. In the other two works reviewed, the impacted individuals were to a degree the backdrops upon which theories of legal history and social history were

constructed. Backhouse's work signals a fundamental shift. This shift is not so much a shift in the way these stories are told as it is a subtle movement towards recognition of the validity of the experience of racism as a part of the study of racism. In establishing this, Backhouse has also opened the door to greater possibilities for the inclusion of oral tradition and personal narrative as historical and legal historical sources. She also establishes a level of responsibility for authors and researchers to people who are the subjects of their works that is commendable and respectful. She has raised the bar and it will be interesting to see the work that follows in this area as a result – particularly in the area of First Nation laws and governance. In discussing parallel systems in these areas Backhouse assigns value and merit to them. Not doing so repeats the errors of the settler peoples who refused to acknowledge both the existence and the authority of existing systems. Harring obviously has a willingness to examine and acknowledge parallel systems but has not risen to the challenge. Walker's work is devoid of this analysis and discussion.

All three works have merit in that they "fill in the historical blanks" which are created in the mere reiteration and review of legal case studies. To differing degrees, they further the rights dialogue by providing fair-minded and anti-colonial messages and discussion in their work. With varying degrees of introduction and discussion by an instructor, each of these works could be offered in History or Native Studies courses. Harring's and Backhouse's works are also appropriate for Law school courses.